

Matthews v Chaudhri
2014 NY Slip Op 34040(U)
May 15, 2015
Supreme Court, Broome County
Docket Number: 2013-2813
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court
of the State of New York, held in and
for the Sixth Judicial District, at the
Broome County Courthouse, in the
City of Binghamton, New York on the
27th day of June 2014

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

Kathleen H. Matthews,

Plaintiff,

vs.

**Kamran I. Chaudhri, M.D. and Ophthalmic
Associates of the Southern Tier, P.C.,**

Defendants.

DECISION AND ORDER

**Index No. 2013-2813
RJI No. 2014-0461-M**

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court for a determination of the defendant Kamran I. Chaudhri's claim that the Court lacks personal jurisdiction over him. This action was commenced by the plaintiff Kathleen H. Matthews by filing a summons and complaint with the Broome County Clerk's Office on November 25, 2013. By Notice of Motion dated March 26, 2014, Dr. Chaudhri moved to dismiss this action upon the ground that the summons and complaint were not properly served on him. By Decision and Order dated September 15, 2014, this Court held that a hearing was necessary before it could be determined whether proper service was made on Dr. Chaudhri. That hearing was held on October 29, 2014.

At the hearing, Ms. Matthews presented the testimony of Broome County Deputy Sheriffs Linda K. Osier and Ronald Bill. Dr. Chaudhri testified in support of his motion and also presented the testimony of Lori Hunsinger, a staff member from the office where he worked at the time the summons and complaint were served.

As set forth in the Decision and Order dated September 15, 2014, Dr. Chaudhri served an answer which included an affirmative defense that the Court did not have personal jurisdiction over him. As required by New York Civil Practice Law and Rules 3211(e), Dr. Chaudhri moved for judgment on that ground within 60 days of serving his answer.

Law

There are numerous oversights and failures to precisely follow the rules or requirements of the law that may be remedied or overlooked. For example, defects in the

proof of proper service go to the form and not the Court's jurisdiction and therefore may be amended so the record conforms to the true facts (*see Ellis v. Schlanger & Schlanger, LLP*, 41 Misc3d 127(A) [App Term, 1st Dept 2013])[a hearing was required in order to determine whether service was made by first class mail and the envelope used bore the legend "personal and confidential," but any defects in the affidavit of service with respect to those issues would not defeat the action]; *State of N.Y. Higher Educ. Servs. Corp. v. Sparozic*, 35 AD3d 1069 [3d Dept 2006][misspelling of defendant's name on summons with notice and affidavit of service were mere irregularities which did not impact jurisdiction]).

However, this is not the case for defects in service of a summons and complaint upon a would-be defendant, which must be made in strict compliance with the statutory methods. As the Court of Appeals has held, "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 NY2d 592, 595 [1986]). More recently, the Third Department cited this language noting "[w]hen the requirements for service of process have not been met, it is irrelevant that [the] defendant may have actually received the documents" (*Raschel v. Rish*, 69 NY2d 694, 697 [1986]), because "[n]otice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Macchia*, 67 NY2d at 595)" (*Clarke v. Smith*, 98 AD3d 756 [3d Dept 2012]).

Once it is established that a hearing is necessary to determine if service was properly made, it is the burden of the party making service to establish by a preponderance of the evidence that service was proper (*see Frankel v. Schilling*, 149 AD2d 657, 659 [2d Dept 1989]; *Skyline Agency v. Coppotelli, Inc.*, 117 AD2d 135 [2d Dept 1986])[noting that the burden of

proving that personal jurisdiction was acquired rests at all times upon the plaintiff in the action]).

Discussion

In this case, both the affidavit of service and the testimony establish that service was made by delivering the summons and complaint to a person of suitable age and discretion, Lori Hunsinger, at Dr. Chaudhri's place of business. Ms. Hunsinger received the summons and complaint at the Guthrie Medical Group office at 2517 Vestal Parkway East, Vestal, NY. She testified that she is an employee of Guthrie Medical Group and works at that location. The testimony of Ms. Hunsinger calls into question the accuracy of her physical description as set forth in the affidavit of service.¹ While Ms. Hunsinger testified that it was a man who handed her the summons and complaint, Deputy Osier (a female) testified, consistent with the affidavit of service, that it was she who delivered the summons and complaint to Ms. Hunsinger.

This testimony does establish that the first part of service – actual physical delivery of the summons and complaint to a person of suitable age and discretion – was proper. The factual variations in just who made that happen (a male or a female) and the physical description of Ms. Hunsinger do not change the fact that everyone agrees it occurred.

Dr. Chaudhri's motion did not challenge this aspect of the service. Rather, his motion asserts that the summons and complaint delivered to him were not in an envelope marked personal and confidential and his office practice or policy was that mail marked personal and confidential would be delivered to him unopened.

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Ms. Hunsinger states she is younger than the age and heavier than the weight listed in the affidavit.

In this regard, Deputy Osier testified that after leaving a copy of the summons and complaint with Ms. Hunsinger, she returned to her office and left her notes (Exhibit 3) with the office clerical employee who prepared the affidavit of service which Deputy Osier later signed. Deputy Osier testified that Nancy A. Cole, a clerical employee in the Civil Division of the Sheriff's Department, handled the mailing of the additional copy of the summons and complaint. Ms. Cole did not testify. Deputy Bill's testimony explained the standard office procedures and policies and how those procedures and policies typically apply in practice.

The record therefore does not contain any testimony from an individual with personal knowledge of: the placement of this particular summons and complaint in an envelope; the address written or typed on that envelope; that the envelope was marked "personal and confidential;" that proper first class postage was affixed to it; and that it was actually mailed.

One way of looking at this case is to start with the affidavit of service. With regard to the mailing requirement, the affidavit states:

"Deponent² also enclosed a copy of same in a postpaid sealed wrapper properly addressed to respondent at respondent's last known residence at 2517 VESTAL PARKWAY EAST, VESTAL, NY 13850³, and deposited said wrapper in a post office — official depository under the exclusive care and custody of the United States Postal Service within New York State."

Testimony from both Deputy Osier and Deputy Bill established that standard office procedure is for the office clerical employee to place the document in an envelope and leave it

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The Deponent is Deputy Osier, as she is the person who signed the affidavit.

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Either "residence" or "2517 VESTAL PARKWAY EAST, VESTAL, NY" is not correct. The 2517 Vestal Parkway East address is Dr. Chaudhri's office address.

for pick up by a Broome County mail courier, who then takes it to a mail room where postage is affixed and it is put in the US mail, the precise manner of which was not explained.

In at least some instances, testimony that a standard office procedure exists and is routinely followed will be sufficient to establish that mailing was done in compliance with that standard procedure. In *Heffernan v. Village of Munsey Park*, 133 AD2d 139 (2d Dept 1987) the Court stated, “In order for an affidavit to constitute valid proof of service by mail, the affiant must have either personal knowledge of the mailing or the affiant must have personal knowledge of the procedure which was used in the handling and eventual mailing of the documents served” (*id.*, citing *Anzalone v. State Farm Mut. Ins. Co.*, 92 AD2d 238 [2d Dept 1983]; *Capra v. Lumbermens Mut. Cas. Co.*, 43 AD2d 986 [3d Dept 1974]).⁴

This Court favors resolution of disputes on the merits and thus is not inclined to apply technical rules to deny resolution of actions on the merits. However, the Court of Appeals has made it abundantly clear that compliance with the procedures for commencing an action, including service of a summons and complaint, must be complied with and where they are not, the action must be dismissed even though the defendant actually receives the documents (*see Raschel*, 69 NY2d at 694; *see also Macchia*, 67 NY2d at 592). It appears that the Court of Appeals’ ruling in this regard remains clear and consistently enforced, as many courts routinely apply this seemingly harsh rule (*see Pierce v. Village of Horseheads Police Dept.*, 107 AD3d 1354 [3d Dept 2013]; *Powell v. Fink*, 39 Misc3d 1221(A) [Suffolk County Ct 2013]; *Cadlerock Joint Venture, LP v. Kierstedt*, 37 Misc3d 1212(A) [Sup Ct, Kings County 2012]; *Clarke*, 98

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Both cited cases involved notices of cancellation of automobile insurance policies and not service of process to commence an action.

AD3d at 756; *Zevgolis v. Pericic*, 32 Misc 3d 1232(A) [Sup Ct, Queens County 2011]; *County of Nassau v. Letosky*, 34 AD3d 414 [2d Dept 2006]; *Einheber v. Bodenheimer*, 12 Misc3d 1177(A) [Sup Ct, New York County 2006]; *Reed v. Gowanda Nursing Home*, 5 AD3d 987 [4th Dept 2004]; *Laino v. Cuprum S.A. de C.V.*, 235 AD2d 25 [2d Dept 1997]; *Dewey v. Hillcrest Gen. Hosp.*, 201 AD2d 609 [2d Dept 1994]).

The record evidence is that there is a standard procedure in the Civil Division of the Sheriff's Department that all summonses and complaints mailed to a place of business are placed in an envelope marked "Personal and Confidential." Here, however, the affidavit of service states that the summons and complaint were mailed to Dr. Chaudhri's "last known residence" at an address that is actually his office address. From the record testimony, it is impossible to tell if the person who mailed the summons and complaint followed the procedure for mailing to a residence (in which case the "Personal and Confidential" notation would not be necessary) or to a place of business (in which case it would). All agree that the 2517 Vestal Parkway East address is a business, not a residence.

It might be reasonable to surmise that the person who mailed the letter knew that the Vestal Parkway East address was a business address⁵ and, with that thought in mind, followed the procedure for mailing to a business address, but merely failed to change the affidavit of service to reflect that. However, based on the record before the Court, one cannot determine that is *more likely than not* (the preponderance of evidence standard) what occurred. For that

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Certainly many people in this community are aware that the Vestal Parkway is largely a commercial street or highway. Whether Ms. Cole is one of them is not known.

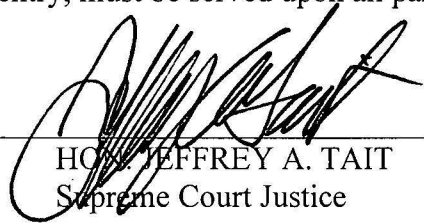
reason, Dr. Chaudhri's motion to dismiss the action against him based on improper service and the resulting lack of personal jurisdiction must be granted.

Conclusion

Based on the foregoing, Dr. Chaudhri's motion to dismiss this action based on lack of personal jurisdiction is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: May 15, 2015
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
MAY 18 2015
BROOME COUNTY CLERK