

New Hampshire Ins. Co. v Ali

2010 NY Slip Op 32267(U)

August 19, 2010

Sup Ct, NY County

Docket Number: 105570/2009

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Louis York

PART 2

Index Number : 105570/2009
NEW HAMPSHIRE INSURANCE
 VS.
ALI, SHOUKAT
 SEQUENCE NUMBER : 001
 DEFAULT JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~THE~~ **ORDER IS DECIDED IN ACCORDANCE**
~~WITH~~ **ACCOMPANYING MEMORANDUM DECISION.**

FILED
AUG 24 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 8/19/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

Supreme Court of the State of New York
County of New York
Part 2

INDEX NO. 105570/2009

NEW HAMPSHIRE INSURANCE COMPANY
a/s/o 600-602 TENTH AVENUE REALTY CORP.,

Decision/Order

Plaintiff,

Present:
Hon. Louis B. York
Justice, Supreme Court

– against –

SHOUKAT ALI and FAJID SADDIQ

Defendants

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiff alleges that co-defendant Shoukat Ali ("Ali") was a tenant in a building owned by 600-602 Tenth Avenue Realty Corporation ("Tenth Avenue"). According to the complaint, co-defendant Fajid Siddiq ("Siddiq")¹ was in Ali's apartment as an invitee on October 11, 2006. There is no allegation that he resided at the premises. While Siddiq was in the apartment, plaintiff alleges, Ali and Siddiq failed to exercise reasonable care in lighting and otherwise handling a candle. As a result, there was a fire in the apartment, resulting in fire, smoke and water damage in the building. Plaintiff subrogee New Hampshire Insurance Company ("plaintiff") paid Tenth Avenue \$31,281.44 to cover the cost of the damages and now sues both Ali and Siddiq to recover that amount.

Once plaintiff initiated the action, it attempted to serve both defendants with the summons and complaint. Service upon Ali is not at issue at this time. Plaintiff alleges

¹ Mr. Siddiq's letter to plaintiff indicates that the spelling of his name in the complaint – that is, Saddiq – is inaccurate and that his name is Siddiq.

that it served Siddiq properly by delivering his copy of the complaint to Ali. The date of the alleged service is June 5, 2009. The Court also notes that there is no nonmilitary affidavit accompanying the affidavit of service.

Siddiq did not answer the complaint but wrote a letter to plaintiff. In the letter he indicates that "I have been informed by Mr. Shoukat Ali that you have filed a lawsuit against me in New York." In addition, he indicates that he lives in Oregon. Plaintiff states that in the letter Siddiq indicates that he has no intention of fighting the lawsuit. Though counsel's statement is technically accurate the quote is taken out of context, to misleading effect. What Siddiq actually writes is that he did not plan "on going back to **New York** to fight the lawsuit," but that he did "plan to defend myself in Oregon if your office continues its lawsuit against me."

Currently, plaintiff seeks default judgment against co-defendant. To obtain default judgment, plaintiff not only must set forth a prima facie case under the complaint but must show that service was proper. Marita Car Rentals v. Ishtiaq, 11 Misc. 3d 506, 508, 810 N.Y.S.2d 869, 871 (City Ct. Buffalo 2006); see Pearson v. 1296 Pacific St. Assoc., Inc., 67 A.D.3d 659, 660, 886 N.Y.S.2d 898, 898 (2nd Dept. 2009). Service upon a person of suitable age and discretion is proper service under CPLR 308(2).

As the Court has indicated, plaintiff claims that service upon Ali as a person of suitable age and discretion is sufficient to comprise service upon Siddiq. However, for several reasons, the Court disagrees. CPLR § 308(2) allows service "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**" (emphasis supplied). Here, plaintiff

served Ali on behalf of Siddiq at Ali's apartment. However, according to plaintiff's own complaint, Siddiq was not a resident but an invitee at Ali's dwelling place. In addition, the Court notes that Siddiq's letter to plaintiff states that he has not lived in New York since 2006 – and, therefore, shows that he did not live in or near Ali's apartment at the time of the purported service. As plaintiff failed to comply with the express terms of the statute, service is defective. Plaintiff's statement that "Mr. Ali was authorized to accept service," *Flomenhaft Aff.*, ¶ 7, is conclusory. As counsel does not set forth the basis of this purported authority, the statement is not persuasive.

In addition, there are other concerns regarding the propriety of service on Ali under CPLR § 308(2). For one, it is not clear that Ali actually delivered the complaint to Siddiq. As plaintiff notes, Siddiq is aware of the lawsuit. However, the first sentence of Mr. Siddiq's letter, which states, "I have been informed by Mr. Shoukat Ali that you have filed a lawsuit against me in New York." There is no indication that he saw the complaint itself. Even if someone is conceivably qualified to accept service, "actual notice . . . depend[s] on several contingencies." *Raschel v. Rish*, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 22, 23 (1986). Among them, the recipient of the documents must know that service was being made to him on behalf of the intended recipient, must notify that intended recipient, and must furnish the intended recipient with copies of the pleadings. *Id.* at 697, 512 N.Y.S.2d at 23-24. It is not clear that service upon Ali satisfied this standard.

For another thing, Ali and Siddiq are co-defendants, and it is possible that their interests in the lawsuit are adverse. For example, there may be an apportionment of liability among the two men. Even if they shared a residence – which, again, they did

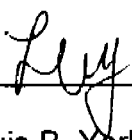
not – due to the potential conflict of interest Ali would not have been a person of suitable age and discretion. See Weidemann v. Keith, 127 A.D.2d 831, 512 N.Y.S.2d 224 (2nd Dept. 1987).

For all the reasons above, it is

ORDERED that the motion is denied.

ENTER:

Dated: 8/18/11



Louis B. York, J.S.C.

FILED
AUG 24 2010
NEW YORK
COUNTY CLERKS OFFICE