Dorch v Taveras
2014 NY Slip Op 34039(U)
April 30, 2014
Supreme Court, Bronx County
Docket Number: 22718/2013E
Judge: Mary Ann Brigantti-Hughes

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA-15

x

KIZZY DORCH,

Plaintiff(s),

-against-

CARLOS TAVERAS and TOWN CAR INTERNATIONAL HOLDINGS, LLC.,

Defendant(s),

x

Index No.: 22718/2013E

DECISION/ORDER

Present:
Hon. MARY ANN BRIGANTTI-HUGHES
Justice, Supreme Court

DECISION AFTER HEARING

By decision and order of this Court, dated February 18, 2014, the instant matter was set down for a Traverse hearing to determine the propriety of service, and if necessary, a framed issue hearing to determine proper venue. On April 21, 2014, the parties herein appeared for the hearing and the following testimony was adduced:

According to the affidavit of service, Plaintiff's process server Mitchell Raider served the Summons and Complaint on defendant Carlos Taveras ("Taveras") on August 2, 2013, at 11:15AM, at 325 East 176th Street, Apartment 4B, Bronx, New York 10457. The affidavit states that the papers were served on "Jane Doe" who was a "suitable age person" described as a Hispanic female, 5'3, 170-180 lbs., brown hair, dark eyes, 40-45 years old. At the hearing, however, Taveras testified that he relocated from the Bronx to Buchanan, New York in or around February 2013. He produced a New York State driver's license, issued April 17, 2013, reflecting that address. Taveras also identified utility bills and bank statements from March and April 2013 reflecting his new address in Buchanan. Taveras testified that no family members

remained in the Bronx apartment when he moved, and he had never spoken to or met the tenants who moved into the apartment after he left. Taveras testified that he first learned of this lawsuit through his attorneys.

Mitchell Raider testified that he was a licensed process server who was self-employed. Mr. Raider confirmed that he was retained by Plaintiff's law firm to serve process in this matter. Mr. Raider, however, did not produce a transmittal letter or documentation from the law firm to indicate that retention. As a process server, he testified that he was given a copy of the Summons and Complaint regarding the instant action. He could not recall whether the papers were sent to him or whether he picked them up from the law firm.

Mr. Raider testified that on August 2, 2013, at approximately 11:15AM, he proceeded to 325 East 176th Street in the Bronx to serve process on Taveras. He recalled that this address was an apartment building with at least four floors, and an elevator. Mr. Raider also remembered that he walked right into the building, and did not have to be "buzzed in" or otherwise allowed entry. Once inside of the building, Mr. Raider proceeded to Apartment 4B. Referring to his log book, he recalled handing a copy of the Summons and Complaint to "Jane Doe," a woman who opened the door to the apartment. He could not recall whether the woman opened the door completely or whether she opened it partially with a chain in place. Mr. Raider testified on direct examination that the woman indicated that she was a family member of Taveras. His log book, however, contained no notations or any documentation of "Jane Doe's" relationship with Taveras. The Court then asked three times whether Mr. Raider had any independent recollection of a conversation with "Jane Doe" regarding her relationship with Taveras, to which Mr. Raider answered in the negative.

At a traverse hearing, plaintiff bears the burden of proving, by a fair preponderance of the credible evidence, that service on the defendant was properly effectuated. *Frankel v. Schilling*, 149 A.D.2d 657 (2nd Dept. 1989). Pursuant to CPLR 308, service upon a natural person may be effectuated by delivering the summons within the state to the person to be served; or by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served 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 in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from a person or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other.

While there is no "explicit duty for the process server to perform an in-depth assessment of the recipient of process," he or she must determine whether the person receiving service is, under these circumstances, of "suitable age and discretion" (*see Countrywide Home Funding Co. v. Henry J.K.*, 16 Misc.3d 1132[A][Sup. Ct., Nass. Cty., 2007]). To determine whether the recipient of process is of "suitable age and discretion," courts will generally look to whether the individual is reasonably likely to transmit papers to the actual respondent, as well as whether the individual actually served "exhibit[s] sufficient maturity and responsibility under the circumstances" (*see Costine v. St. Vincent's Hosp. & Medical Center of New York*,173 A.D.2d 422 [1st Dept. 1991], citing *City of New York v. Chemical Bank*, 122 Misc.2d 104 [Sup. Ct., N.Y. Cty., 1983]). Service on an individual of "limited or no understanding, or of remote or no relationship to the defendant, has not been sustained" (*Chemical Bank* at 109 [internal citations omitted]).

In this case, Mr. Raider could not independently recall any conversation he had with "Jane Doe," the unknown and unidentified woman who allegedly opened the door for him at the Bronx apartment building. Further, Mr. Raider made no notations in his logbook recording any conversation with "Jane Doe" or how he determined that it was appropriate to leave papers with this person in order to effectuate service on Taveras. There is therefore no proof that service was made on a person of "suitable age and discretion" so as to effectuate personal service upon the defendant in accordance with CPLR 308(2).

Moreover, Taveras successfully challenged service here through his credible testimony that he vacated the Bronx apartment in February 2013 and no family members remained thereafter. The statute requires that delivery be made at the "actual dwelling place" or "usual

place of abode of the person to be served" (CPLR 308[2]). Plaintiff's claim that Taveras is estopped from challenging service for his alleged failure to notify the Commissioner of Motor Vehicles of his change of address within ten days after he moved (Vehicle and Traffic Law §505[5]) is without merit. Taveras' driver's license, issued in April 2013, reflects that he notified the Department of Motor Vehicles of his change of address well before service was attempted in August 2013, and the process server could have ascertained his proper address by checking Department of Motor Vehicles records (*see Spath v. Zack*, 36 A.D.3d 410 [1st Dept. 2007]).

In light of the foregoing, the traverse hearing is sustained and the underlying causes of action are dismissed for lack of personal jurisdiction.

This constitutes the court's Decision and Order.

Dated: 4/30/14

Hon. Mary Ann Brigantti-Hughes, J.S.C.