

Ocean v Gustave

2016 NY Slip Op 31762(U)

September 20, 2016

Supreme Court, Kings County

Docket Number: 511887/14

Judge: Larry D. Martin

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 20th day of September, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

LACETEDRA M. OCEAN,
PLAINTIFF,

-VS-

CORNELIA GUSTAVE et al,
DEFENDANT(S).

Motion Sequences #1, #2

INDEX No. 511887/14

The following papers numbered 1 to 5 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	1-2, 3-4 _____
Answering Affidavit (Affirmation) _____	_____
Reply Affidavit (Affirmation) _____	5 _____
Other Papers _____	_____

Upon the foregoing papers, defendants Andrew Hugnel ("Hugnel") and Anita Lubin ("Lubin"; collectively, "defendants") move for an order, pursuant to CPLR 3211(a)(8) and 302, dismissing the instant action as asserted against them on the grounds that the Court lacks personal jurisdiction over them. Plaintiff Lacetedra M. Ocean ("plaintiff") cross-moves for an order, pursuant to CPLR 306-b, extending plaintiff's time to serve defendants.

On or about December 12, 2014, plaintiff commenced the instant action to recover compensatory damages for personal injuries she allegedly sustained as a result of a motor vehicle accident which occurred on January 14, 2012 in Brooklyn, New York. The subject accident involved a vehicle owned by Lubin and operated by Hugnel and a vehicle owned by co-defendant Wilfred Charlery and operated by co-defendant Cornelia Gustave. At the time of the accident, plaintiff was a passenger in defendants' vehicle. Defendants reside at 520 West Fisher Avenue in Philadelphia, Pennsylvania.

In his affidavits of service, plaintiff's process server avers that on January 8, 2015, he mailed copies of the summons and complaint to the New York State Secretary of State with a \$10 fee and that, on January 22, 2015, he forthwith mailed copies of the pleadings by certified mail return receipt requested, along with proof of same, to Hugnel and Lubin, respectively, at the Pennsylvania address. Thereafter, the mailings were returned by the United States Postal Services as "unclaimed." The Court notes that the USPS Tracking printout notes that the mailings were returned as unclaimed on February 28, 2015 (Notice of Motion, exhibit E). In his affidavits of service, Bruce J. Smilowitz ("Smilowitz"), president of R/D Traveler's, avers that "[o]n May 7, 2015, within thirty (30) days of receiving the envelope marked "unclaimed", [he] sent [each of] the defendant[s], [], by ordinary mail and certificate of mailing: Notice that the Summons and Complaint had been served on the Secretary of State; the Summons and Verified Complaint and the Notice of Electronic Filing ..." (Notice of Motion, Exhibit G, Exhibit H).

Subsequently, on or about November 2, 2015, defendants interposed an answer with affirmative defenses, including one based on lack of personal jurisdiction, and a cross-claim against co-defendants. On or about December 8, 2015 co-defendants served an answer to the cross-claim. On or about December 28, 2015, defendants moved to dismiss the instant action and all counter-claims as asserted against them on the grounds of lack of personal jurisdiction. On or about February 4, 2016, plaintiff cross-moved for the relief requested herein.

It is well settled that "[a]n action is commenced by filing a summons and complaint" (CPLR 304[a]). "Service of the summons and complaint ... shall be made within one hundred twenty days after the commencement of the action" (CPLR 306-b).

Vehicle and Traffic Law § 253(2) provides, in relevant part, that in an action against a nonresident owner or operator of a vehicle,

“[s]ervice of [a] summons shall be made by mailing a copy thereof to the secretary of state at his office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of ten dollars, and such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending ... an affidavit of compliance herewith, a copy of the summons and complaint and either a return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail, in accordance with the rules and customs of the post-office department; or if acceptance was refused by the defendant or his agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by or on behalf of the plaintiff that notice of such mailing and refusal was forthwith sent to the defendant by ordinary mail; or, if the registered or certified letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail ... The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete when such papers are filed ...”

“If service is not made upon a defendant within the [120 day] time provided in [CPLR 306-b], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service” (CPLR 306-b). “In deciding whether to grant an extension of time to serve copies of a summons and complaint in the interest of justice, ‘the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious cause of act, the length of delay in service, the promptness of plaintiff’s request for the extension of time, and prejudice to defendant’” (*Wilson v City of New York*, 118 AD3d 983, 984 [2d Dept 2014], quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]).

Based upon a review of the record submitted by the parties, the court finds that plaintiff did

not properly serve defendants with the summons and complaint pursuant to VTL §253(2), as plaintiff failed to comply with the strict time requirements of that statute (*see Watler v Riccuiiti*, 282 AD2d 741, 741 [2d Dept 2001]). While Smilowitz avers that a copy of the pleadings and proof of service of same upon the New York State Secretary of State was mailed by ordinary mail and certificate of mailing to defendants on May 7, 2015, within 30 days of receiving notice that the initial mailing was “unclaimed”, he fails to offer any proof of when he actually received notice that the initial mailing was “unclaimed.” Indeed, the USPS printout indicates that the initial mailing was returned over two months earlier on February 28, 2015. As such, plaintiff failed to demonstrate that the affidavit of the subsequent mailing was filed within 30 days of receipt of the original envelope bearing an “unclaimed” notation. In this regard, the court finds that plaintiff has failed to demonstrate strict compliance with VTL §253(2).

Here, plaintiff seeks an extension of time to serve defendants in the interest of justice. In the exercise of its discretion, the court finds that plaintiff has failed to establish that an extension of time is warranted in the interest of justice because she “exhibited a lack of diligence in commencing the action ... until the statute of limitations had nearly expired... did not seek an extension of time to serve the defendant[s] until after a motion to dismiss had been brought by the defendant[s], despite having been served with the defendant[s]’ answer, which raised the lack of personal jurisdiction as an affirmative defense, and ... failed to establish [a] potentially meritorious cause of action” (*Khodeeva v Chi Chung Yip*, 84 AD3d 1030, 1031 [2d Dept 2011], internal citation and quotation marks omitted). Admittedly, plaintiff only made one attempt to serve defendants within the 120-day time frame following the filing of the summons and complaint and offered no excuse for the failure to timely effect service. Moreover, the verified complaint filed herein is verified by plaintiff’s attorney who lacks personal knowledge of the facts contained therein (*see Jacobsen v S & F Service*

Center Co., Inc., 131 AD3d 450, 452 [2d Dept 2015]) and, as such, cannot substitute as an affidavit (see CPLR 105[u]).

Accordingly, defendants Andrew Hugnel and Anita Lubin's motion to dismiss the complaint as asserted against them only is granted. Plaintiff's cross-motion is denied. The action is hereby severed and shall continue as against the remaining defendants.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

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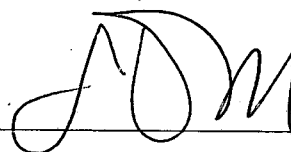
For Clerks use only

MG

MD

Motion Seq. #

1 | 2



HON. LARRY D. MARTIN

J.S.C.