

Port Auth. of N.Y. & N.J. v Montalvo
2018 NY Slip Op 32456(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 450245/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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THE PORT AUTHORITY OF NEW YORK &
NEW JERSEY,

Plaintiff,

- v -

Index No.
450245/2015

**DECISION
and ORDER**

Mot. Seq. #04

ALICIA MONTALVO and JOHN DOE 1-100,

Defendants.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by plaintiff, The Port Authority of New York & New Jersey ("Plaintiff"), to collect unpaid tolls and administrative fees associated with the unpaid tolls incurred by defendant, Alicia Montalvo ("Montalvo"). Plaintiff commenced this action on February 19, 2015, by Summons and Verified Complaint.

Pursuant to Plaintiff's Affidavit of Service, the Summons and Verified Complaint was served on Montalvo on April 2, 2015 at 7:53 AM at her last known residence located at 9 Stonecrest Drive, Thiells, New York 10984. Service was made by affixing a copy of the documents to the door of said residence. Daniel Knight, the process server, states that he had previously attempted to personally serve Montalvo at this address, on: 3/9/2015 at 9:09 AM, 3/23/2015 at 4:29 PM, and on 4/2/2015. Knight states that he "spoke with 'Jane' Smith, neighbor of the defendant, at aforementioned address, who stated that said Defendant lived there, and had no knowledge of place of employment of the Defendant." Knight also states that on April 7, 2015, he mailed a copy of the papers to Montalvo at that address.

On May 3, 2016, Plaintiff moved for default judgment against Montalvo in the amount of in the sum of \$29,476.00 with interest. Plaintiff's motion was granted without opposition on June 15, 2016. By Order dated September 2, 2016, Plaintiff obtained a default judgment against Montalvo in the amount of \$29,476.00. On September 12, 2016, Plaintiff served a copy of the judgment on Montalvo.

On September 28, 2016, Plaintiff served an Information Subpoena pursuant to CPLR 5334 by substituted service at Montalvo's "actual place of abode" at 9 Stonecrest Drive, Thiells, NY, 10984. According to the Affidavit of Service of Gary Hochman, he delivered a copy of the Information Subpoena to "Zengo Tita, Co-Tenant," of Montalvo at that address. He also mailed a copy of the Information Subpoena to the same address.

By Notice of Motion filed on November 17, 2016, Plaintiff moved to compel Montalvo to comply with the Information Subpoena. On January 20, 2017, the motion was granted, and Montalvo was directed to comply with the Information Subpoena within 30 days of the date of this Order. On October 4, 2017, Plaintiff's subsequent application to hold Montalvo in contempt for her refusal to comply with the Court's January 20, 2017 order and Information Subpoena was granted. Montalvo was directed to appear in Part 6, located at 71 Thomas Street, Room 205, on November 21, 2017 at 2:00 pm to purge the contempt.

Counsel for plaintiff and Montalvo (Tristan C. Loanzon, Esq.) appeared on November 21, 2017. They entered a Stipulation, signed by Justice Rakower, which stated that Montalvo would appear on January 30, 2018 to purge the contempt referenced in the Court's October 7, 2017 Order. The Stipulation also provided "that any motion by Defendant be made within forty-five (45) days of the date of this Stipulation."

By Order dated January 30, 2016, Montalvo's contempt was purged. The Order further stated, "Defendant accepts info subpoena and will supply info requested. 5/8/18 9:30 AM to monitor compliance."

On June 21, 2018, Montalvo filed a motion to dismiss pursuant to CPLR 3211(a)(8) for Plaintiff's failure to properly serve the Complaint. In support of the motion, Montalvo submits the attorney affirmation of Defendant's attorney Loanzon and her own affidavit. Plaintiff opposes.

CPLR § 5015 further provides, "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of . . . lack of jurisdiction to render the judgment or order". (CPLR § 5015[a][4]). A motion predicated upon lack of jurisdiction need not assert a meritorious defense; a default judgment entered in the absence of personal jurisdiction over the defendant is a nullity. (*Boorman v. Deutsch*, 152 A.D.2d 48, 51 [1st Dep't 1989]). Where the plaintiff fails to properly serve the summons and complaint, the court fails to acquire personal jurisdiction over the defendant, and any subsequent proceedings are null

and void. (*Prudence v. Wright*, 94 A.D.3d 1073, 1074 [2d Dep't 2012]; *Adames v. New York City Transit Authority*, 510 N.Y.S.2d 610, 611 [1st Dep't 1987]).

CPLR §317 provides, “A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.” As noted by the First Department, CPLR §317 “is available only to a defendant who (1) was served by a method other than personal delivery, (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry), and (3) demonstrates a potentially meritorious defense to the action” (*Caba v. Rai*, 2009 NY Slip Op 5252, *2 [1st Dept. 2009]).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]). A defendant's “mere denial” of service is insufficient, without more, to rebut the presumption of proper service. By contrast, a defendant's “sworn non-conclusory denial” of service is sufficient to dispute the veracity or content of a process server's affidavit. (*NYCTL 1998-1 Trust*, 7 A.D.3d at 460; *Hinds v. 2461 Realty Corp.*, 169 AD2d 629 [1st Dep't 1991]). Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*Id.*).

Under CPLR § 308(2), if a summons is served “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,” it must also be mailed “to the person to be served at his or her last known residence” or “by first class mail to the person to be served at his or her actual place of business ...”

Montalvo submits a letter she wrote to the court and an affidavit. The first is a letter to Judge Rakower dated October 30, 2017. In that letter, Defendant wrote:

I never received any notifications from EZ pass or the judicial system to appear in court to review the allegations. This subpoena is the only notice I have received. I have lived in Florida for the past 7 plus years, and not in NY. I am disputing the contested charges. Currently my husband

and I are both going to medical concerns and cannot make the assigned court date.

Montalvo also submits an affidavit, dated May 21, 2018. Montalvo avers:

I submit this affidavit based on my personal knowledge and in support of the motion to vacate the default judgment. Like I stated in my previous affidavit, I never received any notifications from EZ Pass or the Judicial system to appear in court to review the allegations. I need a Spanish interpreter to read English documents. To write this affidavit, I relied on my daughter to translate for me. My husband and I had medical concerns and could not fly to New York to defend ourselves. I have lived in Florida for the past 7 plus years, or since August 2011, and not in New York. I filed taxes for the year 2011 as a Florida resident. See enclosed. I began to pay for water and sewer charges in Florida beginning February 15, 2010. See enclosed. I was never served in either New York or Florida a summons and complaint in this lawsuit. The affidavit of service said it was mailed to 9 Stonecrest Dr., Thiels, NY in April 7, 2015. At that time, I did not live there and were (sic) living in Florida.

Here, as Montalvo has submitted an affidavit attesting that she did not reside where service of the Summons and Complaint was purportedly made on her, a traverse hearing is warranted on the issue.

Wherefore, it is hereby,

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119 A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: OCTOBER 1, 2018

A handwritten signature in black ink, appearing to be 'ER', with a long horizontal line extending to the right.

HON. EILEEN A. RAKOWER