

Degonzague v Entwistle

2009 NY Slip Op 32275(U)

October 5, 2009

Supreme Court, Albany County

Docket Number: 5407-09

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT
STATE OF NEW YORK

COUNTY OF ALBANY

MICHAEL DEGONZAGUE and
KIRSTEN HAMILTON,

Plaintiffs,

DECISION and ORDER
INDEX NO. 5407-09
RJI NO. 01-09-097730

-against-

ANDREW ENTWISTLE and
GINA ENTWISTLE

Defendants.

Supreme Court Albany County All Purpose Term, September 2, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Finkelstein & Partners, LLP
Attorneys for Plaintiffs
Marie Du Sault, Esq.
1279 Route 300, P.O. Box 1111
Newburgh, New York 12551

Ainsworth, Sullivan, Tracy, Knauf, Warner and Ruslander, P.C.
Attorneys for Defendants
Margaret Comard Lynch, Esq.
320 Great Oaks Boulevard
Albany, New York 12203

TERESI, J.:

Defendant, Gina Entwistle, seeks the dismissal of plaintiff's personal injury action for failure to obtain personal jurisdiction over her pursuant to CPLR 3211(a)(8). Defendant also claims that the process server's request that the defendant husband serve his wife the summons

and complaint is barred by CPLR 2103 as he is a party to the action. The plaintiffs oppose the motion and maintain the defendant was properly served the summons and complaint pursuant to CPLR § 308(2).

On June 26, 2009, the plaintiff, Michael Degonzague commenced this action to recover for personal injuries he sustained in a motor vehicle accident that occurred on June 7, 2007 on I-90 in Albany, New York. The plaintiff alleges his vehicle was struck by a vehicle driven by defendant Gina Entwistle and was owned by defendant, Andrew Entwistle, her husband.

On July 13, 2009, the plaintiffs allege they had the defendants served with the summons and complaint. Plaintiffs claim the defendant Andrew Entwistle was personally served at his residence at 1486 Bame Road, Castleton, New York 12033 pursuant to CPLR § 308(1). Plaintiffs contend defendant, Gina Entwistle was served pursuant to CPLR § 308(2) by the delivery of the summons and complaint to her husband, Andrew Entwistle at the marital residence. On July 14, 2009, the process server mailed a copy of the summons and complaint to defendant Gina Entwistle at the marital residence. The defendant, Andrew Entwistle has appeared and served an Answer. Defendant, Gina Entwistle has failed to appear or answer in this action.

Defendant Gina Entwistle claims in her affidavit in support of her motion to dismiss the complaint that she received the summons and complaint from her husband who was served with process on her behalf at 1486 Bame Road, Castleton. In her affidavit dated August 7, 2009, Gina Entwistle claims she and her husband are separated and that she resides at 32 Summit Avenue, Albany, New York. In support of the motion, Andrew Entwistle claims that when he was served with the summons and complaint at the marital home, he told the process server that his wife did not live with him and resided in Albany. Mr. Entwistle admits that he offered to give the papers

to his wife when he saw her.

In opposition to the motion, the process server, Ryan Gagliardi executed a Supplemental Affidavit dated August 22, 2009 whereby he refutes the claims of Andrew Entwistle. Mr. Gagliardi contends when he served the papers upon him, Andrew Entwistle identified himself and told him that Gina Entwistle was his spouse and that they lived at the marital address together. Mr. Gagliardi alleges he explained to Mr. Entwistle that he was serving two copies of the summons and complaint for him and his wife.

Personal jurisdiction is obtained over a defendant if the summons is delivered “to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by ... mailing the summons to be to be served at his or her last known address.” (see, CPLR § 308(2)). The plaintiffs have the burden of establishing personal jurisdiction has been attained by the service of a summons and complaint. (Ying Jun Chen v. Lie Shi, 19 AD 3d 407 [2nd Dept. 2005]). However, where a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the grounds of lack of personal jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists. (Lang v. Wycoff Heights Medical Center, 55 AD 3d 793 [2nd Dept. 2008]).

A process server’s Affidavit, which indicated that the party was served in accordance with CPLR § 308(2), constituted prima facie evidence of proper service and the defendant’s conclusory denial of receipt of the summons and complaint was insufficient to raise any issue of fact. (Sando Realty Corp. v. Aris, 209 AD 2d 682 [2nd Dept. 1994]). A defendant may rebut that Affidavit with a “detailed and specific contradiction of the allegations in the process server’s Affidavit” sufficient to create a question of fact. (Bankers Trust Co. of Cal. v. Tsoukas, 303 AD

2d 343 [2nd Dept. 2003]).

In support of her motion to dismiss the complaint for lack of personal jurisdiction, Gina Entwistle has not met her burden of proof entitling her to such relief. The defendant offers little evidence to refute the facts affirmed in the affidavits of the process server. The defendant claims she is separated from her husband. The defendant does not establish when she separated from her husband and whether the separation was a trial separation or a legal separation. The defendant did not deny that 1486 Bame Road, Castleton, New York was the marital residence of her and her husband. Although the defendant stated that she moved to the City of Albany, she offers no proof indicating when she moved and when she established her alleged new residence. The defendant failed to offer any proof regarding her alleged change of residence such as notices to the post office regarding her mail, the Department of Motor Vehicles, bank statements, phone or utility bills or the deed from the purchase of a home or a lease. Under these circumstances, the marital residence remained Gina Entwistle's "usual place of abode" for the purpose of service of process pursuant to CPLR § 308(2). (CC Home Lenders v. Cioffi, 294 AD 2d 325 [2nd Dept. 2002]).

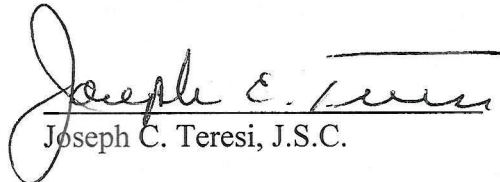
The Court finds the affidavits of the process server credible. (Schorr v. Persaud, 51 AD 3d 519 [1st Dept. 2008]). Since the defendant failed to specifically refute the contents of the affidavit of service or substantiate her conclusory allegations, Supreme Court properly denied the motion to dismiss the complaint. (Sando Realty Corp. v. Aris, supra 682). The plaintiffs have satisfied their burden of proof establishing personal jurisdiction as the process server stated that he served the summons and complaint at the marital residence upon the husband personally and by substituted service upon the husband for service upon the wife pursuant to CPLR § 308(2).

Finally, defendants' allegation that the defendant husband's service of process upon his wife at the alleged request of the process server is barred by CPLR 2103 is misplaced. The facts do not support the notion that the defendant husband acted as an agent for service for the plaintiffs to facilitate service upon his wife.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
October 5, 2009


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated August 11, 2009;
2. Affidavit of Margaret Comard Lynch, Esq. dated August 11, 2009;
3. Affidavit of Andrew Entwistle, Esq. dated August 6, 2009;
4. Affidavit of Gina Entwistle dated August 7, 2009;
5. Affirmation of Marie Du Sault, Esq. dated August 21, 2009 with exhibits A-C ;
6. Affidavit of Elizabeth M. Dumas, Esq. dated August 31, 2009;
7. Affidavit of Andrew Entwistle dated August 31, 2009.