

Lopez v Depietro
2009 NY Slip Op 33296(U)
May 28, 2009
Sup Ct, Richmond County
Docket Number: 10450/04
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 10450/04
Motion No.:006**

CANDIDA LOPEZ

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

JOHN DEPIETRO,

Defendants

The following items were considered in the review of the following order to show cause to vacate a default judgment.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves to renew and reargue the decision and order of Judicial Hearing Officer Vincent Pizzuto dated October 7, 2008, which concluded that the defendant had been properly served in connection with this litigation wherein a the default judgment was entered against him on October 15, 2005.

Facts

Several motions have been made to vacate the default judgement of October 15, 2005. On May 20, 2008 the defendant moved by order to show cause before Justice McMahon. After oral argument Justice McMahon referred the matter to a Judicial Hearing Officer to conduct a traverse hearing. On June 10, 2008 the JHO Pizzuto conducted the hearing and issued an order on October 7, 2008. During the traverse hearing the plaintiff presented the affidavit of service

sworn to by Gene J. Gagliardi, that stated he served the defendant at 1549 East 46th Street, Brooklyn, New York. In his decision, Judicial Hearing Officer Vincent Pizzuto (“JHO Pizzuto”) concluded that “After a review of all the credible evidence I find that jurisdiction was properly obtained by the plaintiff over defendant.”

In reaching this conclusion, JHO Pizzuto reasoned that the plaintiff’s attorney testified credibly that he “. . . made much effort to locate the process server . . .” to give testimony at the traverse hearing. At the traverse hearing the following exchange was placed on the record:

The Court: What happened to the process server? When you
 tried to get him what –

A. I contacted the company that I hired. They said that they
 had lost contact with that process server and did not have
 an address for him or any way to locate him. I tried several
 times.¹

In addition, the plaintiff’s attorney testified at the inquest that he had sent the defendant a letter with a copy of the summons and complaint by certified mail return receipt requested and first class mail to 527 Page Avenue, Staten Island, New York. In response to this letter the plaintiff’s attorney testified that he received a telephone call from the defendant. During that conversation the plaintiff’s attorney testified that the defendant “. . . told [him] that he received mail at both 527 Page Avenue and 1549 East 46th Street in Brooklyn but that he preferred receiving mail at the Brooklyn address.”²

Subsequent to JHO Pizzuto’s decision finding that service was made on the defendant, the defendant moved to reargue, making his motion returnable on November 18, 2008 before Justice McMahon. At that time Justice McMahon transferred the motion to JHO Pizzuto who denied the defendant’s motion for reargument on March 4, 2009. On April 1, 2009 Justice

¹ Transcript p. 16.

² Transcript p. 19.

McMahon without any discussed reason recused herself; and this post judgment motion was randomly assigned to this court.

The defendant moves by order to show cause to renew his prior motion to vacate the default judgment arguing that new information has come into his possession as a result of a request for documents from the New York City Department of Consumer Affairs (“DCA”) pursuant to the Freedom of Information Law (FOIL) made on October 14, 2008.

Discussion

A motion to renew must be based upon additional material facts which existed at the time the prior motion was made but were not then known to the party seeking to renew and therefore not made known to the court.³ Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application.⁴

In this case the defendant comes forward with Gene Gagliardi’s process server license renewal application obtained through a FOIL request to the DCA. In this case the defendant made his FOIL request four months after the traverse hearing before JHO Pizzuto. The defendant fails to offer any excuse as to why this FOIL request was not made prior to the June 10, 2008 traverse hearing before JHO Pizzuto. It is clear that the license renewal application submitted by Gene Gagliardi has been on file with DCA from approximately February 12, 2008. Such facts would have been available to the attorney for the plaintiff who had the obligation to produce the process server. Secondly, the plaintiff’s attorney neglected to demonstrate due diligence in his search for the process server. The prior decision after the traverse hearing without the process server is set aside and rescheduled.

³ *Silverman v. Leucadia, Inc.*, 159 AD2d 254 [1st Dep’t 1990].

⁴ *Quigley v. New York State Office of Mental Health*, 247 AD2d 528 [2d Dep’t 1998].

The defendant's order to show cause is granted to the extent of directing that a new traverse hearing be held to determine whether the plaintiff has properly attained service upon the defendant. If determined that service was properly effectuated, the default judgment shall remain. If service was not attained, then the plaintiff's case is dismissed.

Accordingly, it is hereby:

ORDERED, that John DePietro's order to show cause seeking to renew and reargue the Decision and Order of JHO Pizzuto dated October 7, 2008 is granted to the extent that the case is referred to Judicial Hearing Officer or Court Attorney Referee other than JHO Pizzuto to hear and determine the issue of service in a new traverse hearing.

ENTER,

DATED: May 28, 2009

Joseph J. Maltese
Justice of the Supreme Court