

**Thaler v Lillywhite**

2018 NY Slip Op 34206(U)

June 22, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 601232-17

Judge: Denise F. Molia

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PUBLISH

Index No.: 601232-17

SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,  
Justice

ANDREW M. THALER, Trustee of the Bankruptcy  
Estate of Peter Mergenthaler,

Plaintiff,

- against -

SUSAN F. LILLYWHITE, and DOUGLAS  
ELLIMAN REAL ESTATE,

Defendants.

CASE DISPOSED: YES  
MOTION R/D: 5/19/17  
SUBMISSION DATE: 3/16/18  
MOTION SEQUENCE No.: 001 MG  
002 XMD

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated April 13, 2017; Affirmation dated April 13, 2017; Exhibits A through E annexed thereto; Affirmation in Opposition dated May 15, 2017; Affirmation in Opposition dated May 19, 2017; Notice of Cross-Motion dated June 2, 2017; Affirmation in Support dated June 2, 2017; Exhibits A and B annexed thereto; Affirmation in Opposition dated June 14, 2017; Reply Affirmation dated June 15, 2017; Reply Affirmation dated June 13, 2017; Exhibit A annexed thereto; and upon due deliberation; it is

**ORDERED**, that the cross-motion by plaintiff, pursuant to CPLR 308(5), for an Order permitting an alternative means of service upon defendant Susan F. Lillywhite, in a manner directed by the Court, is denied.

**ORDERED**, that the motion by defendant, Susan F. Lillywhite, for an Order dismissing the Complaint as against said moving defendant, is granted.

The instant action arises from a slip and fall injury allegedly sustained by Peter Mergenthaler on February 7, 2014, on the sidewalk located at the premises of 70 Jobs Lane, Southampton, New York. The Complaint was filed on January 20, 2017, pursuant to the Order of

the Honorable Robert E. Grossman, dated January 4, 2016, which authorized Andrew M. Thaler, the Trustee of the bankruptcy estate of Peter Mergenthaler, to retain counsel to represent him in connection with this personal injury action. The Complaint alleges that defendant Susan F. Lillywhite was the owner of 70 Jobs Lane and defendant Douglas Elliman Real Estate was a tenant at said address. On or about February 22, 2017, defendant Lillywhite served an Answer which contains each of the affirmative defenses enabled by CPLR 3211(a)(5) and (8).

The affidavit of John P. Nugent dated January 31, 2017, states that service of the Summons and Complaint in this matter was effectuated on Susan F. Lillywhite, by affixing said documents to the door of the premises located at 30 Jennings Avenue, Southampton, New York, at 9:35 a.m. on January 30, 2017. The process server alleges that he had previously attempted to serve the defendant at that address on January 27, 2017 at 2:15 p.m., January 28, 2017 at 7:13 p.m., and January 30, 2017 at 9:35 a.m. Nugent states that the address was confirmed by "Sandy Buday (Bookkeeper) at 32 Hampton Rd., Southampton, NY 11968."

Susan Lillywhite has submitted a sworn affidavit dated April 8, 2017, in which she avers that although she is the owner of the premises located at 30 Jennings Avenue, Southampton, New York, the place of attempted service, she did not reside at said premises on the date that the action was commenced or on any date since 2010. She further avers that she has been a resident of Jamaica, West Indies, since 2010, and has never been properly served with a copy of the Complaint in this action.

Sandra Buday has submitted a sworn affidavit dated April 11, 2017, in which she confirms that she is the bookkeeper for Susan Lillywhite. She stated that Lillywhite has been a resident of Jamaica, West Indies, since 2010, and while she is the owner of the premises located at 30 Jennings Avenue, Southampton, New York, she has not resided there or returned to Southampton, New York since 2010. Buday further averred that she was approached by an individual at the end of January 2017, who inquired as to how to locate Susan F. Lillywhite, and that she informed that individual that Lillywhite was "out of the country." The affidavit concluded with Buday's representation that the "aforementioned individual then asked me to sign a document and left, never providing me with a copy of the document I signed, nor any other document."

Lillywhite has moved for dismissal of the Complaint as against her, on the basis that she was not properly served with the Summons and Complaint as directed by CPLR 308. She notes that personal service upon a natural person may only be effectuated under that provision upon serving process on a person of suitable age and discretion at the defendant's actual dwelling place. Movant contends that 30 Jennings Avenue, Southampton, New York, the address identified in the affidavit of service, is not her actual dwelling place. Lillywhite also contends that Buday served as her bookkeeper and was not designated as an agent for service of process. Plaintiff has failed to submit evidence to dispute either contention.

The plaintiff has objected to the submission of Lillywhite's affidavit, claiming that it is not in admissible form pursuant to CPLR 2309 and should not be considered. Plaintiff notes that the affidavit was executed in Jamaica, West Indies, and does not include a certificate of conformity that the oath was taken in accordance with New York law. However, a review of the affidavit reveals that it was witnessed and signed in Jamaica by a Jamaican official, inasmuch as Jamaica does not subscribe to the practice of requiring signature by a notary public. The absence of a certificate of conformity is not a fatal defect in this instance since the affidavit was signed by the defendant before a public official in compliance with the out-of-state law, and no substantial right of a party has been shown to be prejudiced by the absence of the certificate (see, *Bank of*

New York Mellon v. Vytalingam, 144 A.D.3d 1070). In any event, the movant has submitted an affirmation dated June 8, 2017, subscribed and affirmed by Lillywhite to be true under the penalties of perjury, which may be used in this action in lieu of and with the same force and effect as an affidavit (see, CPLR 2106[b]). Based upon the undisputed content of the affidavit dated April 8, 2017 and the affirmation dated June 8, 2017, the Court finds that personal jurisdiction over the defendant Susan F. Lillywhite was not properly effectuated, as the service of the Summons and Complaint at 30 Jennigns Avenue, Southampton, New York, was not at the moving defendant's actual dwelling place.

Plaintiff has cross moved for leave to serve the Summons and Complaint via electronic filing pursuant to CPLR 308(5), maintaining that service is impracticable under the methods permitted pursuant to CPLR 308(1), (2), and (4). Conceding that Lillywhite is not a resident of New York and has not authorized an agent to accept process at the last known address, the plaintiff acknowledges that he has been unable to effectuate service on Lillywhite via CPLR 308(2) and 308(4). Plaintiff maintains that the defendant resides in a remote area of Jamaica which is several hours from the closest city center, rendering service impracticable. Plaintiff also maintains that since Jamaica is not a signatory of the Hague Convention, service would need to be carried out by a private process service agency, and the cost of such service would be a heavy financial burden to the plaintiff. It is noted that the plaintiff has not submitted affidavits from any process serving agencies to support the conclusion that physical service was impracticable and the accompanying cost prohibitive. Neither has the plaintiff demonstrated that the proposed service via electronic filing is a sufficient method to insure that Lillywhite will be actually served in Jamaica.

In opposition to the cross-motion, the defendant contends that the relief sought by plaintiff is moot, inasmuch as the time within which to serve the Summons and Complaint has elapsed. Defendant notes that the action arises from an accident that occurred on February 7, 2014. After the Summons and Complaint were filed on January 20, 2017, the plaintiff had 120 days thereafter to serve the defendant pursuant to CPLR 306-b. Defendant alleges that the time to effectuate service on her has now elapsed, and that plaintiff has neither moved for an extension of time to serve under CPLR 306-b, nor provided evidence of good cause for such extension, thereby rendering plaintiff's request for alternative service as moot. The plaintiff counters that service can still be effectuated because the time to commence the action has been tolled under CPLR 207 as a result of Lillywhite's continued absence from New York since 2010 and the fact that she has not designated a person to whom process may be delivered in New York. Plaintiff maintains that the 120 day deadline to effectuate service will not begin to run until Lillywhite returns to New York.

CPLR 207 provides that the statute of limitations does not run against the plaintiff if the defendant is without the state unless, *inter alia*, jurisdiction over the defendant's person can be obtained by a means other than delivery of the summons and complaint within the state. If such means are provided by law, the burden is on plaintiff to attempt service by such means (see, Schmidt v. Polish People's Republic, 579 F.Supp. 23, *affirmed* 742 F.2d 67). Under the circumstances presented herein, personal jurisdiction over Lillywhite could be obtained pursuant to the long-arm statute based upon her ownership and use of her real property in Southampton, New York. Plaintiff appears to have knowledge of the defendant's location and has acknowledged that service could be effectuated upon Lillywhite in Jamaica. As such, the tolling provisions of CPLR 207 are not applicable to this defendant during her absence from New York (see, Salamon v. Friedman, 11 A.D.3d 700, 701, 783 N.Y.S.2d 651, 651-52; see also, Yarusso v. Arbotowicz, 41 N.Y.2d 516, 362 N.E.2d 600). Accordingly, since service of process has never been effectuated upon Susan F. Lillywhite and the plaintiff's time to effectuate service upon her

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has expired, the Complaint and cross-claims asserted against defendant Susan F. Lillywhite are hereby dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 22, 2018

  
HON. DENISE F. MOLIA, A.J.S.C.