

Son Yuen Tao v Griffin Mgt. Co., Inc.

2018 NY Slip Op 30497(U)

February 8, 2018

Supreme Court, Queens County

Docket Number: 703086/2017

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

SON YUEN TAO,

Index No. 703086/2017

Plaintiff,

Motion
Date: December 1, 2017

-against-

Motion Cal. No. 146

GRIFFIN MANAGEMENT COMPANY, INC.;
ANTHONY BRUNO; JOHN DONAGHTY; and
TABORAH R. WILLIAMS,

Motion Sequence No. 2

Defendants.

FILED
FEB 29 2018
COUNTY CLERK
QUEENS COUNTY

The following e-file papers numbered 33-45; 50-52; 54-55 submitted and considered on this motion by defendant Anthony Bruno seeking an Order pursuant to CPLR 3211(a)(8) and CPLR § 308 for lack of personal jurisdiction due to improper service of process.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion -Affidavits-Exhibits.....	EF 33-43
Affirmation in Opposition-Affidavits-Exhibits.....	EF 44-45
Affirmation in Opposition-Affidavits-Exhibits.....	EF 50-52
Reply Affirmations-Affidavits-Exhibits.....	EF 54-55

The plaintiff is directed to serve defendant Anthony Bruno with a copy of the Summons and the Verified Complaint upon his address at P.O. Box 1148, Scarsdale, New York 10583 via regular mail within twenty (20) days of this Order.

If plaintiff fails to serve defendant Anthony Bruno within the allotted time provided by this Court, defendant's motion shall be granted, and defendant shall submit an Order to chambers requesting the relief.

This personal injury action arises from a motor vehicle accident that occurred on March 17, 2015 on the Long Island Expressway in North Hempstead, Nassau County, New York. Plaintiff alleges that he sustained injuries as a result of the impact as defendant's vehicle, Griffin Management Company's vehicle operated by defendant Anthony Bruno and defendant's vehicle John F. Donaghy operated by defendant, Taborah R. Williams came into contact with his vehicle. Plaintiff commenced this action on March 6, 2017. On April 24, 2017, defendant Griffin Management Company joined issue by verified answer asserting affirmative defenses and cross-claims against defendants' John F. Donaghy and Taborah R. Williams. On September 29, 2017, defendant Anthony Bruno joined issue by verified answer asserting affirmative defenses and cross-claims against John F. Donaghy and Taborah R. Williams. Now, defendant Bruno seeks to dismiss this action pursuant to CPLR 3211(a)(8) and CPLR § 308 as plaintiff failed to obtain personal jurisdiction over him due to improper service of process.

In support of the motion, defendant Anthony Bruno provided copies of the pleadings and the affidavits of service; letter dated July 19, 2017; and an affidavit of Anthony Bruno dated September 27, 2017. In defendant Anthony Bruno's answer, he alleged improper service as an affirmative. In these motion papers, defendant alleges that plaintiff served him at 520 Central Park Avenue, Apt. 237, Scarsdale, New York 10583 as noted in the affidavit of service dated June 27, 2017. Defendant further alleges that he never lived at the address he was served on, through his counsel, respectfully requests, that this action be dismissed for lack of personal jurisdiction. To prove improper service, defendant provided a copy of his New York State Driver's License listing P.O. Box 1148, Scarsdale, New York 10583 as his address.

In opposition, defendants' John F. Donaghy and Taborah Williams contest that this motion is "little more than an exercise of futility." Their counsel explains that Griffin Management Company, Inc., will be liable for the actions of Anthony Bruno either under *respondeat superior* (if deemed an employee) or vicariously liable under the Vehicle and Traffic Laws. Counsel also contends that service on Griffin Management Company, Inc., is service on Anthony Bruno.

In the second opposition, plaintiff alleges that Anthony Bruno is an employee of Griffin Management Company which makes them liable under vicarious liability and *respondeat superior*. Plaintiff also contends that this current motion is moot as there is a pending motion under Index Number 710701/2017 before the Honorable Thomas Raffaele. Plaintiff commenced the separate action solely against Anthony Bruno and is requesting alternative service on insurance carriers. Plaintiff's counsel contests that she cannot effectuate on a *P.O. Box* address and requests that this motion be denied in its entirety as moot or held in abeyance until the Honorable Raffaele renders a decision. It is important to note that plaintiff's attorney affirmation for this motion was dated before the pending Order to Show Cause under Index Number 710701/2017. Therefore, plaintiff's allegation that this motion is moot is without merit.

In reply to the oppositions, defendant Anthony Bruno reasserts the allegations set forth in the motion. Plaintiff did not serve Anthony Bruno properly and lacks jurisdiction. Defendant also contends that there is no proof employment with Griffin Management Company to claim *respondeat*

superior to effectuate proper service on him.

Under CPLR § 308, personal service upon a natural person shall be made by any of the following methods: (1) delivering the summons and complaint within the state to the person to be served; (2) delivering the summons and complaint within the state to a person of suitable age and discretion to the person's place of business or dwelling place; (3) delivering the summons and complaint within the state to an agent. If the aforementioned under (1) and (2) cannot be met with due diligence, section (4) of CPLR § 308 states that the summons can be affixed to the door of the actual building or dwelling place which is commonly known as "nail and mail." However, under section (5), the Court can direct service if it is impracticable under sections (1), (2), and (4). (*See* CPLR § 308; *see also Kelly v Lewis*, 220 AD2d 485 [2d Dept 1995].)

Here, this Court has determined that plaintiff has not exercised due diligence with effectuating service as there is no proof that defendant Anthony Bruno has lived at 520 Central Park Avenue, Apt. 237, Scarsdale, New York 10583. (*See Washington Mut. Bank v Murphy*, 127 AD3d 1167 [2d Dept 2015].) Usually, when service is improper, the Court can dismiss the action for lack of jurisdiction. However, this Court exercises its discretion and will grant plaintiff additional time to serve defendant Anthony Bruno correctly. (*See generally Born to Build, LLC v Saleh*, 139 AD3d 654, 656 [2d Dept 2016]; *compare Michaelson v Hudson*, 142 AD2d 560 [2d Dept 1998].)

Therefore, it is

ORDERED, that plaintiff serve defendant Anthony Bruno with a copy of the Summons and Verified Complaint upon his address at P.O. Box 1148, Scarsdale, New York 10583 via regular mail within twenty (20) days of this Order; and it is further

ORDERED, that upon mailing the Summons and Verified Complaint upon the defendant Anthony Bruno, plaintiff shall file proof of service with the Court; and it is further

ORDERED, that if plaintiff fails to serve the defendant Anthony Bruno within the twenty (20) days allotted by this Court, defendant's motion shall be granted and defendant shall submit an Order directly to Chambers stating the same and including language of the dismissal pursuant to CPLR 3211 (a) (8); and it is further

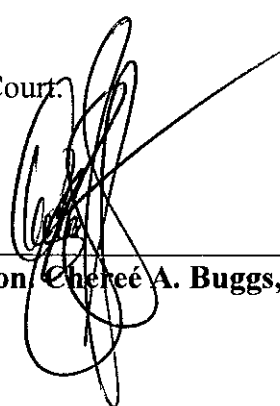
ORDERED, that upon signing the Order, this matter shall be dismissed against defendant Anthony Bruno if plaintiff fails to serve him as directed by this Court.

Submit Order if plaintiff fails to serve defendant Anthony Bruno as listed above.

A copy of this Order shall be mailed to all parties.

This constitutes the decision and Order of the Court.

Dated: February 8, 2018



Hon. Chereé A. Buggs, JSC

FILED
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COUNTY CLERK
QUEENS COUNTY