

Valencia v Omar

2019 NY Slip Op 35210(U)

April 22, 2019

Supreme Court, Queens County

Docket Number: Index No. 710947/18

Judge: Robert I. Caloras

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALOR AS

PART 36

Justice

-----X
CARLOS R. VALENCIA

Plaintiff(s),

-against-

AQUIL RUSSELL OMAR and MARIA FERMIN,

Defendant(s)
-----X

Index No. 710947/18
Motion Date: 2/28/19
Motion Cal. No. 40
Seq. No 2

The following papers numbered E18-E32 read on this motion by defendant, Aquil Russell Omar, to dismiss the complaint and for summary judgment.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits.....	E18-E24
Affirmation in Opposition-Exhibits.....	E25-E30
Reply Affirmation.....	E31-E32

Based upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action for personal injuries allegedly sustained by the plaintiff as a result of an automobile accident which occurred on September 5, 2015. On October 30, 2018, Hon. Diccia T. Pineda Kirwan issued a decision dismissing the complaint as against the defendant Maria Fermin.

Defendant has moved, *inter alia*, to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. "Upon a CPLR 3211(a)(8) motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proof to establish a basis for such jurisdiction" (America/Intl. 1994 Venture v Mau, 146 AD3d 40, 51 [internal quotation marks omitted] [2d Dept. 2016]). "However, to successfully oppose such a motion, the plaintiff need only make a *prima facie* showing that the defendant was subject to the personal jurisdiction of the court" (*id.* at 51; see Chen v Guo Liang Lu, 144 AD3d 735, 736 [2d Dept. 2016]). The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff,

and all doubts are to be resolved in favor of the plaintiff (see Weitz v Weitz, 85 AD3d 1153, 1153-1154 [2d Dept. 2011]).

In support of his opposition, defendant has submitted the following documents: the Summons and Complaint; the Answer with Combined Demands; Laurance Knox's affidavit of service, notarized on August 7, 2018; and a print out of the United States Postal Service ("USPS") zip code locator. Defendant argues that service upon him was improper because the plaintiff's process server did not exercise due diligence in attempting to serve him by personal delivery before resorting to service under the "affix and mail" method prescribed by CPLR §308(4). Defendant asserts that the affidavit of service indicates that the process server only made two attempts to personally serve him on consecutive days in the evening, and that a search was made to determine if he was in the military. Defendant further asserts that the affidavit of service does not indicate whether the process server attempted to ascertain where he worked, nor were any inquiries made of his neighbors regarding his whereabouts. Therefore, the defendant argues that the plaintiff has failed to exercise due diligence, and as a result, service was not effectuated upon him.

Defendant further asserts that the process server failed to mail the Summons and Complaint to his proper address. In the affidavit of service, plaintiff's process server states that the Summons and Complaint was mailed to: 22345 104th Avenue, Queens Village, NY 11425. Defendant has submitted a copy of a search with the USPS, which indicates that the correct zip code for his address is 11429, not 11425. However, defendant acknowledges that the police accident report indicates that his zip code is "11425". Defendant claims that the process server merely relied upon the police accident report to obtain his address, instead of conducting a search to confirm his correct zip code. Therefore, the defendant argues that the Court does not have jurisdiction over him, because plaintiff failed to exercise due diligence to determine his proper address.

In opposition, plaintiff has submitted the following documents: Mr. Knox's affidavit of service, notarized on August 7, 2018; an affidavit from Mr. Knox, notarized on February 13, 2019; the police report; a Google map search of the defendant's street address with zip codes 11425 and 11429; and an affidavit from Danielle Martinez, an employee of Nationwide Court Services, the process serving company that handled the service of process on the defendant, notarized on February 13, 2019. Plaintiff argues that Mr. Knox exercised due diligence prior to serving the defendant by the "affix and mail" method. In Mr. Knox's affidavit of service, he stated that he attempted to personally serve the Summons and Complaint upon defendant Aquil Russell Omar ("defendant") at 22345 104th Avenue, Queens Village, New York on July 27, 2018 at 7:30 PM and July 28, 2018 at 4:24 PM. After these

two attempts, Mr. Knox stated that he affixed a copy of the Summons and Complaint to the door of defendant's residence on August 3, 2018 at 6:49 PM. In his affidavit, notarized on February 13, 2019, Mr. Knox stated that he attempted to serve the defendant on July 27, 2018 at 7:30 PM (Friday evening), July 28, 2018 at 4:24 PM (Saturday afternoon), and August 3, 2018 at 6:40 AM (Friday morning), at which times there was no answer at the door of the defendant's residence. Mr. Knox further stated that he attempted to speak with neighbors of the defendant in an attempt to confirm the defendant's address, to find another address for service, or to find a place of business for the defendant. However, Mr. Knox stated that he was unable to locate a neighbor to speak with, and therefore resorted to the "affix and mail" method of service upon the defendant. Therefore, plaintiff argues that he satisfied the "due diligence" requirement of CPLR §308(4).

Plaintiff also argues that he satisfied the mailing requirement of CPLR §308(4). Plaintiff asserts that the process server mailed the Summons and Complaint to the address listed on the police report for the defendant. Plaintiff has also submitted a copy of a Google map search of the defendant's street address with zip codes 11425 and 11429. Furthermore, in her affidavit, Ms. Martinez, stated that the mailing at issue, which was sent to the defendant, was never returned to Nationwide Court Services, Inc. as undeliverable. Therefore, plaintiff argues that the Summons and Complaint was properly mailed to the defendant.

Pursuant to CPLR 308(1), the preferred methods of personal service on an individual are by delivering the summons to the defendant, or by delivering the summons to a person of suitable age and discretion and mailing another copy of the summons to the defendant's last known residence or actual place of business (see CPLR 308 [2]). If service cannot be effected by those methods "with due diligence," CPLR 308 (4) permits so-called "nail and mail" service, which entails affixing the summons to the door of the defendant's "actual place of business, dwelling place or usual place of abode," and by mailing the summons either to the defendant's last known residence or actual place of business (CPLR 308 [4]). "[T]he due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (Gurevitch v Goodman, 269 AD2d 355, 355 [2d Dept. 2000]; see County of Nassau v Letosky, 34 AD3d 414, 415 [2d Dept. 2006]; O'Connell v Post, 27 AD3d 630, 631 [2d Dept. 2006]). What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality (see Estate of Waterman v Jones, 46 AD3d 63, 66 [2d Dept. 2007]).

Here, in his subsequent affidavit, issued on February 13, 2019, Mr. Knox (plaintiff's

process server) made several significant statements that were not in his original affidavit of service. In his affidavit of service, Mr. Knox stated that he attempted personal service upon the defendant two times before affixing the Summons and Complaint to the defendant's door. However, in his subsequent affidavit, Mr. Knox stated that, prior to affixing the Summons and Complaint to the defendant's door he attempted personal service upon the defendant. Mr. Knox also stated that he attempted to speak with the defendant's neighbors to confirm the defendant's address, to find another address for service, or to find a place of business for the defendant. Even if the Court were to consider Mr. Knox's subsequent affidavit, it is still deficient because it failed to set forth any specific inquiries Mr. Knox made with the defendant's neighbors to ascertain the defendant's whereabouts and place of employment (see McSorley v. Spear, 50 AD3d 652, 653 [2d Dept. 2008]). Moreover, Mr. Knox's subsequent affidavit was issued on February 13, 2019, two months after plaintiff's time to perfect service pursuant to CPLR 306-b. Under these circumstances, the Court finds that the plaintiff has failed to satisfy the due diligence requirement pursuant to CPLR 308(4). Accordingly, the branch of the motion seeking to dismiss the complaint is granted.

The remaining branch of the motion seeking summary judgment is denied as academic.

Dated: April 22, 2019



ROBERT I. CALORAS, J.S.C.

FILED
MAY -8 2019
COUNTY CLERK
QUEENS COUNTY