

Eaton v Asante

2019 NY Slip Op 35121(U)

July 2, 2019

Supreme Court, Bronx County

Docket Number: Index No. 27084/2016E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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ANTHONY EATON,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 27084/2016E

PETER OWUSU ASANTE,

Defendant.
-----X

John R. Higgitt, J.

Upon the traverse hearing of January 16, 2019 (Linda Fitzner, Senior Court Reporter) held pursuant to the October 30, 2018 order of the court, defendant's motion to dismiss the complaint on the ground that plaintiff failed to effect service of process on defendant is granted.

Defendant moved to dismiss the complaint, arguing, among other things, that plaintiff failed to effect service of process on defendant. In the court's October 30, 2018 decision and order, the court found that the affidavit proffered by plaintiff was sufficient to establish, prima facie, that service was achieved on defendant under CPLR 308(2) (deliver-and-mail service); that defendant was estopped from asserting that the address at which service was attempted on him -- 161 East 206th Street, apartment 6E, Bronx, New York 10458 -- was not his actual dwelling place or usual place of abode; and that issues of fact existed as to where the process server left the process, with whom he left it and whether the person to whom he delivered the process was one of suitable age and discretion within the meaning of CPLR 308(2). Therefore, the court ordered a traverse hearing and held defendant's dismissal motion in abeyance.

At the January 16, 2019 hearing, plaintiff called one witness: the process server. Plaintiff introduced into evidence two documents: the affidavit of service, and the relevant entry of the process server's log book.

Based on the court's consideration of the hearing transcript and the two documents

entered into evidence, and the court's evaluation of the process server's credibility, the court concludes that plaintiff failed to establish, by a preponderance of the hearing evidence, that service of process was effected on defendant (*see Woods v M.B.D. Comm. Hous. Corp.*, 90 AD3d 430 [1st Dept 2011]; *Elm Mgt. Corp. v Sprung*, 33 AD3d 753 [2d Dept 2006]; *see also Persaud v Teaneck Nursing Ctr., Inc.*, 290 AD2d 350 [1st Dept 2002]).

With respect to service under CPLR 308(2), the manner of service set forth in the affidavit of service, plaintiff failed to establish by a preponderance of the hearing evidence that the "John Doe" to whom the process was delivered was a person of suitable age and discretion. The process server testified repeatedly that he never saw the person to whom he spoke over the apartment's intercom system and through the apartment's door. The process server offered no testimony suggesting that "John Doe" was of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the process to defendant (*City of New York v Chemical Bank*, 122 Misc 2d 104, 108 [Sup Ct, N.Y. County 1983]; *see Costine v St. Vincent's Hosp. & Med. Ctr. of NY*, 173 AD2d 422 [1st Dept 1991]; *Prochillo v Acker*, 108 AD2d 800 [2d Dept 1985]).

Regarding service under CPLR 308(1), which plaintiff argued at the traverse hearing was satisfied, plaintiff failed to establish by a preponderance of the hearing evidence that the person to whom the process server spoke over the apartment's intercom system and through the apartment's door was, in fact, defendant. Although the process server testified that the male with whom he spoke over the intercom system identified himself as the defendant, no evidence was offered corroborating that the individual was the defendant. As the process server candidly acknowledged, the person with whom he spoke "could have been anybody who could have said he was [defendant], he could have been anyone in the apartment since I haven't seen the person

face to face he could have said he was anybody” (hearing transcript at 42).

In light of the principles that service of process must be made in strict compliance with the methods for effecting service upon a natural person pursuant to CPLR 308 (*Macchia v Russo*, 67 NY2d 592, 594 [1986]; *cf. Ruffin v Lion Corp.*, 15 NY3d 578 [2011] [technical, nonprejudicial defects in service may be overlooked or corrected under CPLR 2001; methods of service that introduce greater possibility of failed delivery cannot be overlooked or cured]); that “the failure to serve [properly] the process leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void” (*Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 [2d Dept 2009]); and that a defect in service is not cured by the defendant’s subsequent receipt of actual notice of the action (*see Feinstein v Bergner*, 48 NY2d 234, 241 [1979]), the court must conclude that plaintiff failed to effect service of process on defendant. Thus, defendant’s motion to dismiss the complaint on the basis that the court lacks personal jurisdiction over him is granted.

Accordingly, it is

ORDERED, that the aspect of defendant’s motion seeking dismissal of the complaint on the ground that the court lacks personal jurisdiction over him is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the complaint.

This constitutes the decision and order of the court.

Dated: July 2, 2019



John R. Higgitt, A.J.S.C.