

Paddyfote v Nunnery-Mullen
2018 NY Slip Op 34222(U)
September 19, 2018
Supreme Court, Rockland County
Docket Number: Index No. 035684/2017
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
LORA M. PADDYFOTE,

Plaintiff,

-against-

DECISION AND ORDER

Index 035684/2017

Motion # 1 - MD
Motion # 2 - MG
Motion # 3 - MD
DC - Y

K D NUNNERY-MULLEN,

Defendant(s).

-----X
THOMAS E. WALSH, II, J.S.C

The following papers, numbered 1 to7, were considered in connection with the Plaintiff's Notice of Motion (Motion # 1) for an Order (a) granting Plaintiff summary judgment as to legal liability and (b) for such and further relief as this Court deems just and proper; and also considered in connection with the Defendant's Notice of Cross Motion (Motion #2) for an Order (a) pursuant to Civil Practice Law and Rules § 3211(a) dismissing Plaintiff's complaint against Mullen in its entirety and (b) granting such other, further and different relief as this Court may deem just, proper and equitable; and also considered in connection with the Plaintiff's Notice of Motion (Motion # 3) for an Order (a) Civil Practice Law and Rules § 308(5) to deem the Defendant as served and (b) permitting Plaintiff to serve the Defendant, through her attorney with service of process:

PAPERS

NUMBERED

Notice of Motion (Motion #1)/Affirmation of Jeffrey M. Adams, Esq./ Exhibits (A-C)	1
Affirmation of Sarah Allison, Esq. in Opposition/Exhibits (A-E)	2
Notice of Cross Motion (Motion #2)/Affirmation of Sarah Allison, Esq./ Exhibits (A-F)	3
Affirmation of Jeffrey M. Adams, Esq. in Opposition (Motion #2)	4
Reply Affirmation of Jeffrey M. Adams, P.C. (Motion #1)	5
Notice of Motion (Motion #3)/Affirmation of Jeffrey M. Adams, Esq.	6
Affirmation of Sarah Allison, Esq. in Opposition	7

Upon the foregoing papers, the Court now rules as follows:

Briefly, this action arises out of a motor vehicle accident that occurred on July 21, 2017 on 87 in which the vehicle operated by Defendant struck the vehicle operated by Plaintiff in the rear. Plaintiff alleges personal injuries as a result of the accident.

The action was commenced by Summons and Complaint filed on November 22, 2017. Plaintiff e-filed an Affidavit of non-service indicating that on March 31, 2018 at 22 Vincenzo Court Monroe, New York 10950 the process server attempted to serve Defendant, but was informed by a male occupant of the residence that Defendant was an old tenant who had moved out months ago. A second Affidavit of non-serve was e-filed indicating that on April 7, 2018 at 9 Lexington Hill Road, Unit 6 Harriman, New York 10926 the process server attempted to serve Defendant, but was informed by a male occupant of the residence that Defendant was an old tenant who no longer lived there. Defendant joined issue by service of an Answer on May 11, 2018 raising failure to properly serve the Defendant (personal jurisdiction) as her first affirmative defense along with discovery demands. Discovery demands were filed by Plaintiff on June 8, 2018. Also filed on June 8, 2018 was Plaintiff's Notice of Motion (Motion #1) seeking summary judgment on liability. In opposition Defendant's raised the argument that the Defendant was never personally served. Along with the opposition Defendants filed a Notice of Cross Motion (Motion #2) seeking dismissal pursuant to Civil Practice Law and Rules § 3211(a)(8) due to lack of personal jurisdiction. Plaintiff opposed Defendant's cross motion and filed a Notice of Motion (Motion #3) to deem the Defendant served pursuant to Civil Practice Law and Rules § 308(5).

Turning first to Defendant's Notice of Cross Motion pursuant to Civil Practice Law and Rules § 3211(a)(8), the Defendant contends that she has never been served with the Summons and Complaint and that she was only informed of the instant action after being contacted by her counsel, who were retained by her insurance carrier. According to Defendant, prior to Defendant's counsel being retained the Defendant's insurance carrier became aware of the instant action based upon Plaintiff's request for uninsured motorist arbitration. The Defendant's counsel asserts that once the Defendant's insurance carrier received the aforementioned notice they retained counsel and counsel filed a responsive pleading on Defendant's behalf. Defendant further argues that they raised the affirmative defense of lack of personal jurisdiction due to Plaintiff's failure to serve Defendant in the aforementioned Answer. Defendant asserts that she has never been served in any manner as subscribed by any section of Civil Practice Law and Rules § 308 as demonstrated by the two (2) Affidavits of non-service filed by the Defendant. Additionally, Defendant notes neither Affidavit of non-service indicates that the Summons and Complaint were affixed at either location, or any other location as required pursuant to Civil Practice Law and Rules § 308(4). Defendant avers in her Affidavit that she

was unaware of the instant action until she was contacted by her counsel retained by her insurance carrier in May 2018.

In opposition Plaintiff's counsel states that the police incident report for the subject motor vehicle accident provide an address of 51 Jay Mar Ct., Monroe, New York 10950, which he presumes is the address provided by the Defendant to law enforcement who responded to the accident. Plaintiff further states that the Defendant did not produce a copy fo her driver's license with the instant cross motion and as such he is presuming that she has not changed her address on her license. Additionally, Defendant argues he has searched the Department of Motor Vehicles website and the Defendant never filed a MV-104 indicating an address change.

Pursuant to Civil Practice Law and Rules § 3211(a)(8) "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the court has no jurisdiction of the person of the defendant." A natural person must be served in strict compliance with the statutory methods set forth in Civil Practice Law and Rules § 308. [Washington Mutual Bank v. Murphy, 127 AD3d 1167 (2d Dept 2015); Estate of Waterman v. Jones, 46 AD3d 63, 65 (2d Dept 2007); Emigrant Mtge. Co., Inc. v. Westervelt, 105 AD3d 896 (2d Dept 2013)]. Civil Practice Law and Rules § 308 sets fourth four different ways in which service of process on an individual can be effectuated so that the court will obtain jurisdiction over the person. "It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceeding are thereby rendered null and void." McMullen v. Arnone, 79 AD2d 496, 499 (2d Dept 1981); Krisilas v. Mount Sinai Hosp., 63 AD3d 887, 889 (2d Dept 2009)]. "A defendant's eventual 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 Civil Practice Law and Rules § 308." [Washington Mut. Bank v. Murphy, 127 AD3d at 1174; Bankers Trust Co. Of Cal v. Tsoukas, 303 AD2d 343, 344 (2d Dept 2003); De Zego v. Donald F. Bruhn, M.D. P.C., 67 NY2d 875, 877 (1986); Macchia v. Russo, 67 NY 2d 592, 595 (1986); Feinstein v. Bergner, 48 NY2d 234, 241 (1979)].

In the instant action the Defendant alleges that she was never served the Summons and Complaint and only became aware of the instant action upon notice from counsel hired by her insurance carrier after they received notice through Plaintiff's filing for uninsured motorist arbitration. Plaintiff has e-filed two (2) separate Affidavits of non-service, (both demonstrating service after the one hundred twenty (120) day window to serve after commencement subscribed by Civil Practice Law and Rules § 306-b), both at addresses that are different from the address which the Plaintiff indicates is the Defendant's address in the police accident report. In essence the Plaintiff has admitted that he has failed to properly serve the Defendant, as he never addresses the two affidavits of non-service that he e-filed earlier and only makes reference to a third address, which he presumes is the Defendant's correct address. Curiously,

Plaintiff fails to state whether he attempted to serve Defendant at the address he provides that was obtained from the police accident report or provide any affidavit of service as to that address that would demonstrate compliance with the service requirements as set forth in Civil Practice Law and Rules § 308. Plaintiff has provided absolutely no evidence that the Defendant or her attorneys were ever served in the instant action. Additionally, Plaintiff's counsel ignores the statement made by Defendant's counsel that the Defendant and her counsel only became aware of the instant action after the Plaintiff filed an uninsured motorist arbitration form which was forwarded to the insurance carrier. The fact that the insurance carrier eventually became aware of the instant action, hired the Defendant counsel and the Defendant was made aware of the instant action does not cure the jurisdictional defect created by the Plaintiff's failure to serve the Defendant pursuant to § 308. As the Defendant was never properly served in the instant action, this Court lacks personal jurisdiction over the Defendant and the instant action must be dismissed.

Based upon the Court's dismissal of the instant action due to a lack of personal jurisdiction over the Defendant, Plaintiff's Motion for Summary Judgment (Motion #1) and Plaintiff's Motion to Deem the Defendant Served pursuant to Civil Practice Law and Rules § 308(5) (Motion # 3) are denied as moot.

Accordingly, it is hereby

ORDERED that Defendant's Cross Motion to Dismiss (Motion #2) is granted in its entirety; and it is further


ORDERED that Plaintiff's Motion for Summary Judgment (Motion #1) is denied as moot; and it is further

ORDERED that Plaintiff's Motion to Deem the Defendant Served pursuant to Civil Practice Law and Rules § 308(5) (Motion # 3) is denied as moot; and it is further

ORDERED that the Clerk is directed to mark the instant matter disposed.

The foregoing constitutes this Court's Decision and Order on Motions # 1, 2 and 3.

Dated: New City, New York
September 19, 2018



HON. THOMAS E. WALSH, II
Justice of the Supreme Court

To:

JEFFREY M. ADAMS, ESQ.
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Attorney for Plaintiff
(via e-file)

SARAH ALLISON, ESQ.
GALLO VITUCCI KLAR, LLP
Attorney for Defendant
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