Khaliyq Sellers v Success Counseling
2014 NY Slip Op 31950(U)
June 16, 2014
Sup Ct, New York County
Docket Number: 251432/2013
Judge: Lucindo Suarez

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

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KHALIYQ SELLERS,

Plaintiff,

- against -

SUCCESS COUNSELING, 1015 Ogden Ave, Bronx, N.Y.,

Defendant.

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DECISION AND ORDER

Index No. 251432/2013

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated May 9, 2014 and the affirmation and exhibits submitted in support thereof; plaintiff's affidavit in opposition dated May 19, 2014 and the exhibits submitted therewith; and due deliberation; the court finds:

Defendant moves pursuant to CPLR 3211(a)(8) to dismiss plaintiff's complaint for failure to acquire personal jurisdiction. According to the affidavit of service filed in this action, plaintiff purported to serve the summons with notice upon defendant on February 25, 2014 solely by mailing a copy of the summons with notice by certified mail. Plaintiff himself performed the mailing.

Service must be made in a manner permitted by law. The only provision permitting service upon a corporation by mailing alone is CPLR 312-a; however, such service requires mailing "by first class mail, postage prepaid, a copy of the summons and complaint, or summons and notice or notice of petition and petition, together with two copies of a statement of service by mail and acknowledgement [*sic*] of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender," CPLR 312-a(a), and plaintiff's affidavit of service does not demonstrate compliance with such procedures. Service by certified mail does not comply with the statute. *See City of Albany v. Wise*, 298 A.D.2d 783, 750 N.Y.S.2d 653 (3d

Dep't 2002). Furthermore, there is no proof that plaintiff fulfilled any other facet of the statute. *See Klein v. Educational Loan Servicing, LLC*, 71 A.D.3d 957, 897 N.Y.S.2d 220 (2d Dep't 2010). As plaintiff cannot produce a signed acknowledgment of receipt, service was not effectuated. *See St. Dominick Med. Servs., P.C. v. Progressive Ins. Co.*, 31 Misc.3d 132(A), 2011 NY Slip Op 50609(U) (App Term 2d Dep't 2011).

Only an affidavit of service which on its face depicts appropriate service constitutes *prima facie* evidence of proper 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). Accordingly, given the insufficiency of the method employed by plaintiff, the complaint must be dismissed. *See Matter of Bokhour v. New York City School Constr. Auth.*, 70 A.D.3d 684, 892 N.Y.S.2d 877 (2d Dep't 2010); *Bennett v. Acosta*, 68 A.D.3d 910, 890 N.Y.S.2d 330 (2d Dep't 2009). The fact that plaintiff has chosen to proceed *pro se* does not require a different result. *See Brown v. Midrox Ins. Co.*, 108 A.D.3d 921, 970 N.Y.S.2d 108 (3d Dep't 2013); *Matter of Maddox v. State Univ. of N.Y. at Albany*, 32 A.D.3d 599, 819 N.Y.S.2d 605 (3d Dep't 2006), *appeal dism*, 8 N.Y.3d 978, 868 N.E.2d 230, 836 N.Y.S.2d 547 (2007).

Nor is a different result required because defendant served a notice of appearance on or about April 17, 2014. Service of a notice of appearance constitutes appearance in an action, see CPLR 320(a); however, such appearance does not confer personal jurisdiction where, as here, "an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211," CPLR 320(b). Thus, "the failure to interpose a jurisdictional objection at the time an appearance is required under CPLR 320 is not controlling." *Al-Dohan v. Kouyoumjian*, 93 A.D.2d 714, 716, 461 N.Y.S.2d 2, 5 (1st Dep't 1983), *appeal dism*, 59 N.Y.2d 967 (1983). "Notice 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, 496 N.E.2d 680, 682, 505 N.Y.S.2d 591, 593 (1986). Accordingly, prejudice and defendant's actual notice of the action are immaterial. *See 72A Realty Assocs. v. New York City Envtl. Control Bd.*, 275 A.D.2d 284, 713 N.Y.S.2d 26 (1st Dep't 2000).

Defendant furthermore argues that CPLR 306-b, requiring service of the summons with notice within one hundred twenty days after commencement of the action, mandates dismissal. Pursuant to the statute, "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, *shall* dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." CPLR 306-b (emphasis added).

An action is commenced by the filing of the summons with notice. *See* CPLR 304(a). Filing means delivery to the County Clerk, *see* CPLR 304(c), and is effectuated when the papers are received by the County Clerk, *see Grant v. Senkowski*, 95 N.Y.2d 605, 744 N.E.2d 132, 721 N.Y.S.2d 597 (2001); *Pelt v. City of New York Police Dep't*, 215 A.D.2d 208, 626 N.Y.S.2d 169 (1st Dep't 1995); *Enos v. City of Rochester*, 206 A.D.2d 159, 619 N.Y.S.2d 459 (4th Dep't 1994), *appeal den*, 1995 N.Y. App. Div. LEXIS 2069 (4th Dep't Feb. 3, 1995). In this action, the Bronx County Clerk received the summons with notice on October 25, 2013, thus requiring service by February 24, 2014. *See* General Construction Law §§ 20, 25-a. Disregarding the impropriety of plaintiff's chosen method of service, service on February 25, 2014 was therefore untimely.

In opposition, defendant submits an unfiled affidavit of service depicting service by mail on October 5, 2013. Inasmuch as the action had not yet been commenced at that time, such service was a nullity, *see e.g. Gershel v. Porr*, 89 N.Y.2d 327, 675 N.E.2d 836, 653 N.Y.S.2d 82 (1996); *Kelly v. Delaney*, 248 A.D.2d 360, 669 N.Y.S.2d 633 (2d Dep't 1998), *appeal den*, 92 N.Y.2d 803, 699

N.E.2d 434, 677 N.Y.S.2d 74 (1998), and in any event was not in conformity with any manner of service permitted by the CPLR or other applicable laws. Plaintiff also invokes the "good cause" and "interest of justice" language of CPLR 306-b to assert, without the notice of cross-motion required by CPLR 2215, that he should be granted an extension of time in which to serve the defendant. While the court may entertain arguments for relief not interposed pursuant to the CPLR where there is no prejudice to the opposing party, the court is reluctant to find a lack of prejudice here in the absence of proof of service of the opposition papers upon plaintiff.

Accordingly, it is

ORDERED, that defendant's motion to dismiss the complaint for lack of personal jurisdiction is granted; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant dismissing the complaint; and it is further

ORDERED, that such dismissal is **without** prejudice.

This constitutes the decision and order of the court.

Dated: June 16, 2014

Lucindo Suarez, J.S.C.