

Williams v City of New York

2010 NY Slip Op 30022(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 113527/2006

Judge: Saliann Scarpulla

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 52

Denise Williams

INDEX NO. 113527/06

City of New York - v -

MOTION DATE 10/21/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED
JAN 08 2010

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This Constitutes Decision and Order of the Court.

Dated: 1/5/10

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X
DENISE WILLIAMS,

Index Number 113527/2006
Submission Date 10/21/09
Mot. Seq. No. 004

Plaintiffs,

-against-

DECISION & ORDER

THE CITY OF NEW YORK, THE CITY OF NEW
YORK POLICE DEPARTMENT and POLICE
OFFICER CRESPO,

Defendants.

----- X
Appearances: For Plaintiff :

The Law Office of Jeffrey Lessoff
By Jeffrey L. Lessoff, Esq.
350 Broadway, Suite 703
New York, New York 10013
212-219-9257

For Defendants New York City and
Police Officer Crespo:
Corporation Counsel
By Ashley Hale, Esq.
100 Church Street, 4th Floor
New York, New York 10007
212-788-0447

Papers considered in review of this motion to preclude and cross-motion for summary judgment

Papers	Numbered
Affirm. in Supp. with Exhib. Attached.....	<u>1</u>
Affirm. in Opp.....	<u>2</u>
Reply Affirm. In Further Supp.....	<u>3</u>
Notice of and Affirm. in Supp. of Cross-Mot with Exhib.....	<u>5</u>
Sur-Reply Affirm. in Further Supp. of City's Motion.....	<u>5</u>
Second Sur-Reply in Further Supp. of City's Motion	<u>6</u>

FILED
JAN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON SALIANN SCARPULLA, J.:

Plaintiff Denise Williams (“Williams”) brought this action against the City of New York, the City of New York Police Department (“the City”) and “Police Officer Crespo” (“Crespo”) for negligent use of Crespo’s sidearm on September 20, 2006. On or about October 12, 2006, Williams effected service of process upon the City. Williams attempted to serve process on “Police Officer Crespo” on October 11, 2006 by delivering

a copy of the summons and complaint to the New York Police Department Headquarters located at One Police Plaza, New York, New York. The summons and complaint were allegedly delivered to a person of suitable age named Evan Peters. Williams also mailed a copy of process to the same address.

On November 16, 2007, Williams moved for entry of a default judgment against Crespo based on Crespo's failure to answer. The City opposed this motion, but did not appear on Crespo's behalf. The City argued that Crespo was never properly served because, for the purposes of CPLR 308(2), Crespo's "actual place of business" was the precinct to which he was assigned, not One Police Plaza, where process had been delivered. The Court (Feinman, J.) entered a judgment of default against Crespo on April 7, 2008.

On April 14, 2009, Crespo, now represented by the corporation counsel, moved pursuant to CPLR 5015(a)(1), (4) and 317 to vacate the default judgment and to dismiss the complaint as against him pursuant to CPLR 3211(a)(8) and 308(2) for lack of personal jurisdiction. At the oral argument, held on June 10, 2009, the Court granted Williams' request for an adjournment to submit additional briefing on the meaning of the phrase "actual place of business" as set forth in CPLR 308(2).

On July 14, 2009, Williams commenced an action in the United States District Court against the defendants named in this action, asserting federal claims under 42 U.S.C. §1983 arising out of the same facts that underlie this state action. On the same

day, Williams commenced a second state action in this Court, Index No. 109962/2009, refiling the complaint and serving it on Crespo by personal service at the 6th NYPD Precinct, which is Crespo's current command.

On September 3, 2009, Williams cross-moved pursuant to CPLR 602 to consolidate the two state actions. Williams also requests the Court to deem the claims against Crespo timely interposed, under CPLR 203 (c), as of the date the process was served on the City in the first state action. The City and Crespo oppose Williams' cross-motion.

On September 15, 2009, the City moved to dismiss the second state action on the grounds of the one-year-and-ninety-day statute of limitations and the pending prior action. The motion to dismiss the second state action is currently pending before Supreme Court Justice Karen Smith.

Discussion

Williams argues that Crespo's motion may not be properly brought under CPLR 5015, because the default judgment was issued after a contested hearing, leaving Crespo with the only option of an appeal or motion to renew and reargue, both of which have long ago passed their thirty-day deadlines.

Generally, pursuant to CPLR 5511, parties may not appeal a judgment issued on default, and the only proper remedy is a motion to vacate under CPLR 5015. However,

contested entry of default is not subject to CPLR 5511 and may be properly appealed, rendering vacatur an inappropriate procedural mechanism. *See Achampong v Weigelt*, 240 A.D.2d 247, 248 (1st Dept 1997); *see also Spatz v Bajramoski*, 214 A.D.2d 436, 436 (1st Dep't 1995).

While Williams accurately points out that its application for default judgment was opposed, the opposition was filed by the City on its own behalf as a defendant, not on behalf of Crespo. As of the date of Williams' motion for a default judgment, Crespo had not yet requested representation by the corporation counsel pursuant to General Municipal Law § 50-k (4). The entry of default judgment on motion may be opposed by any party, not only the party against whom it is made, and CPLR 5015 (a) allows "any interested person" to move to vacate it. The Court, therefore, finds that the City's prior separate opposition to Williams' motion for a default judgment does not deprive Crespo of his individual right to move pursuant to CPLR 5015 to vacate the default judgment issued against him. *Cf. Avery v Caldwell*, 55 A.D.3d 473, 473 (1st Dep't 2008); *see also Oppenheimer v Westcott*, 47 N.Y.2d 595, 602 (1979).

To vacate a default judgment, the moving party must show (1) an excuse for the default and (2) an affidavit of merits, completed by the party, in which defendant must offer a meritorious defense to the satisfaction of the parties. *See* CPLR 5015(a); Siegel, *New York Practice*, sec. 108 (4th ed. 2005), *citing Benado v Antonio*, 10 A.D.2d 40 (1960). However, if the motion to vacate the default judgment is predicated on lack of

[* 6]

jurisdiction under CPLR 5015(a)(4), the moving party is relieved of having to demonstrate a reasonable excuse and meritorious defense. *See Boorman v Deutsch*, 152 A.D.2d 48, 52 (1st Dep't 1989).

The central issue in determining the appropriateness of the service of process on Crespo in this case is whether the headquarters of Crespo's employer falls within the meaning of the phrase "actual place of business" under CPLR 308 (2) even though Crespo was assigned to work at one of the employer's offices located separately.

In case of an employee, such as Crespo, the employee's "actual place of business," must be where the employee is physically present with regularity and the employee must be shown to regularly transact business at the place of service. *See Bridgehampton Natl. Bank v Watermill Heights Assoc.*, 157 Misc.2d 246, 250 (Sup Ct, Suffolk County, 1993) (citation omitted). If a business has several offices at different locations, only the office to which the employee is assigned is considered the employee's "actual place of business." *See Jiminez v City of New York*, 5 A.D.3d 182, 183 (1st Dep't 2004) (finding that a correction officer's place of business was Rikers Island, not the Department of Correction headquarters in Manhattan).

Here, Crespo was assigned to the 32nd Precinct, located at 233 West 10th Street, New York, New York at the time the process was served. Crespo had never been assigned to One Police Plaza or occupied a high-ranking position with the New York Police Department. Therefore, One Police Plaza was not Crespo's "actual place of

business” within the meaning of CPLR 308(2), and personal service upon Crespo at that address was ineffective.

Because Williams never properly served process on Crespo, the Court is divested of personal jurisdiction over Crespo and must vacate the prior judgment of default pursuant to CPLR 5015(a)(4) and dismiss the action as against Crespo pursuant to CPLR 3211 (a)(8). *Feinstein v Bergner*, 48 N.Y.2d 234, 241 (1979).¹

Williams’ belated attempt to remedy the defective service by commencing a second action, serving the summons and complaint in the second action on Crespo at his current precinct, moving to consolidate the two state actions pursuant to CPLR 602, and requesting the Court to relate back the proper service of process in the second action to the commencement of the first action pursuant to CPLR 203(c) is procedurally improper.

Pursuant to CPLR 203(c), a plaintiff may commence an action against a mistakenly omitted defendant even after the statute of limitations has run so long as the co-defendants are united in interest. *See e.g., Nani v Gould*, 39 A.D.3d 508, 509 (2nd Dep’t 2007). However, plaintiff must still properly serve the additional defendant. *See Bryant v South Nassau Communities Hospital*, 59 A.D.3d 655, 656 (2nd Dep’t 2009); see also Siegel, *New York Practice*, sec 45 (4th ed. 2005).

¹Crespo also argues that service was deficient because the summons and complaint omitted Crespo’s first name and badge number, and that no process was ever delivered to One Police Plaza. In light of the foregoing discussion, the Court does not address these alternative arguments.

Here, CPLR 203(c) is inapplicable, because Williams already timely interposed a claim against Crespo when she filed the summons and complaint in the first state action. However, because Williams failed to properly serve the first summons and complaint on Crespo, that action must be dismissed against him. The statute of limitations has run on Williams' claims against Crespo, and Williams may not revive the stale claims simply by commencing a new, untimely action and moving to consolidate the untimely brought action with the action in which Crespo was not properly served.

Williams never requested leave of court pursuant to CPLR 306(b) to effect late service of process on Crespo in the first action, despite numerous opportunities to do so. The Court may not deem service of process in the second state action, which falls outside the statute of limitations, as providing the Court with requisite personal jurisdiction over Crespo in the first state action. *Cf. Bumpus v New York City Transit Authority*, 2009 N.Y. Slip. Op. 5737, *5 (2nd Dep't 2009) (discussing remedying service problems regarding "Jane Doe" designations).

In accordance with the foregoing, it is therefore,

ORDERED that the motion by defendant police officer Edan Crespo pursuant to CPLR 5015(a)(4) to vacate the judgment of default, dated April 7, 2008, and to dismiss the complaint pursuant to CPLR 3211(a)(8) as against Crespo only is granted; and it is further

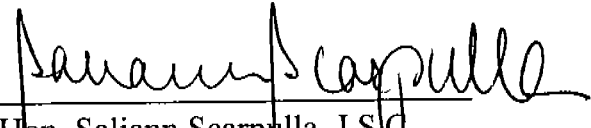
ORDERED that the action shall continue as against defendant the City of New York; and it is further

ORDERED that counsel for defendant police officer Edan Crespo shall serve a copy of this decision and order upon all parties and upon the Clerk of Court (60 Centre St., Basement), who, upon such service, shall enter judgment in accordance with the foregoing and sever and continue the claims which are not dismissed.

This constitutes the decision and order of the Court.

Dated: January 5, 2010
New York, New York

ENTER:


Hon. Saliann Scarpulla, J.S.C.

FILED
JAN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE