

Property Clerk, New York City Police Dept. v Garica
2014 NY Slip Op 30158(U)
January 15, 2014
Supreme Court, New York County
Docket Number: 451069/2013
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. MARTIN SHULMAN, J S C

PRESENT: Justice

PART 1

Index Number : 451069/2013
PROPERTY CLERK, NYPD
vs.
GARCIA, JESSICA
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 451069/13
MOTION DATE
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits A-C No(s) 1
Notice of Cross-Motion and Answering Affidavits - Exhibits 1-8 No(s) 2
Replying Affidavits - Exhibits A-C No(s) 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached interim decision and order setting the matter down for a traverse hearing and holding final determination of the motions in abeyance pending the outcome of such hearing.

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

Dated: Jan. 15, 2014

HON. MARTIN SHULMAN, 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 1

-----X
PROPERTY CLERK, NEW YORK CITY POLICE
DEPARTMENT,

Plaintiff,

Index No.: 451069/13

-against-

Interim Decision & Order

JESSICA GARCIA,

Defendant.

-----X

Defendant Jessica Garcia ("Garcia" or defendant") moves pursuant to CPLR 3211(a)(8) to dismiss the complaint in this civil forfeiture action on the grounds that this court lacks personal jurisdiction over her due to plaintiff Property Clerk, New York City Police Department's ("Property Clerk" or "plaintiff") failure to properly serve her pursuant to CPLR §308 (4) (the "motion").¹ Plaintiff submits a memorandum of law in opposition to the motion and separately moves for summary judgment pursuant to CPLR 3212 (the "cross-motion").² The motion and cross-motion are consolidated for disposition.

Plaintiff commenced this action seeking forfeiture of a 2006 Mitsubishi bearing Vehicle Identification Number 4A3AK24FX6E042502 (the "subject vehicle") pursuant to N.Y.C. Adm. Code §14-140. Plaintiff alleges upon information and belief that Garcia is the registered and titled owner of the subject vehicle, which was seized from Garcia and vouchered under Property Clerk Invoice Number 1000286846 as a result of her

¹ Garcia's tenth affirmative defense alleges lack of personal jurisdiction based upon improper service. See Exh. B to motion.

² Although not designated as such, plaintiff's motion is being treated as a cross-motion because it was electronically filed subsequent to defendant's motion and was not assigned a separate motion sequence number.

February 2, 2013 arrest on charges of operating a motor vehicle while under the influence of alcohol or drugs (VTL §§1192.2 and 1192.3).³ On April 19, 2013, defendant pled guilty to violating VTL §1192.2, a misdemeanor.

This court first addresses Garcia's motion, as plaintiff's cross-motion for summary judgment must be denied in the event this court ultimately finds defendant's lack of personal jurisdiction claims to be meritorious. See *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 (2d Dept 2009), citing *McMullen v Arnone*, 79 AD2d 496, 499 (2d Dept 1981) ("It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void").

Plaintiff's affidavits of service (Exh. 6 to Cross-Motion) indicate that service was effectuated by conspicuous place service and mailing pursuant to CPLR §308(4). Specifically, the Property Clerk has filed two (2) affidavits of attempted personal service of Police Officer Joseph McGuinness, who attests that he attempted to serve Garcia at her "last known residential address"⁴ on July 23, 2013 at 9:13 a.m. and on July 24, 2013 at 1:00 p.m. On both occasions Officer McGuinness states that he attempted to serve defendant but neither defendant nor a person of suitable age and discretion was

³ Despite plaintiff's submission of New York State Department of Motor Vehicles records listing Garcia as the subject vehicle's current owner, defendant denies that she owns the subject vehicle. Defendant offers no indication as to who the actual owner is.

⁴ CPLR § 308(4) actually requires service to be effectuated at the defendant's "actual place of business, dwelling place or usual place of abode", with a follow up mailing to the "last known residence" or "actual place of business". In her affidavit of merit in support of the motion (Exh. C thereto), Garcia concedes that she resides at the address indicated in the process servers' affidavits (the "service location").

present at the service location. Plaintiff also filed an affidavit of service by posting and mailing of Police Officer William Coccodrilli who attests that on July 26, 2013 at 5:05 p.m. he affixed a true copy of the summons and verified complaint to the door of the service location and mailed a copy of same to defendant.

Garcia does not deny that the summons and verified complaint were taped to her residence door on Friday, July 26, 2013. However, she alleges plaintiff failed to exercise due diligence prior to resorting to conspicuous place service.⁵ Defendant submits her own affidavit and that of her grandmother, Maria Rubiela Garcia, with whom she resides. Garcia specifically states that “during the entire week either myself or my grandmother was home to open the door if the process server had knocked.” Her grandmother states in relevant part that she does not work and is home on weekdays and nights and during the specific week in question, “no one came to the door to serve any papers” and “if someone had come to the door and knocked during [that] week” she would have opened the door.

“Affix and mail” service pursuant to CPLR 308 (4) may be used only where personal service under CPLR 308 (1) and (2) cannot be made with “due diligence”. *Krisilas v Mount Sinai Hosp.*, 63 AD3d at 888. The due diligence requirement of CPLR 308 (4) “must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received”. *Gurevitch v Goodman*, 269 AD2d 355, 355 (2d Dept 2000).

⁵ This court finds no merit to defense counsel's hearsay allegation that no mailing was effectuated. See *Mead Aff. in Supp.* at ¶ 7. Garcia's own affidavit lacks any such statement.

“A process server’s affidavit of service constitutes prima facie evidence of proper service.” *Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 614 (2d Dept 2010) (internal quotation marks and citation omitted). When “there is a sworn denial of service by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing.” *D.H. Grosvenor, Inc. v Fur Galleria, Inc.*, 202 AD2d 548, 548 (2d Dept 1994); *see also Poree v Bynum*, 56 AD3d 261 (1st Dept 2008).

Applying the law to the instant motion before the court, defendant supplies sufficient information in her supporting affidavit and that of her grandmother to rebut the affidavits of service. *See Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343, 344 (2d Dept 2003) (“A defendant can rebut a process server’s affidavit by a detailed and specific contradiction of the allegations in the process server’s affidavit”). In response, the Property Clerk solely relies on its process servers’ affidavits without addressing defendant’s specific allegations disputing that due diligence was made. On this record, a conflict exists as to whether service was properly made, thus entitling defendant to a hearing on this issue. *Id.*

Accordingly, the issue of whether due diligence was made prior to effectuating service upon Garcia pursuant to CPLR §308 (4) must be referred to the Special Referee Clerk for designation of a Special Referee to conduct a traverse hearing, and to hear and report, with recommendations. In view of the necessity for a hearing on service, the final determination of defendant’s motion to dismiss and plaintiff’s motion for summary judgment must be held in abeyance.

Accordingly, it is hereby

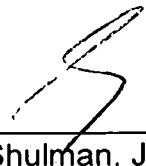
ORDERED that the issue of whether defendant Jessica Garcia was properly served pursuant to CPLR 308 (4) is referred to the office of the Special Referee Clerk for assignment to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that defendant's motion to dismiss and plaintiff's motion for summary judgment shall be held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,⁶ upon the Special Referee Clerk in Rm. 119 M at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

The foregoing constitutes this court's Interim Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

Dated: New York, New York
January 15, 2014



Hon. Martin Shulman, J.S.C.

⁶ Copies are available in Rm. 119 M at 60 Centre Street, and on the Court's website.