

Desai v Azran

2010 NY Slip Op 31421(U)

June 2, 2010

Supreme Court, Nassau County

Docket Number: 12629/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

SAMIR DESAI and REENA SHARMA, X

Plaintiffs,

Index No.: 12629/09
Motion Sequence...02
Motion Date...4/23/10

-against-

ALYSSA AZRAN, 5 HAMILTON STREET
TRUST, and JOHN DOES 1-10,

Defendants.

Papers Submitted: X
Order to Show Cause.....X
Affirmation in Opposition.....X

The Defendant, ALYSSA AZRAN (“AZRAN”), moves by Order to Show Cause for an order vacating the judgment granted on default by a prior order of the Court (LaMarca, J., 12/04/09) (Mot. Seq. 01). The Defendant also moves for a temporary restraining order temporarily enjoining the Plaintiffs from proceeding with the inquest that was scheduled to take place on March 1, 2010. The Court will not address the Defendant’s request for a temporary restraining order as the inquest was previously held on March 1, 2010, rendering that branch of the Defendant’s Order to Show Cause moot. The Plaintiffs, SAMIRE DESAI (“DESAI”) and REENA SHARMA (“SHARMA”) oppose the Order to

Show Cause. The Defendant's Order to Show Cause is decided as provided herein.

This action was commenced by the filing of a summons and complaint and the purchase of an index number on June 29, 2009. The Plaintiffs seek to recover for injuries allegedly sustained from the Defendant's purported breach of a contract for the sale of certain real property. In their Verified Complaint, the Plaintiffs allege that the Defendant, AZRAN entered into a contract with the Plaintiffs for the sale of property located at 5 Hamilton Street, Farmingdale, New York, 11735. The Plaintiffs allegedly effectuated service of process on July 15, 2009, by nailing the pleading to the door at 138 Paulding Street, Staten Island, NY 10314, after attempting service at that address on three (3) prior occasions.

In her moving papers, the Defendant contends that she was never personally served with the summons and complaint. The Defendant also avers that she did not receive the summons and complaint by mail at any time thereafter. In her sworn affidavit, the Defendant states that at the time the Plaintiffs allegedly served her with the summons and complaint, she did not reside at the 138 Paulding Street address listed on the summons and the affidavit of service. The Defendant claims she did not reside anywhere in Richmond County at that time and has lived in Suffolk County for the past one and one half years. The Defendant further states that she had once resided at "138 Paulding Avenue" several years earlier, but never resided at 138 Paulding Street, the address listed on the summons and affidavit of service. The Defendant contends that a Department of Motor Vehicles search of her license would have revealed that the 138 Paulding Avenue address was not her correct

address for several years. Finally, in her sworn affidavit, the Defendant states that she never requested Peter J. Dunn, Esq., to represent her interests in the current action.

In opposition to the Defendant's Order to Show Cause, the Plaintiffs' contend that after due diligence, service by "nail & mail" was proper. The Plaintiffs' counsel submits in his affirmation that counsel for the Defendant, AZRAN, Peter Dunn Esq., indicated that he was not able to accept service at the direction of his client. Thereafter, the Plaintiffs' counsel conducted an investigation as to the last known address and phone number of the Defendant. Annexed to the Affirmation in Opposition as Exhibit "A" are the results of the alleged search that was conducted to locate the Defendant, AZRAN. The search results show two (2) addresses for Staten Island different from the 138 Paulding Street address listed on the purported contract of sale for the subject property. The Plaintiffs' argue that, after a diligent search for the Defendant's last known address, the Defendant was properly served pursuant to CPLR § 308. There is no indication in the papers submitted that any search of the Defendant's driver's license was conducted.

In reply to the Plaintiffs' opposition, the Defendant states that the Plaintiffs, SHARMA and DESAI are Defendants in another action that was commenced by 5 Hamilton Trust on November 25, 2008, bearing Index No.: 021309/2008. The Defendant further states that the Plaintiffs, SHARMA and DESAI defaulted in that case and that a new action should not have been commenced under a separate index number. The Court will not consider these arguments by the Defendant as the underlying merits of the Plaintiffs' complaint are not

properly before this Court. The Court will first determine whether the Defendant was properly served with the Summons and Complaint and given an opportunity to answer the claims against her. Upon rendering its decision, the Court will also determine whether the default and subsequent judgment entered against the Defendant should be vacated. Should the Court find that service was improper, the complaint against the Defendant will be dismissed. Should service be deemed proper, the Defendant will then have the opportunity to make a motion to dismiss the Plaintiffs' complaint for the reasons raised in the Defendants' Reply, or any other reasonable basis for which the Defendant avers the Plaintiffs' complaint should be dismissed.

Addressing the service issue, "nail & mail" service, pursuant to CPLR §308 (4), may be used only where service under the other sections of CPLR §308 cannot be made with due diligence. *Lemberger, et al. v. Khan*, 18 A.D.3d 447 (2nd Dept. 2005). "The due diligence requirement of CPLR § 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" *Id.* citing *Gurevitch v. Goodman*, 269 A.D.2d 355 (2nd Dept. 2000). In *Gurevitch*, the Court concluded that the three (3) attempts to serve the defendant failed to satisfy the due diligence requirement. The affidavit of the plaintiff's process server, together with the papers submitted in opposition to the motion, failed to demonstrate that the process server attempted to ascertain the [defendant's] business address and to effectuate personal service at that location, pursuant to the provisions of CPLR 308 (1) and (2). Under those circumstances, the

attempted service of the summons and complaint pursuant to CPLR 308 (4) was defective as a matter of law. *Id.* at 355-56; *See also, Earle v. Valente*, 302 A.D.2d 353 (2nd Dept. 2003) (attempted service pursuant to CPLR § 308 (4) was defective as a matter of law).

Here, the only evidence submitted by the Plaintiffs detailing the three (3) attempts to effectuate service upon the Defendant is an affidavit of the process server which indicates that an attempt was made on July 9, 2009 at 7:22 a.m., July 10, 2009 at 8:25 p.m. and July 11, 2009 at 3:10 p.m. There are no additional affidavits submitted by the process server, or anyone else, tending to elaborate on the attempts that were made to serve the Defendant. Additionally, the address relied upon by the Plaintiffs as the Defendant's "last known address" was an address on a contract of sale that never came to fruition. Most notably, the contract of sale is not executed by the Defendant and no other proof was submitted to show that the address of the Defendant on the contract of sale was in fact accurate at that time.

While the papers presented are sufficient to raise the question as to whether "due diligence" was exercised before service was effectuated pursuant to subdivision 4 of CPLR § 308, the record is otherwise inadequate to resolve the issue. Therefore, in view of the contested critical facts, this case is remitted for further proceedings to determine the sufficiency of the Plaintiffs' efforts to effectuate service as required by the CPLR.

Accordingly, this matter shall be the subject of a traverse hearing to be held on **July 7, 2010 at 9:30 a.m.** in the CCP Courtroom. The Defendant shall serve a copy of this Order on all parties within ten (10) days of the date of this Order pursuant to CPLR

§2103(b)(1), (2) or (3). **PROOF OF SERVICE MUST BE FILED WITH THE COURT.**

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.


A failure to appear will be deemed a default within the meaning of 22 NYCRR 202.27 and subject the non-appearing party to an appropriate sanction provided for therein or any other sanction authorized by statute, regulation or rule.

If, after the hearing, it is determined that service was not properly effectuated, the subject action shall be dismissed. If, after the hearing, service is found to be proper, the Defendant's motion to vacate the default, as requested in motion sequence # 2, shall be resubmitted to this Court for purposes of rendering a decision thereon.

All matters not decided herein are hereby **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
June 2, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
JUN 04 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE