

Zabari v Zabari

2016 NY Slip Op 31409(U)

July 22, 2016

Supreme Court, New York County

Docket Number: 65397/13

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 15

-----X
 EYAL ZABARI,

Plaintiff,

- v -

DORON ZABARI,

Defendant.
 -----X

Index No.
 653997/13

**DECISION
 and ORDER**

Mot. Seq. 005

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

The Court referred the issue of whether service of process was properly made on defendant, Doron Zabari, pursuant to CPLR § 308(2) to a Special Referee to hear and report with recommendations pursuant to the January 30, 2015 Order of the Court. The matter was assigned to Special Referee Jeremy Feinberg. Michael J. Smikun, Esq. of Callagy Law, P.C. represented Plaintiff Eyal Zabari (“Plaintiff”). Bruce H. Wiener, Esq. of Warshaw Burstein LLP represented Defendant Doron Zabari (“Defendant”).

Mr. Feinberg held a hearing on October 22, 2015, which continued on December 7, 2015, and Plaintiff called witnesses. Plaintiff called to the stand, Sal Alioto (“Alioto”), the process server who purportedly served Defendant on March 14, 2014, and John Swenson (“Swenson”), a videographer who accompanied Alioto on March 14, 2014. Defendant did not call any witnesses. The following documents were admitted into evidence:

- Court Exhibit I (Affidavit of Service)
- Plaintiff’s Exhibit 1 (video from Alioto’s button camera and Swenson’s camera)
- Plaintiff’s Exhibit 2 (copy of receipts from post office)

Mr. Feinberg concluded, in a Report and Recommendation dated April 11, 2016 (the "Report"), "In sum, under the circumstances, I report and recommend that Plaintiff has met his burden, and thus, this honorable Court should conclude that Plaintiff properly served Defendant pursuant to CPLR 308(2)."

Plaintiff, Eyal Zabari, moves pursuant to CPLR § 4403 and Uniform Rule 202.44(a) for an Order of the Court confirming the Report's finding that personal service has been effected on Defendant pursuant to the Special Referee's Report. Plaintiff contends that the videotape of and testimony of the witnesses demonstrates proper service in accordance with the Special Referee's finding. Plaintiff argues that the leaving of the summons with the doorman at Defendant's actual place of residence, a person of suitable age and discretion, and the mailing of the summons and complaint to Defendant by certified mail was sufficient for proper service in accordance with CPLR § 308(2).

Defendant, Doron Zabari, cross-moves pursuant to CPLR § 4303 for an Order of the Court to reject, in its entirety, the Report and, further, to dismiss this proceeding based upon lack of personal jurisdiction over the Defendant. Defendant contends that the video and testimony confirms that there was no proper service upon Doron Zabari and calls into question the credibility of the witnesses. Defendant argues that summons and complaint had to have been handed to the doorman and sent by first class mail – not certified mail – to constitute proper service in accordance with CPLR § 308(2).

The Special Referee determined that service had been properly effected upon Doron Zabari and found the witnesses' testimony credible. CPLR § 308(2) states that service is effected upon a natural person when a summons is delivered "to a person of suitable age and discretion at the actual place of business, dwelling place... of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential'..." There are two aspects to CPLR § 308(2) that are contested by the Defendant: the delivery and the mailing.

Defendant posits that the process server was unlicensed. However, pursuant to CPLR § 2103(a), "papers may be served by any person not a party of the age

eighteen years or over.” A process server individual license is required if one serves personally or by substituted service five or more processes in any one year-period.

Defendant also argues that the papers were not properly handed to the doorman so service must fail. The important question concerning delivery of the physical papers is whether the papers were left within the general vicinity of the person who prevents entry into the building. (*Duffy v. St. Vincent Hosp.*, 198 A.D.2d 31 [1st Dep’t 1993]). Here, evidence that the doorman was preventing the process server’s entry into the building and the placement of the papers in his general vicinity is documented on the video submitted in the hearing.

Additionally, there is no denial by the Defendant that the address served by the process server was the Defendant’s last known residence. Additionally, CPLR § 308(2) “does not provide for the use of any particular class of mail when the process is mailed to the defendant’s last known residence.” (*Cohen v. Shure*, 153 A.D.2d 35, 37 [2d Dep’t 1989]). Also, there is no testimony that the envelopes were not labeled “Privileged and Confidential.”

For the reasons indicated above, the Court accepts the Special Referee’s Report and Recommendation and considers service to have been properly effected upon Doron Zabari.

Wherefore it is hereby,

ORDERED that the Report and Recommendation issued by Special Referee Jeremy Feinberg, after a traverse hearing on October 22, 2015, which continued on December 7, 2015, so-ordered on April 11, 2016 is confirmed; and it is further

ORDERED that defendant Doron Zabari’s motion to dismiss the Complaint for lack of personal jurisdiction over defendant is denied (Mot. Seq. 2); and it is further

ORDERED that defendant Doron Zabari shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JULY 22, 2016

JUL 22 2016



EILEEN A. RAKOWER, J.S.C.