

Supreme Court, New York County v Moss
2013 NY Slip Op 32331(U)
September 25, 2013
Supreme Court, New York County
Docket Number: 156655/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART _____

Index Number : 156655/2012
FRANKLIN, CARLA
vs.
MOSS, CHICO SHON
SEQUENCE NUMBER : 003
VACATE DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

is decided in accordance with the annexed decision.

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

Dated: 9/25/13

OK, J.S.C.

CYNTHIA S. KERN J.S.C.

- 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
COUNTY OF NEW YORK: Part 55

-----X
CARLA FRANKLIN,

Plaintiff,

Index No. 156655/12

-against-

DECISION/ORDER

CHICO SHONRIGUEZ SHEDRIAN MOSS a/k/a
CHICO SHON MOSS a/k/a CHICO SHONRIGUEZ
"SHON" SHEDRIAN MOSS a/k/a SHON MOSS a/k/a
CHICO MOSS a/k/a S.S. MOSS, an individual, MGP &
ASSOCIATES, INC., MIKE PAUL and all other John
and Jane Does, individuals and businesses acting in
concert,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>1</u>
Exhibits.....	<u>3</u>

Plaintiff Carla Franklin commenced the instant action asserting claims for, *inter alia*,
defamation, tortious interference with business relations and intentional infliction of emotional
distress against defendants Chico Shonriguez Shedrian Moss ("Moss"), MGP & Associates, Inc.
("MGP") and Mike Paul ("Paul"). Defendant Moss, *pro se*, now moves for an order dismissing
this action and requests that sanctions be entered against plaintiff on the ground that this action is
frivolous. This court notes that while Moss labels his motion as one to "vacate default

judgment,” this court will treat it as a motion to dismiss as no default has been entered against him and upon a reading of his papers it is clear that he is actually moving to dismiss based on improper service. For the reasons set forth below, Moss’s motion is granted in part and denied in part.

The relevant facts are as follows. On January 23, 2013, plaintiff filed the instant action alleging causes of action for, *inter alia*, defamation, tortious interference with business relations and intentional infliction of emotional distress. Plaintiff then amended her complaint as of right on February 12, 2013. According to the affidavit of service filed by plaintiff, plaintiff’s process server served Moss with plaintiff’s summons and first amended complaint on April 4, 2013, by leaving a true copy of said documents with “Jane Smith” at 244 5th Avenue, Box 200, New York, NY. In Moss’s affidavit provided in support of his motion, he attests that he currently resides in Sao Paulo in the Federative Republic of Brazil and has since March 4, 2011. Additionally, he attests that his “last place of residence in the State of New York was 338 East 120th Street, Apartment 3, NY, NY.” On December 7, 2011, in conjunction with a prior related litigation, the United States Consulate in Sao Paulo, Brazil provided the court with a true copy of Moss’s passport, which affirmed that he had not left Brazil since May 8, 2011 up to that date.

It is well settled that proper service of process is necessary to fulfill the “notice” component of jurisdiction. Indeed, “[n]otice 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). Accordingly, “[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents.” *Raschel v. Rish*, 69 N.Y.2d 694, 697 (1986). Additionally, on a motion to dismiss for improper service,

plaintiff has the burden to demonstrate that proper service was effectuated. *See, e.g., Arroyo v. Mountain School*, 68 A.D.3d 603 (1st Dept 2009).

Pursuant to CPLR § 308(2), service may be effectuated by “delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business.” CPLR § 308(4) allows for alternative service when, after due diligence, plaintiff cannot make personal service upon defendant. Specifically, pursuant to CPLR § 308(4), service may be made by “affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served.” The court has made clear that the documents must be delivered or affixed to the door of the *actual* place of business or *actual* dwelling place of defendant-- affixing or delivering it to defendant’s last known residence does not meet this requirement. *See Feinstein v. Bergner*, 48 N.Y.2d 234 (1979).

In the present case, plaintiff has failed to demonstrate that proper service was made on Moss. Plaintiff asserts in her opposition papers that service upon Moss was effectuated under CPLR § 308(4). To support this contention, plaintiff presents the affidavit of Samara Kane, wherein Ms. Kane attests that on April 2, 2013, she delivered a copy of the summons and first amended complaint to “Jane Smith” at 244 5th Avenue, Box 200, New York, New York 10001, which said address is identified as Moss’s “actual place of mailing.” As an initial matter, this affidavit of service is deficient on its face. Both CPLR § 308(2) and § 308(4), require that service be made at the defendant’s actual place of business or dwelling place, not at his or her

place of "mailing." Accordingly, leaving a copy of the summons and complaint at someone's actual place of "mailing" is insufficient as a matter of law to effectuate proper service.

Moreover, it is not clear from the record what connection the address 244 5th Avenue has with defendant Moss as he attests that his last known residence in New York was at 338 East 120th Street and plaintiff offers absolutely no explanation to identify why service was attempted on Moss at this address. Additionally, plaintiff offers absolutely no evidence to refute Moss's sworn statement, which is supported by his passport, that he has not resided in New York since March 4, 2011. Therefore, on the record before this court, service at any address in New York would be improper as defendant Moss no longer has an actual place of business, dwelling place or usual place of abode within the State of New York. Accordingly, as plaintiff has failed to demonstrate proper service on Moss, Moss's motion to dismiss is granted on the ground that this court lacks jurisdiction over him.

However, the remainder of Moss's motion requesting sanctions against plaintiff on the ground that this action is frivolous is denied. It is simply not clear on the record before this court that this action is frivolous, such that sanctions would be warranted.

Based on the foregoing, Moss's motion is granted to the extent that this action is hereby dismissed as to him. This constitutes the decision and order of the court.

Dated: 9/25/13

Enter: _____

CK
J.S.C.

CYNTHIA S. KERN
J.S.C.