

Carmenati v Christian
2016 NY Slip Op 30762(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 155233/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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RALPH CARMENATI,

Plaintiff,

Index No. 155233/2014

-against-

DECISION/ORDER

NATHANIEL H. CHRISTIAN, NATHANIEL CHRISTIAN
III and NANCILEE HOLLAND,

Defendants.
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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>3</u>

Plaintiff Ralph Carmenati commenced the instant action seeking to recover damages for injuries he allegedly sustained on premises allegedly owned by defendants. Defendant Nancilee Holland (“Holland”) now moves for an Order pursuant to CPLR § 2221(e) granting her leave to renew this court’s decision dated January 9, 2015 (the “Decision”) granting plaintiff’s motion for a default judgment against her, or, in the alternative for an Order pursuant to CPLR § 2221(d) granting her leave to reargue this court’s Decision and upon renewal or reargument, dismissing the action as against Holland pursuant to CPLR §§ 3211(a)(1) and (8). For the reasons set forth below, Holland’s motion is denied.

Plaintiff commenced the instant action in or around May 2014 with the filing of a summons

and complaint. On or about June 6, 2014, Holland was allegedly served with the summons and complaint. According to the affidavit of service, Holland was served by delivering the pleadings to Ricky "Smith" Cotenant, allegedly a person of suitable age and discretion to accept service on Holland's behalf. Thereafter, plaintiff moved for an Order pursuant to CPLR § 3215 for a default judgment against Holland. In the Decision, this court granted plaintiff's motion on the ground that "said defendant has failed to answer or otherwise appear in the within action and the time to do so has expired." Further, the Decision explained as follows:

To the extent defendant Holland submits an affidavit in opposition attesting that she was never served with the complaint, such statement is insufficient to defeat the present motion as it is wholly conclusory. It is well established that the affidavit of a process server constitutes *prima facie* evidence of proper service. See *Hinds v. 2461 Realty Corp.*, 169 A.D.2d 629 (1st Dept 1991). The mere denial of receipt of service "is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service." *Matter of de Sanchez*, 57 A.D.3d 452, 454 (1st Dept 2008). Only a "sworn nonconclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing." *NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 (1st Dept 2004). Here, plaintiff has established the presumption of proper service on Holland by presenting the court with the affidavit of its process server Michael DelCore who attest[s] that service on Holland was effectuated on June 6, 2014. To rebut this presumption, Holland merely attests that she "was never served with the Complaint." This wholly conclusory assertion is clearly insufficient to rebut the presumption of proper service requiring a traverse hearing.

The court first turns to that portion of Holland's motion for leave to renew this court's Decision. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e) (2)-(3). Holland seeks renewal of the Decision based on her assertion that certain facts were not offered in opposition to

plaintiff's motion for a default judgment which would change the prior determination.

Specifically, in the instant motion, she affirms that she was never properly served by plaintiff and that Ricky "Smith" Cotenant, the person served with the pleadings on her behalf, is not a person of suitable discretion as she does not know who that person is. Holland points to the fact that Ricky "Smith" Cotenant was referred to as a white male in the affidavit of service but Holland affirms that her "only cotenant was Nathaniel Christian III, an African-American male, who does not fit the description given in plaintiff's affidavit."

However, this court finds that Holland's motion for leave to renew this court's Decision must be denied on the ground that Holland has failed to provide a reasonable justification for her failure to present the above facts in opposition to plaintiff's original motion for a default judgment. Holland merely asserts that her excuse for failing to provide such facts is that she was opposing plaintiff's motion *pro se* and "was unfamiliar with any requirement for specificity in [her] affidavit." However, the court finds that such excuse is not reasonable based on the circumstances of this case. Indeed, the record establishes, and Holland has not provided evidence to the contrary, that Holland was not merely an unsophisticated *pro se* defendant but rather a self-employed litigation paralegal with over twenty years of experience and a licensed real estate broker. Thus, she should have known that more detail was needed in an affidavit opposing proper service. Further, Holland offers no excuse as to why she waited over one year after the Decision was issued to retain a lawyer and bring the instant motion.

The court next turns to that portion of Holland's motion for leave to reargue this court's Decision. On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. *See* CPLR 2221(d)(2). Here, Holland's motion for leave to reargue this court's Decision is denied as she has failed to establish that this court overlooked or

