

Alvarez v Osorio & Assoc., LLC
2011 NY Slip Op 30975(U)
April 5, 2011
Supreme Court, New York County
Docket Number: 102162/2010
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: J.S.C.

PART 11

Justice

Index Number : 102162/2010

ALVAREZ, RAUL

vs.

OSORIO & ASSOCIATES, LLC

SEQUENCE NUMBER : 001

SUMMARY 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 *is determined in accordance with the annexed decision and order.*

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

FILED

APR 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 5, 2011

[Signature]
HON. JOAN A. MADDEN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
RAUL ALVAREZ and VERONICA ALVAREZ,

Plaintiffs,

-against-

Index No. 102162/10

FILED

OSORIO & ASSOCIATES, LLC, MARTHA L.
OSORIO, CAROLS MORENO, MICHAEL H.
JOSEPH,

APR 12 2011

Defendants.

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Osorio & Associates, LLC (Osorio & Assoc.),
Martha L. Osorio, Carlos Moreno, and Michael H. Joseph move,
pursuant to CPLR 3212, for an order granting summary judgment in
their favor; pursuant to CPLR 3211 (a) (8), for an order
dismissing the complaint for lack of personal jurisdiction; and
for an order awarding defendants reasonable costs and attorneys'
fees as a form of sanctions for filing a frivolous lawsuit.

In this legal malpractice action, plaintiffs Raul and
Veronica Alvarez allege that they hired defendants to adjust
their alien status to that of permanent residents. They further
allege that defendants submitted an I-485 (Application for
Adjustment of Status) with the United States Citizenship and
Immigration Services, without first determining if they were
eligible under section 245 (i) of the Immigration Law. 8 USC §
1255 (i). Plaintiffs allege that, because of defendants' failure
to determine their eligibility under section 245 (i), their
applications for adjustment of status were denied, and

deportation proceedings have been begun. Plaintiffs allege that defendants deviated from accepted professional standards in their representation of plaintiffs.

Defendants move for summary judgment arguing that plaintiffs cannot establish a prima facie case of legal malpractice, the elements of which are: 1) negligence of the attorney, 2) that the negligence was the proximate cause of the loss, and 3) proof of actual damages. *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 (1st Dept 2008). Defendants further argue that plaintiffs are subject to deportation proceedings because they entered the United States illegally, and not because of any action of defendants; therefore, they cannot show that they would not have sustained damages "but for" the alleged negligence of the attorneys. *Id.* Moreover, defendants contend that they were not negligent in filing the application for adjustment of status for plaintiffs, since in filing the papers for plaintiffs, they were advancing a legal theory that was based on unsettled law. Finally, defendants argue that plaintiffs cannot establish that they have suffered damages, because they currently have an appearance scheduled before the Immigration Law Judge, and should he rule against them they can appeal that decision to the Immigration Board of Appeals; therefore, they have not exhausted their administrative remedies regarding the denial of their application for adjustment of

status and removal order.

Defendants also move to dismiss on the basis that they were never properly served, and, thus, personal jurisdiction is lacking. Defendants submit the affidavits of the three individual defendants. Defendants all state under oath that they were neither personally served, nor did they receive a copy of the summons and complaint by first class mail at their home or place of business, as required to accomplish alternative service pursuant to CPLR 308.

Carlos Moreno (Moreno) states that he was of counsel to Osorio & Assoc. during the time relevant to this litigation, and that he maintains an office at 352 7th Ave., Suite 1204, New York, New York. Moreno further states that his office is part of an office suite on the 12th floor, and that a receptionist is provided by the landlord to control access to the office suite. Moreno states that he has never authorized the receptionist to accept service of process on his behalf, but that on or about May 2, 2010, a single copy of the summons and verified complaint was left in his inbox at his office. He states, on information and belief, that the papers were served on the receptionist, who later placed them in his inbox. He states that he never received a copy of the papers in the mail, either at home or at his office.

Michael H. Joseph (Joseph) states that he was never

personally served with the summons and complaint, nor did he receive the papers by first class mail at his home or office. He states that he became aware of the litigation when Moreno forwarded a copy of the papers to him on or about May 3, 2010.

Martha L. Osorio (Osorio) states that she was never personally served with a copy of the summons and complaint nor did she receive a copy of the papers by first class mail at her home or office. Osorio also states that she became aware of this lawsuit when Moreno forwarded a copy of the summons and complaint to her. Osorio further states that Osorio & Assoc., which is an LLC, never authorized or designated a person employed at 352 7th Avenue, where Moreno maintains an office, to accept service on behalf of Osorio & Assoc. Although none of the defendants state where Osorio & Assoc. is located, plaintiffs allege that it is located at 184 Martine Avenue, White Plains, New York.

In opposition to defendants' motion, plaintiffs submit the affidavits of service of Antoine H. Edwards (Edwards) and Luis A. Crespo (Crespo). Edwards states that, on April 26, 2010, he served Carlos Moreno by delivering a copy of the summons and complaint to "Liz Dominguez, receptionist, authorized to accept" service at 352 7th Ave., Room 1204, and, on April 27, 2010, mailing a copy of the summons and complaint to Carlos Moreno at Moreno Law Offices, 352 7th Ave., Room 1204, New York, NY 10001. Affidavit of service of Antoine H. Edwards, Exh. C to Affirmation

in Opposition of Emiliano Perez.

Crespo submits three separate affidavits. In the first, he states that, on May 3, 2010, he served the summons and complaint on Osorio & Assoc. by leaving a copy of the papers, at 184 Martine Avenue, White Plains, NY 10601, with "Frine Ferunid,¹ General Agent authorized to accept on behalf of the corporation." Affidavit of Service of Luis A. Crespo, Exh. D, to Perez Affirmation. In a second affidavit Crespo states that on May 3, 2010, he served Marth (*sic*) L. Osorio by leaving a copy of the summons and complaint with Frine Ferunid, co-worker, at 184 Martine Avenue, White Plains, NY, 10601 and mailing a copy of the papers, by first class mail to Marth (*sic*) L. Osorio at the same address on May 4, 2010. In the final affidavit Crespo states that on May 3, 2010, he served the summons and complaint on Michael H. Joseph by delivering a copy of the papers to "Frine Ferunid, co-worker, person of suitable age and discretion" at 184 Martine Avenue, White Plains, NY 10601, and mailing a copy of the papers to Joseph at the same address, on May 4, 2010. Affidavit of service of Luis A. Crespo, Exh. D., to Perez Affirmation.

In response, defendants submit the affidavit of Osorio, dated September 21, 2010, who states that she is a member of Osorio & Assoc., which is a Limited Liability Company (LLC), and

¹ According to defendants, Frine Fermin is the correct spelling of this name.

that the LLC has never authorized or designated Frine Fermin to accept to service of process on its behalf. Therefore, according to defendants, even assuming Ms. Fermin was served with a copy of the summons and complaint, that service would not satisfy CPLR 311-a which requires personal service on 1) any member of the LLC in the state, if the management is vested in its members, 2) any manager of the LLC in the state, 3) any other agent authorized to accept service of process, or 4) any other person designated by the LLC to accept service, in the manner provided by law for service of a summons as if the person were a defendant. CPLR 311-a. Defendants further argue that service on the LLC would not have been accomplished by the purported substitute service on Osorio, because CPLR 311-a requires personal service, not substitute service. Defendants, therefore, seek a hearing at which plaintiffs must demonstrate by a preponderance of the evidence that service was properly effectuated.

Defendants' sworn statements regarding the lack of authority of both the receptionist at 352 7th Avenue and of Frine Fermin to receive service of process, and of their failure to receive copies of the summons and complaint in the mail, raise sufficient questions of fact regarding personal jurisdiction to require a traverse hearing. *Poree v Bynum*, 56 AD3d 261 (1st Dept 2008). For that reason, the balance of defendants' motion with respect to the issues of legal malpractice and sanctions will not be

determined at this time and may be renewed, if relevant, depending upon the resolution of the jurisdictional question (see *Wyser-Pratte Mgt. Co. v Babcock Borsig AG*, 23 AD3d 269 [1st Dept 2005]), and, therefore, the facts regarding those issues are not set forth in detail in this decision.

Accordingly, it is hereby

ORDERED defendants' motion for summary judgment dismissing the complaint is granted only to the extent that a traverse hearing on the issue of whether defendants were properly served, as discussed further above, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that upon receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee, defendants may also renew the balance of the instant motion to the extent relevant; and it is further

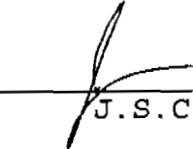
ORDERED that counsel for defendants shall, within 30 days from the date of this order, serve a copy of this order with

notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk in the Motion Support Office in Rm. 119M at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

DATE:

April 5, 2011

ENTER:



J.S.C.

FILED

APR 12 2011

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COUNTY CLERK'S OFFICE

²Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.