

**Musasama v Castle**

2013 NY Slip Op 30886(U)

April 25, 2013

Supreme Court, Queens County

Docket Number: 701040/12

Judge: Robert J. McDonald

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

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

IAS PART 34

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SANA MUSASAMA,

Index No.: 701040/12

Plaintiff,

Motion Date: 2/22/13

- against -

Motion No.: 69

WILLIAM N. CASTLE and YATTA KAMARA,

Motion Seq.: 1

Defendants.

- - - - - x

The following papers numbered 1 to 11 were read on this motion by defendants WILLIAM N. CASTLE and YATTA KAMARA for an order pursuant to CPLR 3211(11)(e); CPLR 3212; CPLR 203; CPLR 306(b) and CPLR 214 dismissing the complaint and directing that summary judgment be entered in favor the defendants on the ground that the court does not have jurisdiction of the person of the defendants; or in the alternative for an order staying the matter until such time as defendant WILLIAM N. CASTLE has completed his military service in North Carolina:

Papers  
Numbered

Defendants' Notice of Motion-Affirmation-	
Affidavits-Service-Exhibits.....	1-4
Plaintiff's Affirmation in Opposition-	
Affidavits-Exhibits.....	5-8
Defendants' Reply Affirmation-Exhibits.....	9-11

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Defendants, WILLIAM N. CASTLE and YATTA KAMARA, by notice of motion, seek an order of the Court, dismissing the plaintiff's complaint for failure to obtain personal jurisdiction over defendants; or in the alternative, for an order staying this matter pending the hearing of this motion and placing this action on the Military Calendar.

The underlying action is for personal injuries allegedly sustained by plaintiff as a result of an automobile accident occurring on June 14, 2009. The accident occurred at an intersection controlled by a stop sign located at Nashville Boulevard and 193<sup>rd</sup> Street, County of Queens, New York. The police report indicates that the defendant driver resided in St. Albans, Queens at the time of the accident and the defendant motor vehicle owner resided at an address in Providence, Rhode Island.

This action was electronically filed and the summons and complaint filed with the Court on June 13, 2012, one day prior to the expiration of the statute of limitations. Affidavits of service were filed with the Clerk on July 17, 2012 (Yatta Kamara) and August 2, 2012 (William Castle). Issue was joined on August 17, 2012 by service of defendants' answer containing affirmative defenses including lack of personal jurisdiction.

In support of the motion, defendants submit a copy the summons and complaint electronically filed on June 13, 2012; a copy of defendants' answer; the affidavits of William N. Castle and Yatta Kamara; and a copy of an order from the Department of the Army.

Defendant Yatta Kamara states in her affidavit dated October 15, 2012 that she never received process of service personally, or by regular or certified mail at her residence, 118-23 200<sup>th</sup> Street, St. Albans, N.Y. She states that she has resided there since 2006 with her two daughters and son.

Defendant, William Castle, states in his affidavit dated October 12, 2012 that he presently resides at Fort Bragg, North Carolina. He states that he is in the active military service of the United States since October 5, 2010 and is presently stationed at Fort Bragg. He states that he was not served personally with a copy of the summons and complaint and did not receive a copy in the mail. Mr. Castle also submits a copy of an order from the Department of the Army dated March 28, 2011 which states that defendant Castle was ordered to report to 108 ADA, Fort Bragg, N.C. on April 7, 2011 for active military service. Mr. Castle states that he does not know when his assignment at Fort Bragg will end.

In support of her affirmation in opposition, plaintiff submits a copy of the electronic filing print out; a copy of the affidavit of service on Yatta Kamara; a copy of the affidavit of service on William N. Castle, via the New York Secretary of State; and a copy of the police report.

The affidavit of service for Yatta Kamara, states that she was served at the address provided in the police report with the summons and complaint on June 30, 2012 by delivering and leaving a true copy at her residence with a person of suitable age and discretion. Pursuant to the affidavit of service, on June 30, 2013, a copy of the summons and complaint was deposited in the U.S. mail addressed to defendant at 118-23 200<sup>th</sup> Street, St. Albans, NY.

Additionally, plaintiff also maintains that the address provided on the police report for William N. Castle is in Rhode Island and that defendant was served pursuant to VTL § 253 via the New York Secretary of State on July 10, 2012. Pursuant to the affidavit of service, on July 10, 2012, a copy of the summons and complaint was deposited in the U.S. mail addressed to William N. Castle at 42 Wilson Street, Providence, Rhode Island.

Defendants maintain that as they were not personally served and only learned of the existence of a lawsuit when plaintiff's insurance carrier called to inquire about the matter in July 2012 and therefore the complaint must be dismissed as the court does not have jurisdiction over the persons of the defendants. Counsel also alleges that the action is barred by the three years Statute of Limitations, and that the plaintiff failed to serve the defendant within 120 days of the filing of the summons and complaint.

Lastly defendants contend that as William Castle is currently in the active military service of the United States and will be at Fort Bragg for an unknown period of time, that the matter must be stayed pursuant to Section 304 of the Military Law. Counsel requests, therefore, that all proceedings in this matter be stayed until such time as the defendant has completed his current assignment and is available to participate in the discovery process and trial of this action.

Upon review and consideration of the defendants' motion, the plaintiff's affirmation in opposition, and the defendants' reply thereto, this court finds as follows:

A process server's affidavit stating proper service in accordance with CPLR 308, constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). However, a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing unless the defendant fails to swear to "specific facts to

rebut the statements in the process server's affidavits" (Simonds v Grobman, 277 AD2d 369 [2d Dept. 2000]; also see U.S. Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983 [2d Dept. 2010]).

Here, the affidavits of the respective defendants each contain a conclusory denial of receipt of the summons and complaint and is insufficient to rebut the presumption of proper service as they never denied the specific facts contained in the process server's affidavit (see Deutsche Bank Natl. Trust Co. v Dixon, 93 AD3d 630 [2d Dept. 2012]; Clover M. Barrett, P.C. v Gordon, 90 AD3d 973 [2d Dept. 2011]; City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]).

Accordingly, this Court finds the plaintiff properly served the summons and complaint upon each defendant and the defendants' motion to dismiss the complaint on the ground of lack of personal jurisdiction is denied. In addition, this court finds that the summons and complaint was timely as it was filed one day prior to the expiration of the three year statute of limitations. In addition, the plaintiff properly served and filed the affidavits of service within 120 days of filing the summons and complaint.

Pursuant to Section 304 of the Military Law, "At any stage thereof, any action or proceeding in any court...in which a person in military service is involved as a party, during the period of such service or within sixty days thereafter may, in the discretion of the court... before which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court ...the ability of plaintiff to prosecute the action, or the defendant to conduct his defense... is not materially affected by reason of his military service."

Defendants maintain that defendant Castle is stationed in Ft. Bragg, North Carolina for an indefinite amount of time and that he would be unable to appear for any deposition or trial in this action. However, this court finds that Castle was not personally involved in the accident and was named as a defendant only based upon his ownership of the vehicle involved in the accident. As such his only role in the trial would be to confirm permissive use by the operator, defendant Kamara. Thus his active military service would not materially affect his ability to defend the action. Further, defendants' motion papers failed to state how its defense would be materially affected by Castle's

military service and plaintiff's counsel states that accommodations will be made so that he may be deposed if necessary (see Feaster v Boulabat, 85 AD3d 664 [2d Dept. 2011]; Pinkowski v All-States Sawing & Trenching Inc., 290 AD2d 873 [3<sup>rd</sup> Dept. 2002]; Carrasquillo v. City of New York, 236 AD2d 576 [2d Dept. 1997]; Fischer v Keep, 231 AD2d 864 [4<sup>th</sup> Dept. 1996]; Turchiano v Jay Dee Transp., 109 AD2d 790 [2d Dept. 1985]). Therefore, this court finds that a stay is not necessary due defendant Castle's military status and his application for a stay is therefore denied.

Dated: Long Island City, NY  
April 25, 2013

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**ROBERT J. McDONALD**  
**J.S.C.**