

Castlepoint Ins. Co. v Mangru
2016 NY Slip Op 31225(U)
June 28, 2016
Supreme Court, New York County
Docket Number: 15961/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index No.
159614/2015

**DECISION and
ORDER**

- against -

Mot. Seq. #001

SHARON MANGRU, DEOCHAND MANGRU
And MANUEL FIGUEROA,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Castlepoint Insurance Company (“Plaintiff” or “Castlepoint”) brings this action seeking a judgment declaring that Castlepoint has no duty to defend or indemnify defendants Sharon Mangru (“Sharon”) and Deochand Mangru (“Deochand” and collectively, “Defendants”) in an underlying personal injury action entitled *Manuel Figueroa v. Sharon Mangru and Deochand Mangru*, pending in the Supreme Court of the State of New York, Bronx County, under Index Number 22499/2015E (the “underlying action”). In the underlying action, Manuel Figueroa alleges that he sustained injuries on February 7, 2015 when he was caused to slip and fall on snow and ice at premises known as 1322 Noble Avenue, Bronx, New York (“the premises”).

Defendants now move for an order, pursuant to CPLR §§ 3211(a)(8) and 3212, dismissing the complaint for lack of personal jurisdiction over the moving defendants due to improper service. In support, defendants submit the attorney affirmation of Susan I. Lubowitz, Esq., and the affidavits of Sharon and Deochand.

In opposition, plaintiff submits the affirmation of James J. Croteau, Esq., annexing copies of affidavits of service on Sharon and Deochand, and Google Maps images of 2140 Blackrock Ave and 2419 Butler Pl., Bronx, New York.

Plaintiff argues that Sharon and Deochand were both properly served pursuant to CPLR § 308(2). On September 26, 2015, the Complaint was served upon Sharon and Deochand by delivering a copy of the Complaint to a person of suitable age, a co-occupant of her residence, and the Complaint was subsequently sent by first class mail to each address bearing the words “personal and confidential.”

Plaintiff further argues that Defendants’ claim of improper service is moot. Plaintiff commenced this action by filing its summons and complaint on September 18, 2015. Following receipt of the instant motion and still within the 120 day period pursuant to CPLR 306-b, Plaintiff served its Complaint upon the Defendants a second time, pursuant to CPLR § 308(4). According to the affidavit of process server Wladimir Chassedini, on January 16, 2016, the Complaint was served on Sharon by affixing a copy of the Complaint at “Sharon Mangru’s place of Abode” at “2140 Blackrock Avenue, Bronx, New York” and mailing a copy of the Complaint to the same address, after two service attempts on “1/11/2016 at 8:40 pm” and “1/12/2016 at 4:03 pm.” In a separate affidavit, Wladimir Chassedini attests that, on January 16, 2016, the Complaint was served on Deochand by affixing a copy of the Complaint at “Deochand Mangru’s place of Abode” at “2418 Butler Place, Bronx, NY 10461” and mailing a copy to the same address, after two service attempts on “1/11/2016 at 8:48pm” and “1/12/2016 at 4:12pm.”

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 Dep’t 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 Dep’t 2008). A sworn affidavit alleging the particulars concerning why service is improper is required. *See, e.g., 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 Dep’t 2004).

Section 308(2) of the CPLR permits service to be effected on a natural person by delivery of a copy of the summons within the state to a person of suitable age and discretion at the defendant’s place of business or dwelling place and by mailing a copy to the defendant’s last known residence. In order to properly effect service pursuant to the section, the plaintiff must strictly comply with both the delivery and mailing requirements. *Brownell v. Feingold*, 82 A.D.2d 844, 844 (2d Dep’t 1981); *see* CPLR 308(2).

Section 308(4) of the CPLR 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. CPLR § 308(4).

In the affidavit of service on Sharon, dated September 26, 2015, process server Wladimir Chassedín avers that he served the Summons and Complaint on “John Doe, a co-occupant,” described as “Age: 45, Sex: M, Race/Skin Color: Brown, Height: 5’6”, Weight: 165, Hair: Black, Glasses: N.” In the affidavit of service on Deochand, dated September 26, 2015, Chassedín avers that he served “Jane Doe, a co-occupant,” described as “Age: 47, Sex: F, Race/Skin Color: Brown, Height: 5’5”, Weight: 150, Hair: Dark Brown, Glasses: N.”

In an affidavit sworn to and dated January 6, 2016, Sharon avers that there is no one in her household who fits the description set forth in the September 18, 2015 affidavit of service. Further, the description in the affidavit of service does not fit the description of anyone else residing in the other units of the three family unit building where she resides in the first floor unit. Her in-laws, Amrit Singh and Neelanjanie Singh, reside in the second floor unit, and the third unit is a basement apartment leased to another couple. Sharon attests that neither she nor her husband were at home at the time of service because they were both at an engagement party, and that there is no co-occupant in her residence other than her husband.

In an affidavit sworn to and dated January 6, 2016, Deochand states that there is no one in his household who fits the description set forth in the affidavit of service. Deochand attests that he was at home with his wife Sue Mangru, babysitting their two grandchildren because their mother, Sharon Mangru, was at an engagement party, and that no one came to the door at the time of the alleged service. Deochand notes that he is married, but the affidavit of service incorrectly states that he is not married. Deochand further notes that the building has three units with three doorbells and the affidavit of service does not indicate which unit the alleged “Jane Doe” was in at the time of the delivery.

While Defendants deny receipt of pleadings and challenge the process server’s delivery of the papers on September 26, 2015, Defendants have not successfully challenged the service by mail and the address to which the pleadings were sent. *Compare Avakian v. De Los Santos*, 183 A.D.2d 687 (2d Dep’t 1992) (defendant’s affirmative defense of lack of personal jurisdiction reinstated based on successful challenge to the mailing requirement of service by suitable age and discretion when affidavit of service indicated different town from that of the defendant and omitted the zip code). Moreover, plaintiff served Defendants on January 16, 2016,

pursuant to CPLR § 308(4), after two attempts on January 11, 2016 and January 12, 2016, with additional mailings to Defendants' addresses.

Since Defendants fail to raise an issue of fact as to the affidavits of service, a traverse hearing is unwarranted. *Public Admire of County of New York v. Marches*, 163 A.D.2d 100, 557 N.Y.S.2d 348 (1st Dep't 1990) (mere denial of receipt by mail, without further probative facts, is "insufficient to overcome the presumption of delivery which attaches to a properly mailed letter").

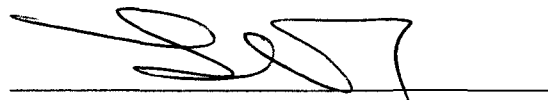
Based upon the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is denied.

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

Dated: JUNE ~~28~~ 2016

JUN 28 2016



Eileen A. Rakower, J.S.C.