

Rudolph v Addinur
2016 NY Slip Op 33192(U)
May 2, 2016
Supreme Court, Nassau County
Docket Number: Index No. 603424/14
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

QUINCY L. RUDOLPH,

Plaintiff,

- against -

YUSSUF ADDINUR and NAJIIB TRUCKING LLC,

Defendants.

TRIAL/IAS PART 37
NASSAU COUNTY

Index No.: 603424/14
Motion Seq. No.: 01
Motion Date: 02/17/16
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(8), for an order dismissing the Verified Complaint against them as the Court has no jurisdiction over the person of said defendants, who are out of state residents, because there is insufficient proof that plaintiff properly served defendants as required by New York Vehicle and Traffic Law § 253(2); or, alternatively, move, pursuant to CPLR § 3211(a)(8), for an order dismissing the Verified Complaint against them as the Court has no jurisdiction over the person of said defendants, who are out of state residents, due to plaintiff's failure to file either sufficient and necessary proof of compliance with New York Vehicle and Traffic Law § 253(2) within one hundred twenty (120) days after commencement of the action as required by CPLR § 306-b. Plaintiff opposes the motion.

Counsel for defendants submits that, “[t]he complaint alleges that QUINCY RUDOLPH ... sustained personal injuries on July 15, 2011, when a motor vehicle owned by NAJIIB TRUCKING LLC and operated by ABDI NUR YUSSUF [s/h/a Yussuf Addinur] struck the rear of the motor vehicle owned by Dorothy Aikens and operated by Robert Redd, in which plaintiff was a passenger.” *See* Defendants’ Affirmation in Support Exhibit A.

Counsel for defendants asserts that, “[t]he instant motion to dismiss centers around plaintiff’s failure to bring TRUCKERS (*sic*), collectively an out of state resident, within the personal jurisdiction of this Honorable Court. As set forth below, plaintiff failed to timely serve TRUCKERS (*sic*) under VTL § 253(2) and additionally failed to do so within the temporal limitations required by CPLR § 306-b. Additional defects or omissions to the service requirements by VTL § 253(2) vary between defendants, and will be separately addressed. The incident in this case was previously litigated in Nassau County Supreme Court under index no. 006492/12 Robert Redd v. Najjib Trucking LLC and Yussuf Abdinut, wherein the instant plaintiff was a non-party witness and deposed under representation of counsel The prior action settled, and a stipulation of discontinuance was filed with the Nassau County Clerk on October 15, 2014 (prior to receipt or notice of the instant Summons and Complaint by NAJIIB TRUCKING LLC).... The instant plaintiff was fully aware of an ongoing personal injury suit regarding the same incident (his friend/driver Robert Redd was the plaintiff in the prior action) and was represented by counsel at his non-party deposition. Despite plaintiff’s notice, involvement, and legal representation in the prior action, he commenced the instant action five days prior to the expiration of the statute of limitations, and as argued herein, subsequently failed to properly bring TRUCKING under the jurisdiction of this Honorable Court. A finding otherwise would result in substantial prejudice to TRUCKING (located in Minnesota) who, as a matter of law are not under the personal jurisdiction of this Honorable Court, and have already

fully absorbed the costs of interstate litigation for the same incident.” See Defendants’ Affirmation in Support Exhibits H and I.

With respect to defendant Abdi Nur Yussuf s/h/a Yussuf Addinur, counsel for defendants submits that, “[o]n September 25, 2014 plaintiff e-filed an Affidavit of Service sworn on September 2, 2015 (*sic*) that deponent, Debbie Cruz, allegedly personally served the Summons and Verified Complaint on ‘YUSSUF ADDINUR’ at the New York Secretary of State pursuant to VTL § 253 on August 27, 2014. Debbie Cruz additionally swears in this Affidavit of Service that on August 27, 2014 she placed the Summons and Verified Complaint along with a letter of notification to ‘YUSSUF ADDINUR’ stating that the New York Secretary of State was served on his behalf into an envelope, and sent said envelope by Certified Mail (Tracking # 7012 2210 0000 7618 1071), Return Receipt Requested by depositing the envelope in an official depository of the United States Postal Service pursuant to VTL § 253.... According to an Affidavit of Compliance e-filed on July 16, 2015 and sworn by deponent, Deborah Ann Rung on November 22, 2014, the following assertions are made:

- i. ‘YUSSUF ADDINUR’ was forwarded notification with the Summons and Verified Complaint on September 2, 2014 by Certified Mail, Return Receipt Requested.
- ii. The notification with Summons and Complaint went ‘unclaimed’ as evidenced by an original envelope annexed to the Affidavit of Compliance. The e-filed copy of the original envelope annexed to the Affidavit of Compliance contains the Certified Mail Tracking # 7012 2210 0000 7618 1071
- iii. Upon receipt of the ‘unclaimed’ envelope containing said notice and Summons and Complaint, the deponent sent an additional notification with Summons and Complaint to ‘YUSSUF ADDINUR’.
- iv. Proof of this additional mailing is supported by an annexed copy of a certificate of mailing with a postal stamp dated November 20, 2014....

Upon review of the aforementioned Affidavit of Service ... and Affidavit of Compliance ..., the following observations can be made:

- i. Despite referencing matching Certified Mail Tracking # 7012 2210 0000 7618 1071 used to indicate the certified mailing of the original notification and Summons and Complaint to YUSSUF ADDINUR, the Affidavit of Service and the Affidavit of Compliance conflict regarding the service dates. The Affidavit of Service states August 27, 2014 ..., and the Affidavit of Compliance states September 2, 2014
- ii. At the latest, plaintiff received the 'unclaimed' envelope containing the original notice with Summons and Complaint on November 20, 2014. This is indicated by the copy of the Certificate of mailing with postal stamp dated November 20, 2014 attached to the Affidavit of Compliance used to prove the second mailing of the notice with Summons Complaint to YUSSUF ADDINUR
- iii. 30 days past November 20, 2014 is December 20, 2014. The Affidavit of Compliance was e-filed with the Nassau County Clerk on July 16, 2015 - 208 days past the 30 day deadline pursuant to VTL § 253(2)....
- iv. The Affidavit of Compliance was e-filed with the Nassau County Clerk on July 16, 2015 - 371 days past commencement of the action and 251 days past the 120 day deadline with which plaintiff has to complete service pursuant to CPLR § 306-b....
- v. The Affidavit of Compliance is silent regarding service of the Summons and Complaint on the Secretary of State.”
See Defendants' Affirmation in Support Exhibits D and E.

With respect to defendant Najjib Trucking LLC, counsel for defendants submits that, “[o]n September July (*sic*) 16, 2015 plaintiff e-filed an Affidavit of Service sworn on November 15, 2014 that deponent, Debbie Cruz, allegedly personally served the Summons and Verified Complaint on NAJIIB TRUCKING LLC at the New York Secretary of State pursuant to VTL § 253 on October 28, 2014. Debbie Cruz additionally swears in this Affidavit of Service that on October 28, 2014 she placed the Summons and Verified Complaint along with a letter of notification to NAJIIB TRUCKING LLC stating that the New York Secretary of State was served on his (*sic*) behalf into an envelope, and sent said envelope by Certified Mail (Tracking #

7011 2970 0002 7661 2531), Return Receipt Requested by depositing the envelope in an official depository of the United States Postal Service pursuant to VTL § 253.... According to an Affidavit of Compliance e-filed on July 16, 2015 and sworn by deponent, Deborah Ann Rung, on November 15, 2014, the following assertions are made:

- i. NAJIIB TRUCKING LLC was forwarded notification with the Summons and Verified Complaint on November 3, 2014 by Certified Mail, Return Receipt Requested.
- ii. The notification with Summons and Complaint was received as evidenced by a copy of the Certified Mailing 'Return Receipt' annexed to the Affidavit of Compliance. The e-filed copy of the 'Return Receipt' annexed to the Affidavit of Compliance contains the Certified Mail Tracking # 7011 2970 0002 7661 2531....

Upon review of the aforementioned Affidavit of Service ... and Affidavit of Compliance ... regarding service on NAJIIB TRUCKING LLC, the following observations can be made:

- i. Despite referencing matching Certified Mail Tracking # 7011 2970 0002 7661 2531 used to indicate the certified mailing of the original notification and Summons and Complaint to NAJIIB TRUCKING LLC, the Affidavit of Service and the Affidavit of Compliance conflict regarding the service dates. The Affidavit of Service states October 28, 2014 ..., and the Affidavit of Compliance states November 3, 2014
- ii. The Affidavit of Compliance is silent regarding when the Precise date the 'Return Receipt' was received; however, The Affidavit of Compliance is dated November 15, 2014 (*sic*) annexes the 'Return Receipt.' Therefore, at the very latest the 'Return Receipt' was received on November 15, 2014....
- iii. 30 days past November 15, 2014 is December 15, 2014. The Affidavit of Compliance was e-filed with the Nassau County Clerk on July 16, 2015 - 213 days past the 30 day deadline pursuant to VTL § 253(2)....
- iv. The Affidavit of Compliance was e-filed with the Nassau County Clerk on July 16, 2015 - 371 days past commencement of the action and 251 days past the 120 day deadline with which plaintiff has to complete service pursuant to CPLR § 306-b....
- v. The Affidavit of Compliance is silent regarding service of the Summons and Complaint on the Secretary of State." See Defendants' Affirmation in Support Exhibits F and G.

Counsel for defendants asserts that “Vehicle and Traffic Law § 253 designates the New York Secretary of State as the agent for service of process upon a non-resident who used or operated a vehicle in New York for actions arising out of an accident or collision involving the non-resident’s operation of that vehicle. In order to complete service using Vehicle and Traffic Law § 253 a copy of the summons must be mailed or personally delivered to the office of the Secretary of State, and the plaintiff must send notice of such service and a copy of the summons and complaint to the defendant by certified or registered mail with return receipt requested. Vehicle and Traffic Law § 253(2). The plaintiff must then file an affidavit of compliance with these procedures, along with a return receipt purporting to be signed by the defendant. Where, as here, the certified letter was returned to the Post Office unclaimed, the plaintiff must then file ‘the original envelope bearing a notation by the postal authorities of such mailing and return, and 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.’ [citation omitted]. Notably, the statute states that ‘[s]ervice of process shall be complete when such papers are filed.’ [citations omitted].”

Counsel for defendants argues that the Court does not have personal jurisdiction over defendant Najiib Trucking LLC since the Affidavits of Compliance do not fulfill the requirements of VTL § 253. Counsel claims that “[t]he statements contained in the affidavits of compliance are alone insufficient to meet the requirements of Vehicle and Traffic Law § 253(2), and the conflicting affidavits of service should not be allowed to supplement the affidavits of compliance.... The Second Department has made it clear that if the affidavit of compliance fails to set forth all of the requirements of Vehicle and Traffic Law § 253(2), that dismissal is required. Failure to provide proof of mailing in the affidavit of compliance requires dismissal. [citations omitted]. In the instant action, the affidavits of compliance are silent regarding service on the Secretary of State or that notice of the filing with the Secretary of State was mailed to TRUCKING. The words ‘Secretary of State’ are completely absent from plaintiff’s affidavits of compliance fin (*sic*) this action.... Therefore, the affidavits of compliance are facially insufficient

as a matter of law.... [Plaintiff's] affidavits of service completely conflict with the service dates as stated in the affidavits of compliance in addition to conflicting with the documents annexed in support of the affidavit of compliance. To wit, with respect to service on the defendant, NAJIIB TRUCKING LLC, the affidavit of service states service occurred on October 28, 2014 ..., while the affidavit of compliance states service occurred on November 3, 2014.... With respect to service on defendant, ABDI NUR YUSSUF, the affidavit of service states service occurred on August 27, 2014 ..., and the Affidavit of Compliance states service occurred on September 2, 2014.... Therefore, these affidavits of service are inapplicable to each other, and are insufficient to supplement the already defective affidavits of compliance. [citation omitted]. Additionally, the inconsistencies in the dates of service between the affidavits make them unreliable, and their lack of veracity should additionally constitute a fatal flaw in obtaining personal jurisdiction over TRUCKING pursuant to New York Vehicle and Traffic Law § 253. There simply isn't sufficient or reliable proof before this Honorable Court to find that plaintiff fulfilled the substantive requirements of Vehicle and Traffic Law § 253(2); especially when compliance therewith is to be strictly construed. [citation omitted]. Therefore, this action should be dismissed as this Honorable Court does not have jurisdiction over TRUCKING." See Defendants' Affirmation in Support Exhibits D - G.

Counsel for defendants also argues that service of process on defendant Najiib Trucking LLC was not timely pursuant to VTL § 253(2). Counsel states, "[i]n addition to the insufficiency of compliance, plaintiff failed to timely serve TRUCKING as required by Vehicle and Traffic Law § 253(2). Under Vehicle and Traffic Law § 253(2), '[s]ervice of process shall be complete' when plaintiff has filed the papers required therein. [citation omitted]. Plaintiff has 30-days to file their (*sic*) affidavit of compliance after receipt of either: 1. The certified mailing receipt; or 2. Receipt of an envelope marked 'unclaimed' by the post office. [citation omitted]. With respect to service on defendant, ABDI NUR YUSSUF, plaintiff filed the affidavit of service and the affidavit of compliance 208 days past the Vehicle and Traffic Law § 253(2) 30-day deadline.

Therefore, plaintiff did not fully comply with the provisions of VTL § 253 ... [citation omitted].... Similarly, with respect to service on defendant, NAJIIB TRUCKING LLC, plaintiff filed the affidavit of service and the affidavit of compliance 213 days past the Vehicle and Traffic Law § 253(2) 30-day deadline. Therefore, plaintiff did not fully comply with the provisions of VTL § 253.... Plaintiff's failure to properly file requisite or sufficient affidavits of service and compliance within any relevant statutory time frame should be deemed synonymous with having not filed them at all. The failure of which is fatal and requires dismissal." *See* Defendants' Affirmation in Support Exhibits E and G.

Counsel for defendants further asserts that this Court does not have personal jurisdiction over the defendants as said defendants were served after the CPLR § 306-b one hundred twenty (120) day deadline and plaintiff cannot demonstrate good cause for this delay. Counsel claims, "[w]ith respect to service on defendant, ABDI NUR YUSSUF, plaintiff filed the affidavit of service and the affidavit of compliance: 1.) 251 days past the CPLR § 306-b 120-day deadline; 2.) 208 days past the Vehicle and Traffic Law § 253(2) 30-day deadline; and 3.) 371 days past commencement of the action. Therefore, plaintiff did not fully comply with the provisions of VTL § 253 [citations omitted]. With respect to service on defendant, NAJIIB TRUCKING LLC, plaintiff filed the affidavit of service and the affidavit of compliance: 1.) 251 days past the CPLR § 306-b 120-day deadline; 2.) 213 days past the Vehicle and Traffic Law § 253(2) 30-day deadline; and 3.) 371 days past commencement of the action. Therefore, plaintiff did not fully comply with the provisions of VTL § 253 As evidenced by plaintiff's counsel's ability to e-file the summons and complaint in this matter, TRUCKING fails to see what possible diligence prevented plaintiff's counsel from timely e-filing affidavits of compliance that were dated 9 months prior to their filing." *See id.*

In opposition to the motion, counsel for plaintiff submits, "[o]n August 27, 2014 service was achieved against defendant YUSSUF ADDINUR using VTL §253, by leaving the Summons and Verified Complaint with Mrs. Nelson, an authorized agent in the Office of the Secretary of

the State of New York.... On September 2, 2014, a copy of the Summons and Complaint was mailed, return receipt requested to defendant YUSSUF ADDINUR, 2940 Pillsbury Avenue, Suite 203, Minneapolis, MN 55408 and P.O. Box 14627, Minneapolis, MN 55408.... On or about November 20, 2014, the Summons and Complaint were returned for failure to be claimed.... On July 15, 2015, the Affidavit of Compliance was filed with the Court.... On October 28, 2014 service as achieved against defendant NAJIIB TRUCKING LLC using VTL §253, by leaving the Summons and Verified Complaint with Mrs. Nelson, an authorized agent in the Office of the Secretary of the State of New York.... On November 3, 2014, a copy of the Summons and Complaint was mailed, return receipt requested to defendant NAJIIB ALI, P.O. Box 14627, Minneapolis, MN 55414.... On or about November 6, 2014, the Summons and Complaint was (*sic*) received by defendant NAJIIB TRUCKING LLC.... On July 15, 2015, the Affidavit of Compliance was filed with the Court.” *See* Defendants’ Affirmation in Support Exhibits E and F.

Counsel for plaintiff contends that, “[t]he delay in filing the Affidavits of Compliance were (*sic*) due to an inadvertent office mistake resulting in no prejudice to the defendants... [T]he Second Department has held that service of process will not be rendered void where it is virtually certain that the summons will arrive at its intended destination. [citation omitted]. The fact that defendants’ insurance company received notice of the instant action, coupled with the fact that 1) defendant’s (*sic*) interposed an answer on December 10, 2014; and 2) the certified mailing to NAJIIB was received indicate that the defendants ultimately received the required papers.”

Counsel for plaintiff adds that, “[s]ince it is clear that the defendant (*sic*) was correctly served, Plaintiff now moves this Court to allow him to file the unclaimed letter and Affidavit of Compliance *nun pro tunc* on the basis that there is no resulting prejudice to the defendant.”

It is evident, from the arguments made and the evidence presented in the instant motion, that plaintiff’s Affidavits of Service on defendants and Affidavits of Compliance in this matter fail to meet the requirements of New York Vehicle and Traffic Law § 253. It is also evident that

the defendants were not timely served pursuant to the requirements of New York Vehicle and Traffic Law § 253. Defendants have proven plaintiff's failure to properly file requisite or sufficient Affidavits of Service and Compliance within any relevant statutory time frame. Additionally, it is evident that the defendants were served after the one hundred twenty (120) day deadline imposed by CPLR § 306-b.

CPLR § 306-b states, in part, “[i]f service is not made upon a defendant within the time provided in this section, 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.”

In order to be entitled to an extension of the 120-day deadline for the service of process for “good cause,” plaintiff must, at the very least, establish that he had been reasonably diligent in its attempts to serve process on the defendant. *See Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 736 N.Y.S.2d 291 (2001). Reasonable diligence should be found to exist where plaintiff had actually “served” process within the 120-day period and then promptly sought an extension when defendant contended that the service might be defective. *See Stryker v. Stelmak*, 69 A.D.3d 454, 892 N.Y.S.2d 102 (1st Dept. 2010).

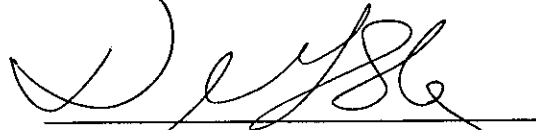
Plaintiff's argument that “[t]he delay in filing the Affidavits of Compliance were (*sic*) due to an inadvertent office mistake resulting in no prejudice to the defendants” without any further detail or explanation provided is clearly without merit.

With respect to plaintiff's request that “this Court to allow him to file the unclaimed letter and Affidavit of Compliance *nun pro tunc* on the basis that there is no resulting prejudice to the defendant,” there is no cross-motion before the Court requesting affirmative relief (*e.g.*, CPLR § 2215; *Khaolaead v. Leisure Video*, 18 A.D.3d 820, 796 N.Y.S.2d 637 (2d Dept. 2005); *Thomas v. Drifters*, 219 A.D.2d 639, 631 N.Y.S.2d 419 (2d Dept. 1995). Consequently, plaintiff's request is improper and will not be entertained.

Therefore, based upon the arguments and analysis detailed above, defendants' motion, pursuant to CPLR § 3211(a)(8), for an order dismissing the Verified Complaint against them as the Court has no jurisdiction over the person of said defendants, who are out of state residents, because there is insufficient proof that plaintiff properly served defendants as required by New York Vehicle and Traffic Law § 253(2); or, alternatively, pursuant to CPLR § 3211(a)(8), for an order dismissing the Verified Complaint against them as the Court has no jurisdiction over the person of said defendants, who are out of state residents, due to plaintiff's failure to file either sufficient and necessary proof of compliance with New York Vehicle and Traffic Law § 253(2) within one hundred twenty days (120) days after commencement of the action as required by CPLR § 306-b is hereby **GRANTED in its entirety**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
May 2, 2016

ENTERED

MAY 05 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE