

Martin v Witkowski

2014 NY Slip Op 33908(U)

April 14, 2014

Supreme Court, Erie County

Docket Number: 2013-802483

Judge: Thomas P. Franczyk

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
COUNTY OF ERIE
SUPREME COURT**

**ANTOINE MARTIN
PLAINTIFF**

v.

**DECISION & ORDER
INDEX # 2013-802483**

**WALTER WITKOWSKI
DEFENDANT**

APPEARANCES:

**Jeanne M. Vinal, Esq.
Vinal & Vinal, P.C.
193 Delaware Avenue
Buffalo, NY 14202**

For the Plaintiff, Antoine Martin

**James J. Nash, Esq.
Cohen & Lombardo, P.C.
343 Elmwood Avenue
P.O. Box 5204
Buffalo, NY 14213-5204**

For the Defendant, Walter S. Witkowski (Jr.)

**Scott J. Bizub, Esq.
Epstein, Gialleonardo and Hartford
2350 North Forest Road, Suite 7A
Getzville, NY 14068**

For the Defendant Walter S. Witkowski (Sr.)

The plaintiff has moved pursuant to CPLR 2221 (d) to reargue and renew this court's decision and order of January 14, 2014 which granted the motion of Walter Witkowski, Jr. to strike the summons and complaint and to dismiss this suit against him. The plaintiff contends

that this court misapprehended his point that the correct defendant (now known to be Walter Witkowski aka Walter Witkowski, Jr.) was properly named in the summons and complaint and timely served under CPLR 306-b on November 23, 2013 within 120 days of the filing of the summons and complaint on October 22, 2013. The plaintiff also moves to amend the complaint to name the defendant as Walter Witkowski aka Walter Witkowski, Jr.

In a separate motion, Walter Witkowski (Sr.) moves to dismiss on the grounds that he is not a proper party inasmuch as he was not involved in the accident of November 4, 2010 which resulted in this lawsuit.

After reviewing the moving and responding papers, hearing the arguments of counsel and considering relevant case law, it is clear to this court that the plaintiff intended to sue the Walter Witkowski who was involved in the accident but incorrectly believed (until being advised by opposing counsel sometime after filing the summons and complaint against Walter Witkowski of 121 Pearl Street and serving him there), that there was only one Walter Witkowski when, in fact, there were two, Walter S. Witkowski, Sr., (age 91) of the Pearl Street address and Walter S. Witkowski, Jr. (Age 61) of 205 Glenwood Road, West Falls, NY (who was involved in the accident).

The plaintiff argues that he sued only the intended defendant (Jr.) but served him improperly at 121 Pearl Street and then properly served him (via a substitute service on his wife) on November 23, 2013 after learning of his correct address.

It is also evident, however, that the plaintiff erroneously believed that Walter Witkowski (Sr.) of 121 Pearl Street was the correct defendant as evidenced by the affidavit of service which describes substitute service of process on the defendant's 35 year-old, live-in grandson,

Matthew Putnam. (Sr. is Putnam's grandfather, Jr. is Putnam's uncle and Jr. hasn't resided at 121 Pearl Street for over 40 years). Moreover, counsel's belated discovery of this oversight is reflected in her letter of December 2, 2013 to opposing counsel wherein she states, "(i)t appears there are two people using the name Walter S. Witkowski and neither uses a Jr. or Sr."

While it is apparent that Walter S. Witkowski, Jr. frequently, if not routinely, identified himself without the "Jr." appellation (see, for example, his insurance carrier's correspondence to plaintiff's counsel and his handwritten information given to the plaintiff at the scene), counsel's own Lexis Nexis search, (albeit after suit was commenced), revealed a Walter S. Witkowski, Sr. of 121 Pearl Street, Blasdell and a Walter S. Witkowski, Jr. of 205 Glenwood Road, West Falls, NY with the same phone number that appears on the handwritten information reportedly provided to the plaintiff at the scene.

Under the circumstances, it cannot be said that the plaintiff obtained jurisdiction over Jr. when he unwittingly brought suit against and served process upon Sr. (If Sr. was not sued, as plaintiff contends, why then did his carrier retain counsel to interpose an answer on his behalf). Moreover, it was not enough, in this court's view, to simply re-serve the same summons and complaint upon Jr. when the proper procedure would have been to make a motion pursuant to CPLR 1003 to supplement the pleadings in order to add Jr. as a defendant. (Crock v. E.I. Dupont and Nemours and Co. 81 NY 2d 807 [1993]).

This is not a case then, where the right party was timely served but simply under the wrong name. (See, for example, Dubar v. Wilmonte, Inc. 298 AD 2d 918 [4th dept. 2002], Holster v. Ross 45 AD 3d 640 [2nd dept. 2007] and Bracken v. NFTA 251 AD 2d 1068 [4th dept. 1998]). Rather, the wrong person (Sr.) was sued and jurisdiction was not timely obtained over

the right person (Jr.) where the summons and complaint had been mistakenly filed against and then served upon the former instead of the latter. (See generally, Jordan v. Lehigh Construction Group 259 AD 2d 962 [4th dept. 199]).

Moreover, while Jr. may have been aware of the action brought against his father (as evidenced by Sr.'s counsel's representations about their family meeting after service upon Sr.), that alone did not bring Jr. within the court's jurisdiction. (See Macchia v. Russo 67 NY 2d 592 [1986], Parker v. Mack 61 NY 2d 114 [1984]).

Finally, although Jr.'s counsel would not concede that he answered on behalf of his own client (Donegal's insured), it makes no sense that he would (or even could) appear on behalf of a party who was already represented by another attorney retained by his own insurance carrier (Harleysville). That Jr.'s counsel brought his motion on behalf of Walter Witkowski as a "non party" and pled "no jurisdiction" as his first defense lends further support to this conclusion.

Accordingly, the plaintiff's motion to reargue/renew and to amend the complaint are, in all respects, denied, and Walter Witkowski, Sr.'s motion to dismiss is hereby granted inasmuch as all parties agree that he had no involvement whatsoever in the accident giving rise to this lawsuit.

This decision shall constitute the order of the court.

Thomas P. Franczyk
Acting Supreme Court Justice

dated: April 14, 2014

GRANTED

APR 14 2014
BY Kimberly King
KIMBERLY KING
COURT CLERK