

Motor Veh. Acc. Indem. Corp. v Porgo

2017 NY Slip Op 32515(U)

November 27, 2017

Supreme Court, New York County

Docket Number: 450130/2017

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

**PRESENT: Hon. _____ Robert D. KALISH
Justice**

PART 29

**MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORPORATION,**

INDEX NO. 450130/2017

MOTION DATE 11/2/17

Plaintiff,

MOTION SEQ. NO. 001

- v -

**SALAM PORGO
MAMADY DORE,**

Defendants.

The following papers, numbered 7-20, were read on this motion for entry of a default judgment.

Notice of Motion – Affirmation in Support – Affidavit of Service – Proposed Order – Exhibits A-H – RJL RE: Notice of Motion – No Fee Authorization | **Nos. 7-20**

Motion by Plaintiff Motor Vehicle Accident Indemnification Corporation pursuant to CPLR 3215 for entry of a default judgment against Defendants Salam Porgo (“Porgo”) and Mamady Dore (“Dore”) is granted in part, as follows, there being no opposition submitted.

BACKGROUND

Plaintiff is a corporation created pursuant to the motor vehicle accident indemnification corporation act. Plaintiff brought this action to recover money it spent relating to a claim stemming from a motor vehicle accident on May 3, 2013 (the “Accident”).

Plaintiff alleges that Trang Dong (“Dong”) is a qualified party alleging injuries and damages from the Accident who brought the claim in accordance with the requirements of Articles 51 and 52 of the Insurance Law. (Aff of Fossett ¶ 3.) The Accident allegedly occurred at 585 Myrtle Avenue, Brooklyn, New York 11205, between Classon Avenue and Taaffe Place. (*Id.*; see also Murtha affirmation, exhibit G.) The motor vehicle involved in the Accident was allegedly

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

a 1999 Nissan with license plate number “H33ATP” which was owned by Porgo and operated by Dore (the “Nissan”). (Aff of Fossett ¶ 3.)

After the Accident, Dong allegedly stated that “she was riding her bike [eastbound] on Myrtle [Avenue] on the right side of traffic when [Dore] opened [the Nissan’s] driver[-]side door causing [Dong] to strike [the door]. . . .” (Murtha affirmation, exhibit G.) Dore allegedly stated that “[the Nissan] was parked when he opened the driver[-]side door [and that Dong] who was to[o] close struck [the Nissan] causing [Dong] to be injured.” (*Id.*) An accident report lists Dore’s address as “1776 Union Street, apt 6E, Brooklyn, New York 11213” and Porgo’s address as “29 South Munn Avenue, apt 3K, East Orange, New Jersey 07018.” (*Id.*)

Pursuant to Insurance Law § 5209, Plaintiff allegedly investigated Dong’s claim. (Aff of Fossett ¶ 5.) Plaintiff allegedly paid \$1,057.23 to Execprotect, Inc. for the investigation. (Aff of Fossett ¶ 8; Murtha affirmation, exhibit E.) The investigation allegedly revealed that Porgo’s former motor vehicle insurer Progressive had allegedly informed Dong and Defendants on August 9, 2013, that Porgo’s insurance policy with No. 22170447-3 had expired on April 28, 2013, and had not been renewed. (Murtha affirmation, exhibit H.) The letter to Dore was allegedly mailed to “1776 Union Street, Brooklyn, New York 11213” and the letter to Porgo was allegedly mailed to “29 South Moon Avenue, East Orange, New Jersey 07018.” (*Id.*) Progressive denied coverage for Dong’s loss as submitted under claim No. 134434213. (*Id.*) As the Nissan was allegedly an uninsured vehicle, Dong brought his claim to Plaintiff.

On or around March 11, 2014, Plaintiff allegedly settled with Dong and paid the claim in the amount of \$20,000.00 pursuant to Insurance Law § 5213. (Aff of Fossett ¶ 4; Murtha affirmation, exhibit E.)

Plaintiff commenced this action on January 18, 2017, by e-filing a summons and verified complaint. (Murtha affirmation, exhibit A.) Plaintiff alleges that process was served upon Porgo by: (1) on February 18, 2017, a licensed process server’s allegedly leaving a copy of the summons and verified complaint with Porgo’s wife at 602 Park Avenue, apt C, Brooklyn, New York 11206, allegedly Porgo’s usual place of abode; and (2) on February 24, 2017, the mailing of a copy of the summons and verified complaint to the same address. (Murtha affirmation, exhibit B.) (*Id.*)

Plaintiff further alleges that process was served upon Dore by: (1) on April 1, 2017, a licensed process server's allegedly leaving a copy of the summons and verified complaint with "Abayami Doe," a person of suitable age and discretion at 1776 Union Street, apt 6E, Brooklyn, New York 11213, allegedly Dore's usual place of abode; and (2) on April 4, 2017, the mailing of a copy of the summons and verified complaint to the same address. (*Id.*) The affiant states that "service . . . was made at the address reflected on [Dore's] license pursuant to DMV verified as per 623 NYS 2D932."¹ (*Id.*) The affidavit alleging service of process upon Dore is both unsworn and unsigned. (*Id.*)

Plaintiff further alleges that it properly noticed Defendants pursuant to CPLR 3215 (g) (3). (Murtha affirmation, exhibit C.)

As Defendants have not appeared in this action, Plaintiff now moves for entry of a default judgment.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

"Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308." (*Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1175 [2d Dept 2015] [internal quotation mark and citations omitted].) CPLR 308 provides, in pertinent part, that

¹ It appears to the Court that the affiant is referring to *Burke v Zorba Diner*, 213 AD2d 577, 623 NYS2d 932 (2d Dept 1995) (holding that a plaintiff may rely on the address on file with the Department of Motor Vehicles as the last known residence for CPLR 308 (2) purposes).

“Personal service upon a natural person shall be made by any of the following methods: . . .

“2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode 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” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, . . . ; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, . . .”

The affidavits of service of process upon Defendants suggests that service of process was attempted upon each of them pursuant to CPLR 308 (2).

“[Usual place of abode] may [not] be equated with the ‘last known residence’ of the defendant.” (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979] [internal citations omitted].) This distinction is no “mere redundancy.” (*Id.* at 241.) To “blur the distinction between [usual place of abode] and last known residence . . . would be to diminish the likelihood that actual notice will be received by potential defendants” (*id.* at 240), contrary to the legislature’s intent.

In *Feinstein*, a process server attempted to complete the “nail” prong of CPLR 308 (4) at Bergner’s last known residence. As a result,

“the purported service was ineffective, since the plaintiff failed to comply with the specific mandates of CPLR 308 [(4)]. The summons here was affixed to the door of defendant’s last known residence rather than his actual [or usual place of] abode. That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court.”

(*Id.* at 241 [internal citation omitted].) As such, the plaintiff in *Feinstein* failed to meet its burden of proof that it had satisfied the “nail” prong of CPLR 308 (4).

Similarly, in *Washington* (at 1174), “the plaintiff failed to meet its burden of proof that its mailing of copies of the summons and complaint satisfied the mailing requirement of CPLR 308 (2),” which is analogous to the “mail” prong of CPLR 308 (4), by failing to mail the summons to Murphy’s last known residence.

In the instant action, Plaintiff submits adequate proof of service of its summons and verified complaint upon Porgo. The affidavit alleging service of process upon Porgo indicates that the Brooklyn, New York address to which the summons and complaint were mailed is the address of Porgo’s wife. While both the police accident report and the letter from Progressive indicate that Porgo had an address in East Orange, New Jersey, those documents are dated May 3, 2013 and August 9, 2013, respectively. Plaintiff therefore submits adequate proof that the Brooklyn, New York address is Porgo’s actual residence. In addition, for the purposes of the instant unopposed motion, Plaintiff offers adequate proof of the facts constituting its claim by means of its affidavit of indebtedness. Further, Porgo has not appeared in the instant action. As such, Plaintiff has shown *prima facie* entitlement to entry of a default judgment against Porgo.

Plaintiff in the instant action fails to submit adequate proof of service of process upon Dore. In support of its motion, Plaintiff submits an unsworn and unsigned “affidavit” alleging service of process upon Dore. This Court will not disregard such a defect as a mere “technical infirmity.” (*Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010]; *see also* CPLR 2001.) This Court is “guided by the principle of notice to the defendant—notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” (*Id.* [internal quotation marks omitted].) “Where a defect creates a ‘greater possibility’ of frustrating the core principles of notice to the defendant, the defect must be regarded as substantial and courts may not disregard it under CPLR 2001. (*Segway of N.Y., Inc. v Udit Group, Inc.*, 120 AD3d 789, 791 [2d Dept 2014], citing *Ruffin* at 583.) Here, the unsworn and unsigned affidavit is an insufficient showing of proof of service of process upon Dore for the purposes of the instant motion. As such, Plaintiff fails to show *prima facie* entitlement to entry of a default judgment against Dore.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff Motor Vehicle Accident Indemnification Corporation's motion pursuant to CPLR 3215 for entry of a default judgment against defendant Mamady Dore is denied, with leave to renew; and it is further


ORDERED that Plaintiff's motion pursuant to CPLR 3215 for entry of a default judgment against defendant Salam Porgo is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff in the amount of \$21,057.23, plus statutory interest from May 3, 2013, together with costs and disbursements to Plaintiff, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that Plaintiff serve a copy of this order with notice of entry upon the Clerk of the court and upon Defendants within 20 days of entry of this order.

The foregoing constitutes the decision and order of the Court.

Dated: November 27, 2017
New York, New York


HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE