

Vladeck, Raskin & Clark, P.C. v Camme
2016 NY Slip Op 31042(U)
June 6, 2016
Supreme Court, New York County
Docket Number: 162951/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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VLADECK, RASKIN, & CLARK, P.C.

Plaintiff,

-against-

DECISION/ORDER

Index No.: 162951/15

Seq. No.: 001

GERARD CAMME,

Defendant.

----- X

HON. KATHRYN E. FREED:

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

PAPERS

NUMBERED

SUMMONS AND AFF. ANNEXED
NOTICE OF MOTION

1-2 (Exs. A-C)
3

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff Vladeck, Raskin & Clark, P.C. moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint in the amount of \$38,369.78, the amount of an unsatisfied judgment entered against defendant Gerard Camme in the Superior Court of New Jersey, Law Division Monmouth County on February 28, 2013. Defendant does not oppose the motion. After a review of the papers, and after a review of the relevant statutes and case law, the motion is **denied and the proceeding is dismissed without prejudice to refile upon proper papers.**

FACTUAL AND PROCEDURAL BACKGROUND:

On February 28, 2013, the law firm of Vladeck, Waldman, Elias & Englehard, P.C. obtained a judgment in the amount of \$38,369.78 against its former client and New Jersey resident defendant Gerard Camme, in the Superior Court of New Jersey, Law Division Monmouth County. The money owed represented unpaid legal fees for work performed by the firm in New Jersey relating to a New Jersey litigation in 2010.

Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, seeking to recover the amount of the unpaid judgment from defendant.

PLAINTIFF'S CONTENTIONS:

Plaintiff argues that it is entitled to summary judgment in lieu of complaint in the amount of \$38,369.78 due to defendant's failure to pay the New Jersey judgment entered against him.

CONCLUSIONS OF LAW:

Plaintiff's motion is denied on several grounds. A party may move for summary judgment in lieu of complaint where an action is based upon a judgment. *See Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). A movant's service of a summons and motion pursuant to CPLR 3213 requires a defendant to serve answering papers by the time set forth in the notice of motion, and "the minimum amount of time the plaintiff must give the defendant to appear and oppose the motion is dependent upon the date and method of

service” which is calculated pursuant to CPLR 320. *Goldman v Saltzman*, 13 Misc3d 1023, 1025 (Sup Ct Nassau County 2006). Under CPLR 320(a), unless service is made in person, a defendant must appear within 30 days after service is complete. Pursuant to CPLR 3213, a plaintiff may schedule a motion hearing date beyond the minimum time and then require that responding papers be served within that extended period, not exceeding 10 days before the return date. However, because service is not complete until ten days after proof of service is filed with the clerk of the court (CPLR 308[2]), “the minimum amount of time between service of the summons and motion papers and the return date is 40 days.” *Goldstein v Saltzman*, 13 Misc3d *supra* at 1025, n.1.

Here, plaintiff purported to serve the summons and motion for summary judgment in lieu of complaint on defendant on December 30, 2015. Defendant was served by leaving a request for judicial intervention, summons and notice of motion and affidavit in support of motion for summary judgment in lieu of complaint, notice of commencement of action subject to mandatory electronic filing papers with his son, a person of suitable age and discretion, at his “dwelling house”. Since, as noted above, the minimum amount of time between service of the summons and motion and the return date is 40 days, the motion had to be returnable as to defendant no earlier than February 10. *See Goldstein v Saltzman*, 13 Misc3d *supra* at 1025, n.1. However, since plaintiff set the return date as 30 days after service of the summons, defendants were clearly not afforded with appropriate time to respond to the motion.

On March 5, 2016, defendant was served with the request for judicial intervention, the notice of motion, and affidavit in support of the motion for summary judgment in lieu of complaint by “affix and mail” at the same address. Plaintiff set the return date as April 8, 2016.

Where, as here, defendants have not been provided with the statutorily required time in which to respond to a motion brought pursuant to CPLR 3213, a court lacks the jurisdiction to hear the

motion and it must be denied without prejudice and the action must be dismissed. *See Goldstein v Saltzman*, 13 Misc3d *supra* at 1027, citing *National Bank of Canada v Skydell*, 181 AD2d 645 (1st Dept 1992).

In addition to denial of the motion for the foregoing reasons, there are other issues which must be addressed by plaintiff if it seeks to re-file this motion.

As movant, plaintiff has the burden of establishing that it properly served defendant with process. *See* CPLR 3213; *Cadle Co. v Ayala*, 47 AD2d 919, 920 (2d Dept 2008). This Court finds that it failed to do so, since the affidavits of service raise issues of fact regarding whether such service was proper. *Cadle Co. v Ayala*, 47 AD2d at 920.

Initially, the affidavit of service dated December 31, 2015 reflects that, on December 30, 2015, the process server delivered the request for judicial intervention, summons and notice of motion¹ and affidavit in support of motion for summary judgment in lieu of complaint, notice of commencement of action subject to mandatory electronic filing on defendant by delivering the said documents to his son, a person of suitable age and discretion, at 3 Walden Court, Manalapan, New Jersey, which the process server stated was defendant's "dwelling house." Pursuant to the substitute service provision set forth in CPLR 308(2), a person of suitable age or discretion may be served at a defendant's "dwelling place or usual place of abode." Therefore, "dwelling house" was an improper location for service and this affidavit of service was a nullity.

On March 5, 2016, the process server served defendant with the request for judicial intervention, the notice of motion, affidavit in support of the motion for summary judgment in lieu

¹No notice of motion was served until March of 2016. However, since neither the summons served in December, 2015 nor the notice of motion served in March, 2016 gave more than 30 days' notice of the motion, either documents would have provided insufficient notice to defendant pursuant to CPLR 3123.

of complaint with exhibits by affixing them to defendant's door at 3 Walden Court in Manalapan, New Jersey after four attempts to find defendant or a person of suitable age and discretion at that address. He described the premises as defendant's "dwelling house/usual place of abode within the state." However, since "affix and mail" service pursuant to CPLR 308(4) requires that the summons be affixed to the door of defendant's actual dwelling place or usual place of abode within New York State (*see, Sapienza v Haag*, 89 AD2d 816 [4th Dept 1982]), service on defendant in New Jersey in this fashion was a nullity.

He further stated that a dogwalker, whose name he did not obtain, told him that the house was where defendant lived. The process server noted, however, that the dogwalker did not tell her where defendant worked. Since the process server clearly failed to perform a thorough investigation into defendant's place of employment, it was improper for her to have resorted to affix and mail service. *See Riverwalk Holding, Ltd. v Fiallo*, 40 Misc3d 1211(A) (Sup Ct Queens County 2013).

The motion must also be denied due to the unexplained alteration of the caption. The caption of plaintiff's action in New Jersey Superior Court was *Vladeck, Waldman, Elias & Englehard, P.C. v Gerard Camme*. Ex. A. This is the same caption pursuant to which judgment was entered against defendant. Ex. C. However, the caption of this action is *Vladeck, Raskin & Clark, P.C. v Gerard Camme*. Plaintiff provides no explanation why its name has been changed in the caption, and the court file does not indicate that a motion has been made to amend the caption in this manner.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Vladeck, Raskin & Clark, P.C. for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied without prejudice, and the action is dismissed with leave to refile upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: June 6, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**