Arias-Percel v Thorpe
2016 NY Slip Op 30222(U)
January 14, 2016
Supreme Court, Bronx County
Docket Number: 12938/2013
Judge: Lucindo Suarez
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 FILED Jan 22 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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FELIX R. ARIAS-PERCEL,

Plaintiff,

- against -

GREGORY A. THORPE,

Defendant.

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DECISION AND ORDER

Index No. 12938/2013

PRESENT: Hon. Lucindo Suarez

Upon the order to show cause signed September 2, 2015 and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated September 21, 2015; defendant's affirmation in reply dated September 28, 2015; the decision and order of the court dated October 22, 2015 setting this matter down for a traverse hearing and holding the determination of the motion in abeyance; the traverse hearing held January 13, 2016 (Adrianne Tirado, Senior Court Reporter); and due deliberation; the court finds:

In this personal injury action arising out of an April 2012 motor vehicle accident, defendant moves to vacate his default and dismiss plaintiff's complaint against him based on plaintiff's failure to properly serve him with the summons and complaint. According to the affidavit of service filed in this action, process server Charles Kastner ("Kastner") affixed a copy of the summons and complaint to the door of defendant's "last known dwelling house" on December 18, 2013 after unsuccessful attempts to serve him pursuant to CPLR 308(1) or 308(2) on October 8, 2013, December 17, 2013 and December 18, 2013. Service was made at 537 West 149th Street, #52, in New York County. Kastner "[v]erified with Mary Hooper - Neighbor in Apt. #51 at premise and DMV Verification attached" that defendant resided at the subject address. Defendant acknowledged in his affidavit in support that he had lived at

the address for "many years." Defendant, though, denied that he had "a neighbor by the name of 'Mary Hooper' in apartment 51." The matter was set down for a traverse hearing to determine whether the manner of service of process upon said defendant was sufficient to acquire *in personam* jurisdiction.

At the traverse hearing, Kastner produced this his logbook, a photograph, and a three-page printout from the New York State Department of Motor Vehicles ("DMV"). Kastner testified that he has worked as a licensed process server for twenty-five years. He completed his logbook entries contemporaneously with each service. Kastner described defendant's apartment building as a six or seven story gray stone building with six or seven apartments on each floor. Defendant's apartment was located on the fifth floor. On his first attempt at service, a man inside the apartment refused to open the door. Speaking through the door, Kastner asked for defendant and said that he had legal documents for him. The man stated that defendant had moved and no longer lived there. Kastner believed the man speaking to him was at least thirty years old if not older. Kastner also heard a dog inside the apartment.

Sometime between October 8 and December 17, Kastner received the results from a DMV search requested by plaintiff's attorney. The search confirmed defendant's address as 537 West 149th Street, Apartment 52. Kastner returned to the building on December 17, 2013. There was no answer when he knocked on defendant's door. Kastner then spoke to "Mary Hooper" in Apartment 51. She confirmed that defendant resided in Apartment 52 and that he did not serve in the military. Kastner believed that "Mary Hopper" knew defendant because she was his neighbor.

Kaster returned a third time on December 18. The man inside defendant's apartment again refused to open the door to accept legal papers. Kastner affixed the summons and complaint to the front door with cello tape. A photograph Kastner took of the front door shows the date, time and geographic location of service. Kastner then mailed a copy of the summons and complaint to defendant at the subject address; the mailing was not returned as undeliverable. Kastner's testimony was consistent with the information contained in his affidavit of service.

Defendant testified that he has resided in the same fifth floor apartment for nearly forty years. There were five units on each floor of the seven story elevator building, and until recently, there was a small locked vestibule on the ground floor. It was a "family" building with numerous residents related to other residents, and defendant knew everyone who lived in the building. He retired prior to October 2013, and he generally spent his days inside the apartment. Defendant acknowledged that he owned a Labrador dog that barked each time the elevator door opened.

Defendant denied receiving the summons and complaint, the motion for a default judgment, or any notice of the action until his insurance carrier told him of the judgment. Even after learning of the judgment, he never asked any of his neighbors whether someone had been looking to serve him with legal papers. He identified Ms. Sterling whom he has known for over thirty years as his neighbor in Apartment 51. Although no one named "Hooper" lived on the fifth floor, an "Etta" Hooper lived on the fourth floor. "Etta" was already living in the building when defendant moved in. He admitted that his neighbor knew "Etta" and that it was possible "Etta" may have answered the door to speak to Kastner while visiting Ms. Sterling's apartment. Defendant was never asked whether "Etta" was also known as "Mary" or if he knew her by any other name.

CPLR 308(4) provides that personal service may be made "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode" and then mailing the summons to his or her last known address. It is plaintiff who bears the burden of establishing jurisdiction at a traverse hearing. *See 2110-2118 ACBP, LLC v. Holland-Harden*, 118 A.D.3d 461, 987 N.Y.S.2d 369 (1st Dep't 2014). Plaintiff has met his burden. *See Farias v. Simon*, 73 A.D.3d 569, 899 N.Y.S.2d 843 (1st Dep't 2010). Kastner attempted service at different times of the day and confirmed with a neighbor that defendant resided there. As for the purported deficiencies concerning the military affidavit, it was sufficient that Kastner was told defendant was not active in the military. *See Bergani v. Desena*, 50 A.D.3d 716, 855 N.Y.S.2d 228 (2d Dep't 2008). In any event, defendant testified that

he last served in the military in 1969. The court finds Kastner to be a credible witness. *See Finkelstein Newman Ferrara LLP v. Manning*, 35 Misc.3d 130(A), 950 N.Y.S.2d 722 (App. Term 1st Dep't 2012). Because service of process conformed to the requirements set forth in CPLR 308(4), dismissal of plaintiff's complaint for lack of personal jurisdiction is denied.

The balance of defendant's motion seeking to vacate his default pursuant to CPLR 317 is also denied. Defendant failed to establish that he did not receive notice of the action in time to defend. *See Morrison Cohen LLP v. Fink*, 81 A.D.3d 467, 917 N.Y.S.2d 155 (1st Dep't 2011). His bare denial of receipt of the summons and complaint is insufficient to overcome the presumption of proper mailing. *See Public Adm'r of County of New York v. Markowitz*, 163 A.D.2d 100, 557 N.Y.S.2d 348 (1st Dep't 2000). Defendant was also served within one hundred twenty days after plaintiff commenced the action. *See* CPLR 306-b.

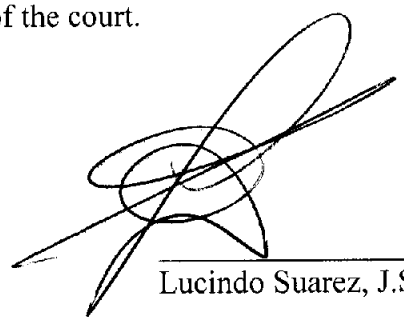
Accordingly, it is

ORDERED, that the motion of defendant Gregory A. Thorpe seeking to vacate his default and the judgment entered against him is denied; and it is further

ORDERED, that any temporary stay of enforcement proceedings and other related court proceedings is hereby vacated in its entirety.

This constitutes the decision and order of the court.

Dated: January 14, 2016



Lucindo Suarez, J.S.C.