Winley-Dunk v Davis
2012 NY Slip Op 33945(U)
October 19, 2012
Supreme Court, Queens County
Docket Number: 700114/2012
Judge: Robert J. McDonald

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

DUANNE WINLEY-DUNK,

Plaintiff,

- against -

LASHAWN S. DAVIS and ELRAC INC.,

Defendants.

- x

Index No.: 700114/2012

Motion Date: 10/04/12

Motion No.: 30

Motion Seq.: 1

The following papers numbered 1 to 16 were read on this motion by defendant, LASHAWN S. DAVIS, for an order pursuant to CPLR 3211(a)(8), dismissing the plaintiff's complaint against said defendant on the ground that the court does not have personal jurisdiction of said defendant due to improper service of the summons and complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 5
Affirmation in Opposition-Affidavits-Exhibits	6 - 9
Reply Affirmation	10 - 12
Supplemental Reply Affirmation	13 - 16

This is a personal injury action in which plaintiff, Duanne Winley-Dunk, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on March 7, 2009, on the eastbound lanes of the Belt Parkway near the Cross Bay Boulevard exit in Queens County, New York. It is alleged that the plaintiff's vehicle was hit in the rear by the vehicle owned by defendant Elrac, Inc., and operated by defendant LaShawn S. Davis.

The plaintiff commenced this action by the filing of a summons and complaint on January 23, 2012. Defendant was

personally served by service upon a person of suitable age and discretion at his usual place of residence pursuant to CPLR 308(2) on February 8, 2012. The law firm of Brand, Glick & Brand, P.C. served a verified answer on behalf of both defendants on or about February 17, 2012. The answer contained an affirmative defense of lack of personal jurisdiction due to improper service of the summons and complaint on the defendants.

Defendant LaShawn Davis now moves to dismiss the complaint against him on the ground that he was not properly served and the court lacks personal jurisdiction. In support of the motion defendant submits a copy of the affidavit of service dated February 17, 2012 and executed by process server, Kendric Lever. Mr. Lever states that he served LaShawn Davis on February 8, 2012 by delivering and leaving a copy of the summons and complaint with one Mary Barry, the defendant's grandmother, at 710 East 94th Street Brooklyn, New York. He also mailed a copy of the summons and complaint to the defendant at the same address on February 17, 2012. The defendant was served at that address based upon the address which appeared on his driver's license at the time of the accident.

In his affirmation in support of the motion, defendant's counsel, Edward J. Savidge, Esq., asserts that a review of the New York City Department of Corrections website indicates that LaShawn Davis was arrested on February 8, 2012 the same date on which he was purportedly served and has been held at Rikers Island from the date of his arrest to the present time. Counsel states that in light of his incarceration that service at his residence in Brooklyn was improper as he was actually a resident of the Anna M. Kross Correctional Facility at Rikers Island from February 8, 2012 to the present time. Counsel contends therefore, that as service was not properly effectuated that the plaintiff's complaint must be dismissed as to Mr. Davis.

In opposition, plaintiff's counsel, Denny A. Brown, Esq. contends that the defendant was properly served pursuant to CPLR 308(2) as the summons and complaint was delivered to a person of suitable age and discretion, to wit, defendant's grandmother, at the address which was listed on the police accident report. Counsel does not contest the fact that the defendant was arrested and incarcerated on February 8, 2012, however, counsel contends that the defendant was served at his residence and that his usual place of abode is not the correctional facility at Rikers Island.

In reply, the defendant submits further documentation indicating that the defendant was arrested on February 8, 2012 at 9:30 a.m. and charged with attempted robbery in the first degree

a Class C Felony. His bail was set at $75,000 and he was then incarcerated on February 9, 2012 at Rikers Island where he has remained, awaiting trial, since that date. Counsel reiterates that as of February 8, 2012, defendant's dwelling place or usual place of abode was the jail he was housed in. Counsel states that, "It is respectfully submitted that a person cannot be considered a resident of a private home when the State has forcefully confined him to its own facility." He claims that to permit service at a location other than the jail facility where he is housed would deprive him of due process as he would not be given reasonable notice that a lawsuit was commenced.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds that the motion by LaShawn Davis for an order dismissing the complaint for lack of personal jurisdiction is denied.

Here, there is no dispute that the defendant was arrested on February 8, 2012 at 9:30 am and incarcerated since that time. There is also no dispute that he was served at the home address which was listed on his driver's license which he presented to the police officer at the scene of he accident. The only issue is whether service was proper pursuant to CPLR 308(2) given that the defendant was incarcerated prior to the time that service was effectuated at his home address.

This Court is in agreement with the determination of Justice Lehner in Montes v Seda, 157 Misc 2d 895 {N.Y. Supreme Ct. 1993] aff'd 208 AD2d 388 [1st Dept. 1994]. In Montes the defendant was incarcerated in a state correctional facility at the time that service was made pursuant to CPLR 308(2) on the defendant's adult daughter at the defendant's prior home address. The court, citing Mullane v Central Hanover Bank & Trust Co., 339 US 306 [1950], held that due process required that notice be made which is reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections. In that regard Justice Lehner held that where defendant was incarcerated at the time of service that service upon a family member at the prior dwelling of the defendant was reasonably calculated to inform the defendant of the pendency of the action as there was no testimony that the defendant's whereabouts were not known to the adult daughter. The court also held, citing Feinstein v Bergner, 48 NY 2d 234 [1979], that the term "usual place of abode" implies a place where there is a degree of permanence and stability. The court held that a degree of permanence and stability cannot be ascribed to a location where a defendant is placed involuntarily

by the State. The court reasoned that prison is a place where persons are segregated away from their homes and should not, in cases where a prisoner has family at home, be considered to be that person's dwelling or usual place of abode. The Appellate Division, First Judicial Department in affirming Justice Lehner's decision (see Montes v Seda, 208 AD2d 388 [1st Dept. 1994], stated that the address where plaintiff delivered a copy of the summons and complaint to defendant's daughter was defendant's "usual place of abode" within the meaning of CPLR 308(2), and that "a different conclusion is not required by the fact that defendant was in prison serving an 18-month sentence at the time of such service."

Accordingly, this Court finds that service of the summons and complaint at the plaintiff's usual place of abode was sufficient to apprise the defendant of the pendency of this action notwithstanding that he had been incarcerated for one day prior to service. There was no proof submitted that the place where he was served was not his usual place of abode and no proof that his grandmother did not know where he was or could not advise him of service of the papers.

Accordingly, for all of the above-stated reasons, it is hereby

ORDERED, that the motion of defendant LaShawn Davis for an order dismissing the plaintiff's complaint for failure to obtain personal jurisdiction over the defendant is denied.

Dated: October 19, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.