

**Rivera v Corrections Officer L. Banks**

2014 NY Slip Op 31067(U)

March 20, 2014

Sup Ct, Bronx County

Docket Number: 304455/2013

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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SHAFI RIVERA,

Plaintiff,

DECISION AND ORDER

Index No. 304455/2013

- against -

CORRECTIONS OFFICER L. BANKS, Shield No.  
02011, CORRECTIONS OFFICE "JOHN"  
WASHINGTON, Shield No. 11579 (whose first name  
being fictitious, the true name being unknown to  
Petitioner, the person a Corrections Officer), C.O.  
CAPTAIN OTIS BOUNT, Shield No. 1146,

Defendants.  
-----X

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated January 21, 2014 and the affirmation, affidavits (2) and exhibits submitted in support thereof; defendants' affirmation in opposition dated February 27, 2014 and the affidavits (2) and exhibits submitted therewith; plaintiff's affirmation in reply dated March 12, 2014 and the exhibit submitted therewith; and due deliberation; the court finds:

Plaintiff moves for leave to renew and/or reargue the December 24, 2013 decision and order of the undersigned which denied his motion for a default judgment against the defendants on the ground that the affidavits of service did not establish proper service. According to the affidavits of service, the summons and complaint were served upon the defendants, Corrections Officers assigned to the George Motchan Detention Center at Rikers Island, by delivering them to a suitable age person at the New York City Department of Correction Human Resources Office in East Elmhurst, Queens. CPLR 308(2) requires service at the defendant's "actual place of business, dwelling place or usual place of abode." Because an administrative office is not the actual place of business of an active Corrections Officer, *see e.g. Jiminez v. City of New York*, 5 A.D.3d 182, 772

N.Y.S.2d 515 (1st Dep't 2004), the motion was denied.

Plaintiff now moves to renew, submitting the affidavits of its paralegal and its process server explaining the circumstances leading to service at the administrative office. None of this information was submitted on the original motion. Plaintiff explains that he had no reason to anticipate that the court would find service to be improper, so this information was not included. However, an affidavit of service cannot constitute *prima facie* evidence of proper service if on its face it does not depict appropriate service. See *New Century Fin. Servs., Inc. v. Baines*, 12 Misc.3d 1182(A), 2006 NY Slip Op 51382(U) (App Term 1st Dep't 2006). "A person's 'actual place of business' must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location." *Selmani v. City of New York*, 100 A.D.3d 861, 861, 954 N.Y.S.2d 580, 581-82 (2d Dep't 2012) (finding defective service upon a firefighter at the fire department's headquarters). On its face, the location served could not have been deemed to be the actual place of business of the defendants. The present motion makes abundantly clear that counsel, the paralegal and the process server were well aware all along that defendants were being served not merely at an alternative actual place of business but at a location *other than* their actual place of business, and plaintiff declined to supplement the deficient affidavit of service on his motion for a default judgment.

Plaintiff's reliance upon *Criscitiello v. Alcala*, 20 Misc.3d 589, 861 N.Y.S.2d 569 (Sup Ct Richmond County 2008) appears misplaced. In that case, because the defendant physician actually maintained an office in the alternate location and the performed the majority of his work, both in general and specific to the facts underlying the action, at that location, he was found to have held himself out as having the requisite relationship to the alternate location to deem it his actual place of business.

Even where the newly submitted evidence was available at the time of the original motion, the court has discretion to “relax this requirement ... in the interest of justice.” *Atencia v. MBBCO II, LLC*, 75 A.D.3d 424, 425, 904 N.Y.S.2d 59, 60 (1st Dep’t 2010). However, “[w]hile the statutory prescription to present new evidence ‘need not be applied to defeat substantive fairness,’ such treatment is available only in a ‘rare case,’ such as where liberality is warranted as a matter of judicial policy, and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance.” *Henry v. Peguero*, 72 A.D.3d 600, 602, 900 N.Y.S.2d 49, 51 (1st Dep’t 2010) (citations omitted), *appeal dismissed*, 15 N.Y.3d 820, 934 N.E.2d 886, 908 N.Y.S.2d 152 (2010), *reconsideration denied*, 2011 N.Y. LEXIS 13 (Jan. 6, 2011). Regardless of the newness of the proffered evidence, the movant must present reasonable justification for failure to present the evidence on the original application. *See Shine v. Roosevelt Hosp.*, 26 A.D.3d 204, 809 N.Y.S.2d 45 (1st Dep’t 2006), *appeal denied*, 2006 N.Y. App. Div. LEXIS 6481 (1st Dep’t May 9, 2006). In the absence of an excuse that the court deems reasonable, the motion must be denied. *Cf. Doherty v. City of New York*, 16 A.D.3d 124, 791 N.Y.S.2d 523 (1st Dep’t 2005).

As to plaintiff’s motion for leave to reargue the prior decision, the court cannot have overlooked or misapprehended any matter not brought to its attention. A motion to reargue may not be used to introduce matters of fact not offered on the prior motion. *See* CPLR 2221(d)(2).

Plaintiff’s motion for an enlargement of the time to serve defendants is granted. However, given defendants’ affidavit explaining the procedure for service, of which plaintiff was already aware, plaintiff has not established that appropriate service under CPLR 308 is impracticable.

Accordingly, it is

ORDERED, that plaintiff’s motion for leave to renew the December 24, 2013 decision and order of the undersigned is denied; and it is further

ORDERED, that plaintiff's motion for leave to reargue the December 24, 2013 decision and order of the undersigned is denied; and it is further

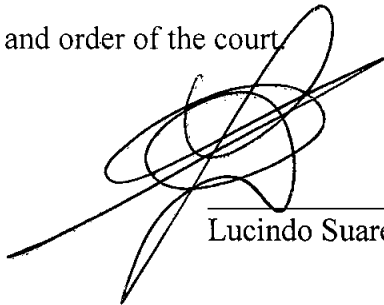
ORDERED, that plaintiff's motion for permission to employ alternative service is denied; and it is further

ORDERED, that plaintiff's motion for an enlargement of the time in which to serve defendants is granted; and it is further

ORDERED, that the time in which to serve defendants is extended to one hundred twenty days after the date of this decision and order.

This constitutes the decision and order of the court.

Dated: March 20, 2014

A handwritten signature in black ink, appearing to read 'Lucindo Suarez', is written over a horizontal line. The signature is stylized and somewhat illegible.

Lucindo Suarez, J.S.C.