

**Kelman v Sims**

2013 NY Slip Op 31769(U)

July 24, 2013

Sup Ct, New York County

Docket Number: 651512/13

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS  
Justice

PART 6

Index Number : 651512/2013  
KELMAN, M.D., DAVID  
vs.  
SIMS, RANDALL  
SEQUENCE NUMBER : 002  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE 7/9/13  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to confirm Award.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) E-File: 1-3

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 4-8

Replying Affidavits \_\_\_\_\_ No(s) 9-12  
13

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM <sup>INTERIM</sup> DECISION <sup>ORDER</sup>

Dated: 7/24/13

Joan B. Lobis, J.S.C.

**JOAN B. LOBIS**  
 NON-FINAL DISPOSITION

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
 NEW YORK COUNTY: IAS PART 6

-----X  
 DAVID KELMAN, M.D., PHILIP LISTER, M.D.,  
 ARTHUR SCHORE, M.D.,

Petitioners,

Index No. 651512/13

-against-

**Interim Decision and Order**

RANDALL SIMS,

Respondent.

-----X  
 JOAN B. LOBIS, J.S.C.:

David Kelman, M.D., Philip Lister, M.D., and Arthur Schore, M.D., petition under Section 7510 of the Civil Practice Law and Rules to confirm an arbitration award, refunding them \$10,000 from their retainer paid to the Respondent, Randall Sims, for prior legal representation. In motion sequence number 2, Respondent moves under Rule 3211(a)(8) of the Civil Practice Law and Rules to dismiss the petition for lack of personal jurisdiction. Petitioners cross-move under Rule 305(c) of the Civil Practice Law and Rules to amend the proof of service. Respondent opposes the cross-motion. For the following reasons, Respondent's motion is denied, and Petitioners' cross-motion is granted.

This matter arises from Respondent's prior legal representation of the Petitioners. Petitioners gave Mr. Sims a \$15,000 retainer in connection with that representation. Petitioners subsequently terminated Mr. Sims and sought a refund. The dispute was arbitrated before a three-member panel of arbitrators for The Joint Committee on Fee Disputes and Conciliation. The panel determined that Mr. Sims was entitled to \$5,000 of the \$15,000 retainer, and awarded the remainder

to be refunded to the Petitioners.

The Petitioners now seek an order confirming that award under Section 7510 of the Civil Practice Law and Rules. The petition was served on Mr. Sims on May 2, 2013. The process server, Benny Gonzalez of Progressive Process Service, Inc., delivered the papers to Mr. Sims's place of business at 1370 Avenue of the Americas here in New York City. The affidavit of service, sworn to on May 6, 2013, identifies the person with whom the papers were left as "Daniel Lane," and physically describes him. The room number at which the papers were left and to where copies were subsequently mailed is listed as "Suite 2601."

On May 31, 2013, Mr. Sims contacted Petitioners' counsel and obtained consent for more time in which to respond to the petition. He now seeks to dismiss the petition "with prejudice" for lack of personal jurisdiction. In support he affirms that he has not worked in Suite 2601 at that location since January 2010. Rather, he lists his current room information as "29th Floor." He admits that he knows Daniel Lane, but denies that he employs him.

Respondent does not deny that he received the papers that the process server hand-delivered. He merely claims that he did not receive any mailing. In his reply affirmation, Respondent affirms that he received the Petitioners' legal papers but "only eventually chanced" upon them "inside an unaddressed blank flat envelope during the last days of May 2013 . . . ."

Petitioners, in response to Mr. Sims's motion to dismiss for lack of personal

jurisdiction, oppose the motion and cross-move to amend the proof of service. In support of their cross-motion, Petitioners submit an affidavit dated June 24, 2013, of the process server, Benny Gonzalez. In that affidavit, Mr. Gonzalez explains that on May 2, 2013, he attempted to serve the papers on the Respondent at Suite 2601, but when Mr. Gonzalez arrived at the building, he learned that the Respondent's current office within the building was the 29th floor. Mr. Gonzalez's affidavit includes as an exhibit Mr. Gonzalez's worksheet from that delivery, which includes, among others, the handwritten notations, "suitable," referring to Mr. Lane, and "29th fl." Mr. Gonzalez explains his failure to update the Respondent's address information in preparing the original affidavit of service as "clerical error." Petitioners' motion to amend the proof of service also includes a revised affidavit of service of process by Mr. Gonzalez reflecting the Respondent's correct office location within the building.

As an initial matter, it is improper for Respondent to seek dismissal "with prejudice" under Rule 3211(a)(8) for lack of personal jurisdiction. Dismissals for lack of personal jurisdiction are not determinations on any merits, see Section 49 of the Restatement of Judgments, comment a, and are dismissed without prejudice. E.g., Peters v. Peters, 101 A.D.3d 403, 403 (1st Dep't 2012); Leiderman Assocs. v. Robotool Ltd., 154 A.D.2d 515, 515 (2d Dep't 1989).

Nor does this Court find that any dismissal is warranted. Section 308 of the Civil Practice Law and Rules governs personal service upon natural persons. That section provides, in pertinent part, that service may be made by delivering the summons to a "person of suitable age and discretion at the actual 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 . . . ." Id. § 308(2). This court may allow amendment of proof of service of a summons where "a substantial right of a party against whom the summons issued is not prejudiced." C.P.L.R. Rule 305(c).

This Court will allow Petitioners to amend their proof of service. The amendment will not prejudice any substantial right of the Respondent. The process server's affidavit, which swears that the process server made a clerical error in the original affidavit of service in setting forth the Respondent's room location within the building, is un rebutted.<sup>1</sup> The record shows from Respondent's own affirmations that he received the hand-delivered papers and that he knows Mr. Lane, the individual with whom they were left. Respondent even corroborates Mr. Gonzalez's sworn statement that Mr. Gonzalez actually left the papers on the 29th floor with Mr. Lane. In Respondent's affirmation acknowledging that he knows Mr. Lane, Respondent added that Mr. Lane does not work in Suite 2601. Lastly, the statute governing personal service defines service as having been completed following delivery by "mailing," not receipt of mailing. See C.P.L.R. § 308(2); Melton v. Brotman Foot Care Group, 198 A.D.2d 481, 482 (2d Dep't 1993). Accordingly, it is

ORDERED that Respondent's motion to dismiss for lack of personal jurisdiction is denied; it is further

ORDERED that Petitioners' motion to amend the proof of service is granted; it is

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<sup>1</sup>Respondent's affirmation in support of his motion to dismiss contains its own "clerical error," listing the suite purportedly indicated on the original affidavit of service as "Suite 2610," rather than "Suite 2601," as actually appears.

further

ORDERED that Respondent shall serve and file his answer to the petition within 21 days of service of this interim decision and order with notice of entry, and provide a courtesy copy to the Court at Part 6, Room 345, 60 Centre St., New York, New York 10007; and it is further

ORDERED that any reply shall be served and filed within 14 days of service of the answer and a courtesy copy provided to the Court at Part 6, Room 345, 60 Centre St., New York, New York 10007.

Dated: July 24, 2013

ENTER:



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JOAN B. LOBIS, J.S.C.