

Coba v Kutler

2014 NY Slip Op 32028(U)

July 29, 2014

Supreme Court, New York County

Docket Number: 805243/13

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

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

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SULYA M. COBA and RICARDO CISTERNA,

Plaintiffs,

Index No. 805243/13

-against-

Decision and Order

DAVID IVAN KUTLER, M.D., DANIELLE SHEHORN,
M.D., MARIA LaGRATTA, M.D., ROBERT D.
SUMMERMAN, M.D., DAVID IVAN KUTLER, M.D.,
P.C., WEILL CORNELL IMAGING AT NEW YORK-
PRESBYTERIAN and NEW YORK-PRESBYTERIAN
HOSPITAL/WEILL CORNELL MEDICAL CENTER,

Defendants.

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

Plaintiffs move for an order extending the time to file a notice of medical malpractice pursuant to Rule 3406 of the Civil Practice Law and Rules. In the same motion, they also seek an order declaring that Defendants Danielle Shehorn, M.D., and Robert Summerman, M.D., are in default, and directing the matter to be set down for a jury trial on damages. Defendants oppose the motion to the extent Plaintiffs are seeking an order declaring Dr. Shehorn and Dr. Summerman to be in default. For the reasons explained below, the motion is granted only to the extent that Plaintiffs seek to extend the time to file a notice of medical malpractice.

Plaintiffs claim that Defendants Dr. Shehorn and Dr. Summerman have failed to appear or answer. They argue that Defendants' time to appear has expired and the time has not been extended by stipulation or court order. Defendants oppose this portion of the motion, and argue that Plaintiffs' motion for a default judgment is deficient as a matter of law, and that service was improper. They assert that pursuant to Section 3215(f) of the Civil Practice Law and Rules,

the Plaintiffs were required to submit proof of the facts constituting the claim, the default, and the amount due by affidavit. Service was made on Defendants at Weill Cornell Imaging (Weill) at 1305 York Avenue, New York, NY. Follow-up mailing was made on the same address. Defendants claim Dr. Shehorn was not an employee there when service was made. Moreover, they assert that there has never been a physician named Robert D. Summerman, M.D., at Weill.

In support of their opposition, they attach the affidavits of Dr. Shehorn and Mia Jozwick, an administrative support employee at Weill. Dr. Shehorn states that she worked at Weill until September 16, 2012, after which she moved to Texas. Service was made on July 10, 2013. Dr. Shehorn claims that on that date Weill was no longer her actual place of business. Ms. Jozwick, who according to the affidavits of service accepted service for both Dr. Shehorn and Dr. Summerman, claims that she would not have accepted service for Dr. Shehorn since she was no longer an employee at Weill. She attests that she would not have accepted service for Dr. Summerman because she does not know anyone by that name.

The Court first addresses the portion of the motion seeking an order declaring that Defendants Danielle Shehorn, M.D., and Robert Summerman, M.D., are in default, and directing the matter to be set down for a jury trial on damages. Section 3215(a) of the Civil Practice Law and Rules allows for a plaintiff to seek a default judgment against a defendant who “has failed to appear, plead or proceed to trial of an action reached and called for trial [.]” Section 3215(f) requires that when making a motion for a default judgment, the plaintiff must submit “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party

Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due [.]”

Service must be made by personal delivery, or “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . 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” C.P.L.R. § 308. Section 308 of the Civil Practice Law and Rules requires strict adherence. Avakian v. De Los Santos, 183 A.D.2d 687, 688 (2d Dep’t). The Court lacks personal jurisdiction when service of process is “mailed to an incorrect address.” Montoya v. Richmond Cty. Ambulance Serv., Inc., 30 A.D.3d 385 (2d Dep’t 2006).

The Court finds that service on Dr. Shehorn and Dr. Summerman was improper. The affidavits of Dr. Shehorn and Ms. Jozwick establish that service was not made on their actual places of business. Furthermore, as Weill was not the actual place of business, service was also mailed to an incorrect address. Due to lack of personal jurisdiction, there is no default by the Defendants. See Montoya, 30 A.D.3d at 388. This portion of the motion is denied.

Next the Court turns to the portion of the motion seeking to extend the time to file notice of medical malpractice. Rule 3406(a) provides, in pertinent part, that “[n]ot more than sixty days after issue is joined, the plaintiff in an action to recover damages for dental, medical or podiatric malpractice shall file with the clerk of the court in which the action is commenced a notice of dental, medical or podiatric malpractice action[.]” C.P.L.R. § 3406(a). But, the

rule authorizes an extension of time to file a notice for “good cause.” Id. (citing C.P.L.R. § 2004). Plaintiffs claim the delay is due to law office failure. There is no evidence that Defendants have been prejudiced. See Tewari v. Tsoutsouras, 75 N.Y.2d 1, 12-13 (1989); C.P.L.R. §§ 2004, 2005. Accordingly, it is

ORDERED that the portion of the motion seeking to extend the time to file notice of medical malpractice is granted; it is further

ORDERED that in all other respects the motion is denied.

Dated: *July 29*, 2014

ENTER:



JOAN B. LOBIS, J.S.C.