

**Orix Fin. Servs., Inc. v J&S & Sons Transp., Inc.**

2010 NY Slip Op 33796(U)

February 22, 2010

Supreme Court, Suffolk County

Docket Number: 06981/2009

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
A.J.S.C.

|   |   |
|---|---|
| -----X                                  |   |
| ORIX FINANCIAL SERVICES, INC., formerly | : |
| known as ORIX CREDIT ALLIANCE, INC.,    | : |
|   | : |
| Plaintiff,                              | : |
| - against -                             | : |
|   | : |
| J& S AND SONS TRANSPORTATION, INC.,     | : |
| and JOSEPH PREISER,                     | : |
|   | : |
| Defendant.                              | : |
| -----X                                  |   |

**COPY**

Pursuant to the undersigned's order dated June 1, 2010, on July 21, 2010, a traverse hearing was held to determine whether the defendant was properly served with process (CPLR § 5015(a)(4)) regarding a renewal judgment.

It is well settled that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made. *See, e.g., Forrester v. Luisa*, 52 AD3d 324 (1st Dept 2008); *Persaud v. Teaneck Nursing Ctr., Inc.*, 290 AD2d 350, 351(1st Dept. 2002); *Kearney v. Neurosurgeons of N.Y.*, 31 AD3d 390 (2d Dept 2006); *McCray v. Petrini*, 212 AD2d 676 (2nd Dept. 1995). In the matter at bar, the defendant denies service, and the testimony at the hearing presented a credibility contest between the parties' versions of the relevant facts. Towards its resolution, the undersigned has reviewed the evidence, testimonial as well as by way of exhibits. Regarding that

testimony, the exercise included coolly, calmly and objectively observing the witnesses, “the very whites of [their] eyes,” during some brief, limited questioning by the court as well as and primarily their direct as well as cross-examination, the so-called “greatest engine for ascertaining the truth.” *Wigmore on Evidence*, § 1367. Additionally, the Court has juxtaposed the exhibits to each other, as well as the testimony. As a result, the Court is satisfied that the record contains sufficient, credible evidence to resolve the issue at hand. It should, however, go without saying that in evaluating the witnesses’ contributions - in this as well as all such determinations - it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence*, 2d ed., § 1090. Additionally, during the course of its fact-finding analysis, the undersigned’s task included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court’s unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

As a result of that exercise, the Court credits the testimony and other proof proffered by the defendant and concludes that the plaintiff failed to properly serve him. *See, e.g., McCray v. Petrini, supra*. Accordingly, the defendant’s application is granted and the default renewal judgment is vacated.

The forgoing constitutes the decision and order of the Court.

Dated: \_\_\_\_\_

7/22/10

\_\_\_\_\_  
Hon. Ralph Y. Gazzillo  
Acting Justice of the Supreme Court

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