

Brown v A 1998 Audi, VIN No. WAUAA34B2WN89089
2017 NY Slip Op 31786(U)
July 31, 2017
Supreme Court, Suffolk County
Docket Number: 17404-2015
Judge: Peter H. Mayer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-18-16
ADJ. DATE 1-3-17
Mot. Seq. # 001 - MD

-----X		Dennis M. Brown, County Attorney
DENNIS M. BROWN, County Attorney	:	Attorney for Plaintiff
for the COUNTY OF SUFFOLK,	:	H. Lee Dennison Building
	:	100 Veterans Memorial Highway, PO Box
Plaintiff/Claiming Authority,	:	6100
	:	Hauppauge, New York 11788-0099
- against -	:	
	:	
	:	
a 1998 AUDI, VIN NO. WAUAA34B2WN89089,	:	
C. PEREZ RODRIGUEZ,	:	
	:	
Defendant(s).	:	
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff/claiming authority, dated November 30, 2016, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. #001) by the plaintiff/claiming authority, Dennis M. Brown, County Attorney for the County of Suffolk ("the County"), which seeks an order for a default judgment against the non-criminal defendant vehicle owner, C. Perez Rodriguez, and forfeiture of his 1998 Audi, VIN # WAUAA34B2WN89089, pursuant to Suffolk County Code ("SCC") §818, is hereby denied for the reasons set forth herein, and it is further

ORDERED that since the County has failed to satisfy the requirements of SCC §818-40-E, the County shall promptly make the subject vehicle, seized by the County on or about April 17, 2015, available for release to the noncriminal defendant at the current place of storage (without any charge for towing, maintenance or storage fees), as further set forth herein; and it is further

County of Suffolk v Rodriguez

Index No. 17404-2015

Page 2

ORDERED that the County shall promptly serve notice upon the noncriminal defendant, by personal delivery, or by Certified Mail (return receipt requested) and First Class Mail to the noncriminal defendant's address on file with the New York State Department of Motor Vehicles, that he/she has the right to take possession of the subject vehicle at the current place of storage (without any charge for towing, maintenance or storage fees), and that in the event of failure to take possession of the vehicle within 60 days after such notice, the vehicle will be subject to forfeiture upon application by order to show cause by the County for an order granting forfeiture on grounds of the noncriminal defendant's failure to take timely possession of the subject vehicle; and it is further

ORDERED that the County shall promptly serve a copy of this Order upon said noncriminal defendant by Certified Mail (return receipt requested) and First Class Mail, and shall thereafter file the affidavit(s) of such service with the Suffolk County Clerk, and annex a copy of such proof of service to any future applications submitted in this matter.

First, the County has failed to submit evidentiary proof of compliance with the personal service provisions of CPLR §308 regarding "due diligence" for those defendants served by the "nail and mail" method pursuant to CPLR §308(4), sufficient to establish jurisdiction over the defendant(s), not merely a showing of several attempts to serve a defendant at his or her residence without a showing that there was first a genuine inquiry about the defendant's whereabouts and place of employment.

The "nail and mail" method of service pursuant to CPLR §308(4) may be used only where personal service under CPLR §308(1) and (2) cannot be made with "due diligence" (see *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 882 NYS2d 186 [2d Dept 2009]; *Lemberger v Khan*, 18 AD3d 447, 794 NYS2d 416 [2d Dept 2005]). The due diligence requirement of CPLR §308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (see *Serraro v Staropoli*, 94 AD3d 1083, 943 NYS2d 201 [2d Dept 2012]; *McSorley v Spear*, 50 AD3d 652, 854 NYS2d 759 [2d Dept 2008]; *Estate of Waterman v Jones*, 46 AD3d 63, 843 NYS2d 462 [2d Dept 2007]; *O'Connell v Post*, 27 AD3d 630, 811 NYS2d 441 [2d Dept 2006]; *Scott v Knoblock*, 204 AD2d 299, 611 NYS2d 265 [2d Dept 1994]; *Kaszovitz v Weiszman*, 110 AD2d 117, 493 NYS2d 335 [2d Dept 1985]). A defendant's eventual awareness or actual awareness of pending litigation will not affect the absence of jurisdiction over him or her where service of process is not effectuated in compliance with CPLR 308 (see *Washington Mut. Bank v Murphy*, 127 AD3d 1167, 10 NYS3d 95 [2d Dept 2015]; *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 882 NYS2d 186 [2d Dept 2009]).

What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality (see *Aurora Loan Services, LLC v Gaines*, 104 AD3d 885, 962 NYS2d 316 [2d Dept 2013]; *Serraro v Staropoli*, 94 AD3d 1083, 943 NYS2d 201 [2d Dept 2012]; *McSorley v Spear*, 50 AD3d 652, 854 NYS2d 759 [2d Dept 2008]; *Estate of Waterman v Jones*, 46 AD3d 63, 843 NYS2d 462 [2d Dept 2007]). Attempting to serve a defendant at his or her residence without showing that there was a genuine inquiry about the defendant's whereabouts and place of employment is fatal to a finding of due diligence as required by CPLR §308(4) (*id.*; *Cadlerock Joint Venture, L.P., Appellant, v Marcus Kierstedt*, 119 AD3d 627, 990 NYS2d 522 [2d Dept 2014]; *Sanders v Elie*, 29 AD3d 773, 816 NYS2d 509 [2d Dept 2006]). Further, absent any evidence that the process server attempted to determine that the address where service was attempted was, in fact, the actual dwelling or

County of Suffolk v Rodriguez

Index No. 17404-2015

Page 3

usual place of abode of the defendant, such as by searching telephone listings or making inquiries of neighbors, the requirement of CPLR §308(4), that service under CPLR §308(1) and (2) first be attempted with "due diligence," is not met (see *McSorley v Spear*, 50 AD3d 652, 854 NYS2d 759 [2d Dept 2008]; *Kurlander v A Big Stam, Corp.*, 267 AD2d 209, 699 NYS2d 453 [2d Dept 1999]).

Since the County has failed to meet the "due diligence" requirement for "nail and mail" service under CPLR §308(4), jurisdiction over the defendant has not been established and the motion must be denied (*Sanders v Elie*, 29 AD3d 773, 816 NYS2d 509 [2d Dept 2006]; *Earle v Valente*, 302 AD2d 353, 754 NYS2d 364 [2d Dept 2003]; *Annis v Long*, 298 AD2d 340, 751 NYS2d 370 [2d Dept 2002]).

The County has also failed to submit an affidavit of military status: (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the County is unable to determine whether or not the defendant is in military service, stating that the County is unable to determine whether or not the defendant is in military service, as required by 50 USCS §521[b)].

Title 50 USCS Appx §521, which applies in state courts, was enacted for the "protection of service members against default judgments." Pursuant to 50 USCS Appx §521(a), this section "applies to *any* civil action or proceeding in which the defendant does not make an appearance" (emphasis supplied). Under 50 USCS Appx §521(b)(1), "the court, before entering judgment for the plaintiff, *shall* require the plaintiff to file with the court an affidavit: (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service." Under §521(b)(4), "[t]he requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury" (emphasis supplied). Here, the County's affidavit of service does not contain the statutorily required statement as to the military status of the defendant. Therefore, pursuant to 50 USCS Appx §521(b), a judgment of default may not be entered against the defendant.

Lastly, the County has failed to produce clear and convincing evidence that the noncriminal defendant engaged in affirmative acts which aided, abetted or facilitated the conduct of the non-party criminal driver, as required by SCC 818-40E.

SCC §818-40C authorizes the County to commence a civil action against a noncriminal defendant to recover the property which constitutes the instrumentality of an offense. SCC 818-40E states: "No property shall be forfeited under this article unless the [County] produces *clear and convincing evidence* that the noncriminal defendant engaged in *affirmative acts* which aided, abetted or facilitated the conduct of the criminal defendant (SCC §420-7G; §818-40E) (emphasis added). Here, the County has failed to submit *any* evidence (much less clear and convincing evidence) that the noncriminal defendant "engaged in affirmative acts which aided, abetted or facilitated the conduct of the criminal [nonparty] defendant" (see SCC §818-40E). Therefore, forfeiture of the noncriminal defendant's vehicle must be denied.

The noncriminal defendant's alleged default in pleading does not automatically qualify the County for victory in that proceeding. A plaintiff seeking a default judgment under CPLR §3215 must present prima facie proof of a cause of action, and while a default admits all factual allegations of the complaint and all

County of Suffolk v Rodriguez**Index No. 17404-2015****Page 4**

reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination (see *McGee v Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]; *Green v Dolphy Constr. Co.*, 187 AD2d 635, 590 NYS2d 238 [2d Dept 1992]; *Silberstein v Presbyterian Hospital in the City of New York*, 96 AD2d 1096, 463 NYS2d 254 [2d Dept 1983]). Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default (see *Litvinskiy v May Entertainment Group, Inc.*, 44 AD3d 627, 841 NYS2d 882 [2d Dept 2007]; *Beaton v Transit Facility Corp.*, 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]; *Cree v Cree*, 124 AD2d 538, 507 NYS2d 683 [2d Dept 1986]; *Green v Dolphy Constr. Co.*, 187 AD2d 635, 590 NYS2d 238 [2d Dept 1992]; *Silberstein v Presbyterian Hospital in the City of New York*, 96 AD2d 1096, 463 NYS2d 254 [2d Dept 1983]). Accordingly, notwithstanding the defendant's alleged default, the County's failure to establish a prima facie case pursuant to the burden of proof set forth in its own Code precludes a judgment by default and forfeiture in favor of the County, and requires prompt return of the subject vehicle to the noncriminal defendant as set forth herein.

Although other sections of SCC Chapter 818 (i.e., §§818-15[I]; 818-24[I]; 818-40[I]) contain provisions which specifically require immediate return of a noncriminal defendant's vehicle when a that defendant prevails under certain circumstances, those provisions are silent as to return of a defendant's vehicle where, as here, the County fails in the first instance to meet its burden of showing "clear and convincing evidence that the noncriminal defendant engaged in affirmative acts which aided, abetted or facilitated the conduct of the criminal defendant" (SCC §818-40E) (emphasis added). The Code authorizes the Court to exercise its discretion, in the interests of justice, in determining the forfeiture liability of a noncriminal defendant. In this regard, SCC §818-42B states: "Nothing contained in this article shall require a court to order a forfeiture when it determines, in its discretion, that it is in the interests of justice not to do so." Given the lack of provision for return of a defendant's vehicle under the circumstances presented herein, and given the "interests of justice" discretion afforded by the Code, the Court directs that the County shall notify the noncriminal defendant, by personal delivery or by certified mail (return receipt requested) and First Class Mail, to his/her address on file with the New York State Department of Motor Vehicles, of his/her right to take possession of the subject vehicle at the current place of storage.

Since the County has failed to produce clear and convincing evidence that the noncriminal defendant engaged in affirmative acts which aided, abetted or facilitated the conduct of the criminal defendant, as required by SCC §818-40E, said defendant shall not be required to pay any related charges or fees as a condition of release of the vehicle to her. It would be unjust to grant forfeiture against the noncriminal defendant under the circumstances presented herein, and it would be equally unjust to require a noncriminal defendant to pay any charges and fees related to seizure of the subject vehicle where the County has failed to show, by clear and convincing evidence, that the noncriminal defendant bears any culpability in this case.

In the event the noncriminal defendant fails to take possession of the subject vehicle within 60 days after notice by the County of her right to do so, then the County shall promptly submit an application by order to show cause for an order granting forfeiture on the basis of the defendant's failure to timely take possession of the subject vehicle. Such order to show cause shall include as exhibits a copy of the affidavit of service of this Order and a copy of the notice served upon the noncriminal defendant regarding his/her right to take possession of the vehicle.

County of Suffolk v Rodriguez
Index No. 17404-2015
Page 5

This constitutes the Decision, Order and Judgment of the Court.

Dated: July 31, 2017



PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION