

<b>Smith v NYSJK, LLC</b>
2019 NY Slip Op 34707(U)
June 3, 2019
Supreme Court, Oswego County
Docket Number: Index No. EFC-2019-0750
Judge: Gregory R. Gilbert
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF OSWEGO

DAVID A. SMITH and KELLEY M. SMITH,

Plaintiff,

v.

NYSJK, LLC, d/b/a NATURAL BRIDGE/  
WATERTWON KOA, KAMPGROUNDS OF  
AMERICA, INC., JOHN KELSEY and  
SALLY KELSEY,

Defendants.

DECISION & ORDER

Index No.: EFC-2019-0750

RJI No.: 37-19-0374

HON. GREGORY R. GILBERT, JSC

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On May 14, 2016, plaintiffs, David A. Smith, Kelley M. Smith (“Smith”) and their children were on campgrounds operated by NYSJK, LLC (“the LLC”) and owned by John and Sally Kelsey, managing members of the LLC. David A. Smith was struck and injured by an unknown individual operating an all terrain vehicle at that time. Smith commenced this action by summons and complaint filed May 14, 2019.

The present motion is one to dismiss under CPLR §3211(a)(8) for lack of personal jurisdiction over John Kelsey (“Kelsey”). The motion is timely under CPLR §3211(e) being within 60 days of the Kelsey’s July 8, 2019 answer which preserved the jurisdictional defense.

The issue raised by Kelsey concerns substituted service on his wife, Sally. It is alleged that the necessary mailing was not done within 20 days under CPLR §308(2) nor was there a filing to complete service. Kelsey admits that the service was attempted at his actual place of business and this would allow for substituted service. Kelsey also denies that there was a follow up mailing received marked “personal and confidential”.

The implications are serious as the statute of limitations has expired in the action. Smith has filed a cross motion which seeks *nunc pro tunc* approval for the filing of the affidavit of service as submitted to the Court.

The complaint was served in Connecticut. CPLR §313 dictates that the manner of service is governed by New York statute although the issue of who may serve would be governed by Connecticut law. Shepard v. Morning Pride Manufacturing, Inc., 138 AD2d 74 (3<sup>rd</sup> Dept 1988); Weinstein, Korn & Miller §313.06. Qualification is not raised as an issue by the post hearing submissions.

Smith’s cross motion is brought pursuant to CPLR §2001 and 2004 both to correct an irregularity, omission or mistake and to extend time. Whether CPLR §2001 or 2004 can be applied

in a failure to mail or file setting was left as an open question by Davis v. Bollweg, 249 AD2d 972 (4<sup>th</sup> Dept 1998) and Matter of Laidlaw Energy & Environmental, Inc. v. Town of Ellicottville, 60 AD3d 1284 (4<sup>th</sup> Dept 2009) leave to appeal denied 61 NY3d 710. However, the issue is emphatically decided in Ward v. Kaufman, 120 AD2d 929 (4<sup>th</sup> Dept 1986) and Bank v. Eschwege, 71 AD3d 1413 (4<sup>th</sup> Dept 2010) to allow correction at least as to the filing requirement. Divito v. Fiandach, 160 AD3d 1404 (4<sup>th</sup> Dept 2018) notes that a motion for late filing would be required as a late filing without a motion is considered a nullity. Relief would not have been properly considered without the cross motion. Zheleznyak v. Gordon & Gordon, PC, 175 AD3d 1360 (2<sup>nd</sup> Dept 2019).

The filing issue is non-jurisdictional. Conde v. Zaganjor, 66 AD3d 947 (2<sup>nd</sup> Dept 2009). It can be cured by *nunc pro tunc* relief. Reporter Company v. Tomicki, 60 AD2d 947 (3<sup>rd</sup> Dept 1978) appeal dismissed 44 NY2d 791. Further, this is not a case where there was a complete failure to file given that the initial affidavit of service on Kelsey was filed with the Clerk's Office on June 14, 2019. Given that Kelsey is aware of the litigation, is represented by competent counsel and has already answered, there is no apparent prejudice on the cross motion.

Smith also asserted by cross motion that the mailing requirement (which was not shown on the initial affidavit of service) was met by the process server who subsequently corrected the affidavit of service to show mailing under CPLR §308(2). Smith asserted that this was sufficient to resolve the mailing issue.

The amended/corrected affidavit of service dated September 23, 2019 shows substituted service on June 4, 2019 followed by a mailing on June 6, 2019. The amended/corrected affidavit states that it was mailed as "a 1<sup>st</sup> Class postpaid properly addressed envelope not indicating that the mailing was from and (*sic*) attorney or concerned legal action and marked "Personal and Confidential". Assuming this is accurate, there was no delay in mailing resulting in dismissal for lack of jurisdiction which met the requirements of CPLR §308(2). See Estate of Norman Perlman v. Kelly, 175 AD3d 1249 (2<sup>nd</sup> Dept 2019). Nevertheless, the initial affidavit of service failed to meet these requirements. This separate issue is jurisdictional. RWP Group, Inc. v. Resnick, 166 AD2d 514 (2<sup>nd</sup> Dept 1990); Broomes-Simon v. Klebanow, 160 AD2d 973 (2<sup>nd</sup> Dept 1990).

Bare and unsubstantiated denials are insufficient to rebut the presumption of service from a proper affidavit of service. The original affidavit of service did not mention a follow up mailing. This was sufficient to require a traverse hearing. US Bank National Association v. Vanvliet, 24 AD3d 906 (3<sup>rd</sup> Dept 2005); Cach, LLC v. Ryan, 158 AD3d 1193 (4<sup>th</sup> Dept 2018); Fabian v. Mullen, 20 AD3d 896 (4<sup>th</sup> Dept 2005). LeFevre v. Cole, 83 AD2d 992 (4<sup>th</sup> Dept 1981) is directly on point and the failure to conduct a traverse hearing even with an affidavit of service meeting the requirements of CPLR §308(2) would have been error.

The traverse hearing was conducted on March 3, 2020. Smith offered the testimony his process server, Sandra Yade. The Kelseys testified on their own behalf.

The testimony of John Kelsey was relevant only as to his continuing denial of a recollection

that he received an envelope marked personal and confidential containing a copy of the summons and complaint. The testimony of Sally Kelsey was generally to the same effect but for the admission that she was not the only person to open and deal with the mail. Sally Kelsey also denied that Yade was the individual who made the physical service of the complaint but the Court discounts that claim as not credible given the initial affidavits of service filed on June 14, 2019.

The Court found Yade's testimony to be credible. She completed delivery of the summons and complaint at the Kelsey Niantic campground office at 271 West Main Street, Niantic, CT 06357 on June 4, 2019. Kelsey does not dispute that service was made at that time and place. Yade further testified that she personally addressed an envelope to John Kelsey to that same address marking it personal and confidential in blue ink beneath the Kelsey address, enclosing an additional copy of the papers she had served and that she personally placed it in the mail on June 6, 2019 which mailing was not returned.

That the amended/corrected affidavit of service references CPLR §308(4) rather than CPLR §308(2) is irrelevant given the fact that the affidavit of service describes delivery to a person of suitable age and discretion and that the mailing requirements are identical between the two subsections. At best, the reference constitutes a mere irregularity. Pierre v. Pierre, 298 AD2d 511 (2<sup>nd</sup> Dept 2002); Miller v. Roche, 227 AD2d 998 (4<sup>th</sup> Dept 1996). CPLR §306 specifies the facts of service such as the papers served, the person served, the date time and address of service and the method of service be stated but does not require recitation of the statute under which service is made.

The Court is not persuaded by Kelsey's argument that the failure of a check box to show mailing on software kept by Connecticut Process Server has any bearing on this matter. Yade testified that she merely referenced the software to refresh her recollection of when she had completed service before completing the amended/corrected affidavit. Yade neither maintained the software or made any entries to it. An error in data entry has no bearing on Yade's recollection of what she did or did not do. Burr v. Eveready Insurance Co., 253 AD2d 650 (1<sup>st</sup> Dept 1987) appeal dismissed 92 NY2d 1041 as referenced by Kelsey dealt with an irregularity to a notice of claim and no such irregularity is presented as to the amended/corrected affidavit of service.

The Court rejects the notion that Yade was an interested witness as claimed by Kelsey. It is incredible to even consider that there would be a financial interest in maintaining a relationship with Smith or Smith's attorneys. Speculation that there might be some exposure to litigation is not a substitute for evidence of witness bias particularly given that the issue was always under the supervision of Smith's counsel who bears the ultimate responsibility for the conduct of the case.

Kelsey also suggests that Yade's lack of familiarity with the CPLR may be grounds to discount her testimony. The mere fact that a process server did not fully comprehend the affidavit of service that is signed is not dispositive of whether service was properly made. Blue Spot, Inc. V. Superior Merchandise Electronics Co., 150 AD2d 175 (1<sup>st</sup> Dept 1989). The same would be true as to a lack of knowledge of the CPLR for an out of state process server.

Kelsey takes the position that the failure of Yade to specifically recall what document she mailed to him is “incredulous” and requires the Court to dismiss the complaint. The position has no merit. Karanja v. Karanja, 193 AD2d 718 (2<sup>nd</sup> Dept 1993); Miller v. Roche, 227 AD2d 998 (4<sup>th</sup> Dept 1996).

The precise issue in this matter is whether there is a preponderance of credible evidence that Yade made the follow up mailing to Kelsey as required under CPLR §308(2). She has testified that she completed the envelope herself and personally mailed it with an additional copy of the papers she had just served. She testified that the envelope was marked personal and confidential in her handwriting in blue ink directly below Kelsey’s address. She also testified that the envelope was not returned. Such testimony constitutes a preponderance of evidence as compared to the mere denial by Kelsey of receipt of such a mailing. Accordingly, it is

**ORDERED**, that the motion of defendant, John Kelsey, to dismiss the complaint of plaintiffs, David A. and Kelley M. Smith, for lack of personal jurisdiction shall be and the same is hereby **DENIED**, and it is

**ORDERED**, that the cross motion of plaintiffs, David A. and Kelley M. Smith, for leave to file an affidavit of service, as presented upon the motion herein, upon John Kelsey *nunc pro tunc* to be effective June 6, 2019 shall be and the same is hereby **GRANTED**.

**IT IS SO ORDERED.**

**ENTER**

Dated: June 3, 2019  
Oswego, NY

  
HON. GREGORY R. GILBERT  
SUPREME COURT JUSTICE