

**Colasanti v Powers**

2011 NY Slip Op 31999(U)

July 14, 2011

Supreme Court, New York County

Docket Number: 114115/2010

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 114115/2010

COLASANTI, PHILLIP

INDEX NO. \_\_\_\_\_

vs

POWERS, FRANCES MANETTA

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

DISMISS

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with accompanying memorandum decision.*

FILED

JUL 18 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/14/11

*Saliann Scarpulla*  
SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

-----X  
PHILIP COLASANTI and KURSTEN COLASANTI,

Plaintiffs,

- against -

FRANCES MANETTA POWERS,

Defendant.

-----X

For Plaintiffs:  
Charles Kirschner, Esq.  
2 Rector St.  
New York, NY 10006

For Defendants:  
Carol Ann Solferino, Esq.,  
Solferino & Solferino, LLP  
15 Roslyn Rd.  
Mineola, NY 11501

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**JUL 18 2011**

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Papers considered in review of this motion to dismiss:  
Second Amended Notice of Motion..... 1  
Aff in Opp..... 2  
Reply Aff..... 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages, defendant Frances Manetta Power s/h/a Frances Manetta Powers ("Power") moves to dismiss the complaint for lack of personal jurisdiction. Plaintiffs, Philip Colasanti's and Kursten Colasanti's (collectively "the Colasantis"), claims relate to the alleged failure of Power to pay rent for the apartment at 430 West 34<sup>th</sup> St, New York, NY, which she leased from the Colasantis.

In her motion to dismiss, Power alleges that service of process upon her was defective, depriving the Court of personal jurisdiction over her. Power argues that a copy of the summons and complaint mailed to her place of employment indicated that it was from an attorney, in violation of CPLR 308 (2), and that the Colasantis' attorney failed to

file an affidavit of service with the clerk of the court within 20 days of service, also in violation of CPLR 308 (2).

The Colasantis do not deny that the affidavit of service was not timely filed. However, the Colasantis argue that there was another separate mailing of the summons performed in compliance with the CPLR. Further, the envelope that was sent met some of the criteria set forth in CPLR 308 (2). The envelope was marked “peronal and confidential,” even though, it also displayed the name of the law office representing the Colasantis in the return address field. The Colasantis argue that this partial compliance raises an issue of whether the defect in this case should be deemed jurisdictional or a mere irregularity.

### **Discussion**

If in-hand service is not possible, CPLR 308 (2) provides an alternative method of service whereby a party may be served by delivering the summons to a person of suitable age at that party’s place of business and “by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served.” CPLR 308 (2). “Proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing.” CPLR 308 (2).

With regards to service of process, “[s]trict compliance with all the service dictates of CPLR 308 [ . . . ] is required in order to obtain jurisdiction.” *Persaud v. Teaneck Nursing Ctr., Inc.*, 290 A.D.2d 350, 351 (1<sup>st</sup> Dept. 2002) (internal citations omitted). Additionally, “[i]n a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment. Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.” *Macchia v. Russo*, 67 N.Y.2d 592, 595 (1986) (internal citations omitted). If, “the plaintiffs’ process server fail[s] to comply with the conditions prescribed for the mode of substituted service utilized, jurisdiction over the respondents [is] not acquired.” *Broomes-Simon v. Klebanow*, 160 A.D.2d 973 (2<sup>nd</sup> Dept. 1990) (holding that mailing a summons to a party’s place of business in an envelope denoting that it was sent by an attorney, and that was not labeled “personal and confidential,” constituted a jurisdictional defect of service).

Here, the Colasantis’ attorney mailed the summons to Power’s place of business in an envelope that indicated an attorney sent it, in violation of CPLR 308 (2). Although this case differs from *Broomes-Simon* because the envelope here was labeled “private and confidential” while the envelope in that case was not, this distinction is inconsequential. In *Gazes v. Bennett*, this Court (Goodman, J.) held that “there is no reason to distinguish cases dismissing complaints where an envelope does not bear the legend ‘personal and confidential’ from cases where the legend is included, but the envelope indicates that it is from an attorney. Because the [ . . . ] mailing envelope indicated that it was from an attorney (albeit it also contained the legend ‘personal and confidential’) which fact is

undisputed, plaintiff [ . . . ] failed to obtain jurisdiction over defendant- [ . . . ] as of that date.” *Gazes v Bennett*, 2008 N.Y. Slip. Op. 33265U, 14 (N.Y. Sup. Ct., Nov. 25, 2008). Accordingly, the Court finds that mailing a summons in an envelope bearing the return address of a law office constitutes a jurisdictional defect, and that, therefore, the Court does not have personal jurisdiction over Power.

The Colasantis’ attorney, Charles Kirschner, Esq. (“Kirschner”), claims, without any documentary support, that this envelope was sent mistakenly and in addition to a proper mailing of the summons. “It is well settled that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made.” *Persaud v. Teaneck Nursing Ctr., Inc.*, 290 A.D.2d 350, 351 (1<sup>st</sup> Dept. 2002). Here, Power has come forward with evidence of improper service, while Kirschner has simply asserted that there was some other mailing that fulfilled CPLR 308, without offering any proof thereof. As the Colasantis have failed to show that service of process was effectuated in accordance with CPLR 308 (2) Power’s motion to dismiss for lack of personal jurisdiction must be granted.<sup>1</sup>

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<sup>1</sup> With respect to the failure of the Colasantis’ attorney to file the affidavit of service within the twenty days required by CPLR 308 (2), the Court finds that this is not a jurisdictional defect. “Failure to timely file the affidavit of service [ . . . ] was an irregularity that was properly cured by deeming it filed nunc pro tunc.” *Bell v. Bell, Kalnick, Klee & Green*, 246 A.D.2d 442, 443 (1<sup>st</sup> Dept. 1998) (internal citations omitted). See also *Paracha v. County of Nassau*, 228 A.D.2d 422, 423 (2<sup>nd</sup> Dept. 1996). Nevertheless, process was not served in accordance with CPLR 308 (2).

In accordance with the foregoing, it is hereby

ORDERED that the motion to dismiss brought by the defendant, Frances Manetta Power s/h/a Frances Manetta Powers, is granted, this action is dismissed and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York

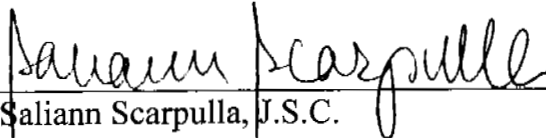
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ENTER :

  
Saliann Scarpulla, J.S.C.