

Zabari v Zabari

2015 NY Slip Op 30150(U)

January 30, 2015

Supreme Court, New York County

Docket Number: 653997/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

EYAL ZABARI,

Plaintiff,
- v -

INDEX NO. 653997/2013

MOTION DATE

DORON ZABARI,

MOTION SEQ. NO. 2

MOTION CAL. NO.

Defendant.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-4
Answer — Affidavits — Exhibits	5-6
Replying Affidavits	7
Cross-Motion: <input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

On January 28, 2014, Defendant, Doron Zabari (“Zabari”), moved to dismiss Plaintiff’s Complaint based on Plaintiff’s failure to effectuate service on January 28, 2014. A traverse hearing was held on July 16, 2014.

After his initial service, Plaintiff subsequently e-filed proof of service on March 16, 2014 as to service on March 14, 2014. By Supplemental Decision dated July 17, 2014, the Court held that this subsequent service vitiated the improper service of January 28, 2014 and stands as presumptively proper service of the service of the summons and complaint.

By Supplemental Decision dated July 17, 2014, the Court denied Defendant’s motion to dismiss and directed Defendant to answer the Complaint within 20 days. The Court granted Defendant leave to make a new motion to dismiss regarding the March 14, 2014 service within the time to answer.

Zabari now moves to dismiss Plaintiff’s Complaint, pursuant to CPLR §3211(a)(8), based on Plaintiff’s subsequent service.

Plaintiff cross moves for an Order pursuant to CPLR 306-b, extending the time for Plaintiff to serve Defendant with the Complaint, and pursuant to CPLR 308(5), directing that service be made in an alternative method by publication in accordance with CPLR 316.

CPLR § 3211(a)(8) states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant.

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]).

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459 [1st Dept. 2004]).

CPLR §306-b provides that “[i]f service is not made upon a defendant within the [120-day period] provided in this section, the court, upon motion, shall dismiss the action without prejudice... or upon good cause shown or in the interest of justice, extend the time for service.” Determining whether to grant an extension on this ground “requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties.” (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 [2001]). A plaintiff who seeks such an extension is not required to establish that diligent efforts to effect timely service were made, but diligence may be considered “along with any other relevant factors. Including expiration of the [s]tatute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of plaintiff's request for the extension of time, and prejudice to defendant.” (*Id.* at 105-106; see, *Matter of Palmateer v. Greene County Indus. Dev. Agency*, 38 A.D.3d 1087 [2007]).

In his Affidavit of Service, Salvatore F. Alito, the process server, attests to service upon Defendant on March 14, 2014 by delivering a copy of the Summons and Complaint to “Doorman-Refused Access and to Identify Himself” at 9:28 AM at 426 West Broadway, New York, NY 10012,” Defendant's “actual place of business.” Alito states that an additional copy was mailed to Defendant's “last

know residence” and “actual place of business” located at 17 Bleecker Street, New York, NY 10012 and 426 West Broadway, New York, New York 10012.”

In support of Zabari’s motion to dismiss, Zabari and John Morgan, the doorman of the building located at 426 West Broadway, New York, NY (“the Building”), submit an affidavit. Morgan avers that,

On March 14, 2014, at approximately 9:24 am, I was present at my post, which is located in the lobby of the Building, just inside the outer door and outside the inner door (which was locked for security purposes). At about that time, a gentleman came into the lobby and asked for Doron Zabari, whose offices are located at the far end of a long hallway on the Building’s first floor, and who, I had been advised, is the named defendant in this action. After the gentleman asked me to open the door, I told him that I would not do so because Mr. Zabari was not present at the Building at that time. The man then walked out of the Building’s lobby and left some papers outside the Building’s exterior door by the intercom, before sitting in a car that was parked on the street in front of the Building for a while. At no point during the very brief time that the man was in the Building, did he ever: (a) give his name or identify himself as a process server; (b) state that he was serving legal documents; (c) ask my name, or whether I was willing to accept legal papers; or (d) deliver any papers to either me or Mr. Zabari (who again, was not there). In short, neither that man, nor anybody else, delivered any legal papers to me on the morning of March 14, 2014. I later picked up the papers that had been left outside the Building, and have since been advised that they were the Summons and Complaint in this action.

Zabari avers in his affidavit that he “never received any copies of the Summons and Complaint, by certified mail or any other method of mailing, at either the Building or 17 Bleecker Street, New York, New York 10012- the two (2) addresses to which the process server swears that he directed mailings in his affidavit of service” and has not received “any mailed copy of the Summons and Complaint, certified or otherwise, addressed to me at ‘124 Green [sic] Street, New York, NY 10012’- the address listed on the other purported certified mailing slip electronically filed with the Court.”

Plaintiff submits the attorney affirmation of Michael J. Smikun in opposition and in support of Plaintiff’s cross motion to extend the time for Plaintiff to serve Defendant with the Complaint via an alternative method. Plaintiff does not address the allegations set forth in Morgan or Zabari’s affidavits regarding the process

allegedly rendered. Rather, Smikun avers, "Through multiple years of litigation, the Defendant has become adept at avoiding service by any means necessary, as evidenced by his conduct as a defendant in previous actions."

Defendant has provided sworn affidavits which raise factual issues contesting the affidavit of the process server with respect to the purported supplemental service. A traverse hearing is therefore directed.

Wherefore, it is hereby

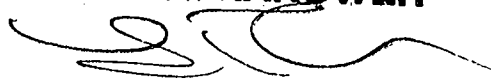
ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including Respondents, of the date of the hearing; and it is further

ORDERED that Plaintiff's cross motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

HON. EILEEN A. RAKOWER



J.S.C.

Dated: JANUARY 30, 2015

JAN 30 2015

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE