

Kates v Pressly

2010 NY Slip Op 32381(U)

August 23, 2010

Supreme Court, Nassau County

Docket Number: 009928-10

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
EXECUTOR OF THE NEW YORK ESTATE OF
CELIA KATES, PHILIP BARASH & BENEFICIARY
OF THE IRVING G. KATES NEW YORK TRUST,
SANDRA BARASH,

Plaintiffs,

-against-

JAMES G. PRESSLY, JR. ESQUIRE &
PRESSLY & PRESSLY, P.A.

Defendants,
-----X

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 009928-10

MOTION SEQ. NO: 1

SUBMIT DATE: 08/02/10

The following papers having been read on this motion:

- Notice of Motion1
- Opposition.....2
- Reply.....3

Plaintiffs, Executor of the New York Estate of Celia Kates, Philip Barash, and Beneficiary of the Irving G. Kates New York Trust, Sandra Barash, move pursuant to CPLR 3215, for an order granting them a default judgment against the defendants, James G. Pressly, Jr. Esquire & Pressly & Pressly, P.A. The motion is denied.

This action, commenced in May 2010, is the latest suit in a series of actions stemming from the same underlying facts. The facts revolve around the two plaintiffs herein: (1) the Estate of Celia Kates whose Executor is Philip Barash; and, (2) the Irving G. Kates New York Trust, whose beneficiary is Sandra Barash. Notably, plaintiffs are *pro se*. It is noted at the outset that despite moving for a default judgment, plaintiffs fail to provide a copy of their complaint in this action. Nevertheless, as best as can be determined from the papers submitted herein, this action purports to set forth a cause of action against the defendants, James G. Pressly, Jr. Esquire & Pressly & Pressly, P.A. (collectively referred to herein as "Pressly") for treble damages pursuant to Judiciary Law §487.

Prior to addressing the merits of the instant motion, it must be noted that the plaintiffs bring

this action in complete defiance of the prior Orders of this Court and the Appellate Division enjoining plaintiffs from bringing this type of action. Specifically, plaintiffs bring this action in complete defiance of the Orders of the Honorable Justice Daniel Palmieri, dated April 20, 2007, July 9, 2007, July 18, 2007 and August 1, 2007 in the matter entitled Beneficiary, Irving G. Kates New York Trust, et. al. V. Northern Trust Corporation, Index No. 07-001713 (the “Northern Trust Action”).

In the April 20, 2007 Order, Justice Palmieri “directed that no further actions or proceedings may be commenced against the respondents, its officers, employees or agents without the express written permission of [the Supreme Court, Nassau County].” In subsequent orders in which Justice Palmieri ruled on various applications made by plaintiffs in the Northern Trust Action, such as plaintiffs’ application to vacate the April 20, 2007 injunction, Justice Palmieri repeatedly held that the injunction must remain in effect and, most notably, that “future violations of [the] mandate will not be tolerated.” By Order dated August 19, 2008, the Appellate Division of the Supreme Court of New York, Second Department, held that Justice Palmieri properly enjoined the plaintiffs from commencing further litigation against Northern Trust Corporation (“Northern Trust”) or, *inter alia*, any of its agents without prior leave of the Court.

Defendants have submitted ample proof, including the Notices of Entry of the Orders, confirming that the plaintiffs were properly and timely served with these Orders.

Based upon a plain and simple reading of the inarticulate and poorly pleaded allegations in the complaint, it is noted that plaintiffs are clearly aware of the fact that Pressly represented Northern Trust in prior actions commenced by the plaintiffs against, *inter alia*, Northern Trust in the State of Florida (the “Florida Actions”), which were based upon the same set of facts and issues giving rise to this action and the Northern Trust Action. There is no doubt that Pressly, as counsel for Northern Trust, falls within the purview of “agents” as contemplated by Justice Palmieri of this Court in his April 20, 2007 Order and within the context of the prior Florida Actions and the facts and issues giving rise to the Northern Trust Action. Therefore, it is the finding of this Court that plaintiffs’ commencement of this action is patently improper and is in complete defiance of the April 20, 2007 injunction, which, as stated above, was upheld by Justice Palmieri on numerous subsequent occasions and by the Appellate Division of the Supreme Court, Second Department. Furthermore,

it is noted that similar injunctions were also ordered against the plaintiffs in the Florida Actions, together with impositions of sanctions and fees for the same brand of wastefully litigious conduct. Therefore, despite plaintiffs' efforts in this motion to establish the merits of their action, plaintiffs have a meritless action on the basis that they are simply enjoined from bringing this action in the first place.

Furthermore, it cannot be overlooked by this Court that despite being demanded by counsel for the defendants to do so, plaintiffs have failed to discontinue this case with prejudice. In fact, at the height of temerity, plaintiffs bring this motion for a default judgment. Given their status as being *pro se* however, this Court will nevertheless afford the plaintiffs with the benefit of an analysis of their motion.

Pursuant to CPLR 3215(f):

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint. . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due;. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

Plaintiffs have failed to satisfy any of the criteria required on a motion for a default judgment (CPLR 3215[f]).

Initially, it cannot be overlooked that Pressly has not been properly served and is therefore not in default. On May 21, 2010, plaintiffs commenced this action by filing a Summons and Complaint. On May 25, 2010, Mr. Pressly received, via U.S. Postal Service, an undated (and otherwise procedurally defective) "Statement of Service By Mail" from the plaintiffs, together with a copy of plaintiffs' Summons and Complaint.¹ Pressly did not sign and return the "Acknowledgment of the Receipt of a Summons and Complaint" within the Statement of Service.

Thereafter, on July 1, 2010, Pressly received, via U.S. Postal Service, a "Notice Pursuant to New York Court Rule 202.27, New York Business Rule 306(2)(d), Rule 3215(4)(i)(ii) of the New

¹A certificate of service with respect to the mailing was subsequently filed with this Court.

York Civil Practice and Rules” dated June 25, 2010, from the plaintiffs.

By letter to the plaintiffs dated July 8, 2010, counsel for the defendants demanded that the plaintiffs discontinue the action with prejudice. On or about July 19, 2010, Pressly received a copy of plaintiffs’ notice of the instant motion, together with plaintiffs’ supporting papers and a Request for a Judicial Intervention. By letter dated July 21, 2010, counsel for the defendants again demanded that the plaintiffs discontinue the action with prejudice and withdraw the instant motion. Without acceding to the personal jurisdiction of this Court, the defendants oppose the plaintiffs motion.

Insofar as plaintiffs have filed a certificate of service for the purported service by mailing pursuant to CPLR 312-a and the certificate of service for the mailing of a copy of the summons pursuant to CPLR 3215(g)(4)(I) and inasmuch as the defendants did not return the acknowledgment, service upon Pressly has not been properly effectuated.

The mailing of process pursuant to CPLR 312-a does not effect personal service (*Dominguez v. Stimpson Mfg. Corp.*, 207 AD2d 375 [2nd Dept. 1994]; see also, *Patterson v. Balaquiot*, 188 AD2d 275 [1st Dept. 1992]). Moreover, a defendant has no duty to acknowledge mail service purportedly made upon him by a plaintiff (*Patterson v. Balaquiot*, supra); that is, a defendant who receives a summons and complaint in the mail pursuant to CPLR 312-a is not required to sign and return the acknowledgment of receipt form (*Kostelanetz & Fink, LLP v. Hui Qun Zhao*, 180 Misc. 2d 847 [Civ. Ct. New York 1999]). In fact, if a defendant who has received a summons and complaint in the mail does not return the acknowledgment of receipt form within 30 days, the plaintiff is placed on notice that his attempted mail service has aborted and must then resort to other methods of service (*Id.*). Specifically, if the acknowledgment of receipt is not mailed or returned to the sender, the sender is required to effect *personal* service in another manner (*Shenko Electric., Inc. v. Hartnett*, 161 AD2d 1212 [4th Dept. 1990]). Plaintiffs have failed in this regard entirely.

Inasmuch as the plaintiffs rely on their subsequent mailing of the summons pursuant to CPLR 3215(g)(4)(I), said reliance is misplaced as “service pursuant to CPLR 3215(g)(4)(I)” does not constitute personal service of a summons and complaint, especially in this context. Pursuant to CPLR 3215(g)(4)(I):

When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section

three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

Here, plaintiffs never attempted service upon either of the defendants pursuant to BCL §306(b). In fact, it is undisputed that neither of the defendants are corporations and that neither of them are authorized to do business in New York. In any event, even if the plaintiffs had attempted service pursuant to BCL §306(b), such service would not be proper as against the individual defendant, "James G. Pressly, Jr. Esquire." Therefore, plaintiffs reliance on having complied with CPLR 3215(g)(4)(I) as a prerequisite to the instant motion is of no moment.

Accordingly, this Court finds that plaintiffs have failed woefully to properly serve Pressly with the summons and complaint and that Pressly's time to answer, move, or otherwise appear in this action never began to ran. Therefore, Pressly is not in default in this action.

The plaintiffs' motion is denied.

Further, the action is dismissed on the grounds of being improperly commenced in violation of the previously imposed filing injunction.

Notwithstanding their *pro se* status, the plaintiffs must be charged with the responsibility of honoring this Court's prior decisions and orders. The plaintiffs are reminded that they are enjoined from commencing any further actions. Any future violation of this injunction, previously imposed by a decision and Order of this Court issued by Judge Palmieri on April 20, 2007, WILL, without issue or debate, result in sanctions against the plaintiffs. In fact, the plaintiffs must be made aware that the only reason this Court is not imposing sanctions for commencing this "frivolous" litigation and making the instant motion is that the defendants have mercifully refrained from requesting same (22 NYCRR §130-1). This will not prevent the Court in the future.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

This constitutes the decision and order of this Court.

DATED: August 23, 2010

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED
AUG 26 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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