

Andrade v Bruenn

2019 NY Slip Op 35212(U)

November 18, 2019

Supreme Court, Queens County

Docket Number: Index No. 708699/17

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

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FRANCISCO ANDRADE,

Plaintiff,

-against-

**CYNTHIA BRUENN, LINDA ZABALA-DURAN,
and MIGUEL PINOS,**

Defendants.

Index No. 708699/17

Motion Date: 10/3/19

Motion Cal. No. 1

Seq. No. 2

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The following papers numbered E18-E26 read on this motion by defendants Linda Zabala-Duran and Miguel Pinos for an order pursuant to CPLR 306-b, 308(4), 3211(a)(8), and 3215(c), dismissing plaintiff's Complaint against said defendants for failure to prosecute and lack of personal jurisdiction; and the cross motion by plaintiff for an order pursuant to CPLR 3215 for a default judgment against defendants Linda Zabala-Duran and Miguel Pinos, and denying their motion to dismiss the Complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation.....	E18
Affirmation in Opposition-Exhibits.....	E19-E22
Notice of Cross Motion-Affirmation in Opposition-Exhibits.....	E23
Reply Affirmation and Affirmation in Opposition.....	E24-E25
Reply Affirmation.....	E26

Upon the foregoing papers, it is ordered that the motion by defendants Linda Zabala-Duran (Hereinafter "Duran") and Miguel Pinos (Hereinafter "Pinos") is granted, and the cross motion by the plaintiff is denied as follows:

This is an action to recover damages for personal injuries plaintiff allegedly sustained as the result of an motor vehicle accident on June 22, 2014, wherein plaintiff was a passenger in defendants', Duran and Pinos, vehicle when it collided with the vehicle owned and operated by co-defendant Cynthia Bruenn. In the Affidavit of Service, notarized on September 5, 2017 and E-Filed under E-15, Jazmin Velasquez stated that on August 30, 2017 at 9:10 PM she personally served the Summons and Verified Complaint upon defendant Pinos. In the Affidavit of Service, notarized on September 27, 2017 and E-Filed under E-14, Taffhina L. Thonpson stated that she served the Summons and Verified Complaint upon defendant Duran "by affixing a true copy of each to the door of said premises, which is recipient's dwelling place. Deponent was unable, with due diligence to find defendant or a

person of suitable age and discretion, thereat having called there on 9/9/17 @ 9:07 am; 9/13/17 @ 7:52 pm; and 9/14/17 @ 7:49 a.m". Both Affidavits of Service were filed with the County Clerk on September 28, 2018. Defendants Duran and Pinos have not filed an Answer or otherwise appeared in this matter.

In the first branch of the motion, defendant Pinos argues that the Complaint should be dismissed as to him pursuant to CPLR 3215(c). Pinos was personally served with the Summons and Verified Complaint on August 30, 2017, and his time to Answer expired on September 20, 2017. Therefore, Pinos argues that pursuant to CPLR 3215(c), plaintiff had until September 20, 2018, to move for a default judgment against him. Consequently, Pinos argues that plaintiff's Complaint should be deemed abandoned, because he has failed to move for a default against him.

In opposition, plaintiff argues that his time to comply with CPLR 3215(c) does not elapse until September 28, 2019. Although Pinos was personally served on August 30, 2017, plaintiff did not file the Affidavit of Service until September 18, 2018. As such, plaintiff argues that service upon Pinos was not complete until September 28, 2018. Defendant Bruenn also opposes, and argues that in balancing the equities herein, a greater prejudice would ensue if the case against Pinos was dismissed on a technicality, and not on the merits.

The Court finds that the Complaint as against defendant Pinos is deemed abandoned pursuant to CPLR 3215(c). Contrary to plaintiff's claim, CPLR 308(1) provides that service of process by personal delivery is accomplished "by delivering the summons within the state to the person to be served", and does not require that . Unlike CPLR 308(2) and 308(4), there is no additional requirement that an affidavit of service by personal delivery under CPLR § 308(1) be filed with the clerk of the court before service of process is deemed complete. Consequently, service as against defendant Pinos was complete on August 30, 2017, the day that the Summons and Verified Complaint was personally delivered to him. The Affidavit of Service plaintiff filed on September 28, 2018 did not extend his deadline to move for a default judgment against Pinos. The Court also finds that plaintiff failed to set forth either any reasonable excuse for failing to timely move for a default judgment against Pinos, or demonstrate that his cause of action is potentially meritorious (Giglio v NTIMP, Inc., 86 AD3d 301, 308 [2d Dept 2011]). Notably, plaintiff failed to submit an affidavit demonstrating a reasonable excuse and a meritorious claim. Accordingly, this branch of the motion is granted, and plaintiff's Complaint as against defendant Pinos is dismissed pursuant to CPLR 3215(c).

The branch of the motion seeking to dismiss the Complaint as to defendant Duran pursuant to CPLR 308(4) and 3211(a)(8) is granted. Duran argues that the Complaint should

be dismissed because the plaintiff did not exercise the "due diligence" required by CPLR § 308(4). Duran argues that plaintiff's affidavits of service contain no indication that the process server made any inquiries as her whereabouts and places of employment. Moreover, the Process Server's weekday attempts at service were at times Duran could have reasonably been expected to be working or traveling to or from work, and each attempt at service was within the same six day period. As such, defendant Duran argues that plaintiff's Process Server failed to satisfy the due diligence requirement of CPLR § 308(4), and that the Plaintiff's complaint must accordingly be dismissed for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8).

In opposition, plaintiff argues that the attempts at service upon defendant Duran satisfied the "due diligence" requirement of CPLR 308(4). The Process Server made three attempts at service at varying times of day, from morning to night, as well as on varying days of the week at Duran's residence. Defendant Bruenn also opposes, and the action against Duran should not be dismissed on a technicality, and should be determined on the merits.

Affix and mail service pursuant to CPLR 308(4) is only valid where service under CPLR 308(1) by personal delivery or CPLR 308(2) by delivery to a person of suitable age and discretion "cannot be made with due diligence" (CPLR 308[4]; see Gray v Giannikios, 90 AD3d 836, 837 [2d Dept. 2011]; McSorley v Spear, 50 AD3d 652, 653 [2d Dept. 2008]; Estate of Waterman v Jones, 46 AD3d 63, 65 [2d Dept. 2007]). This requirement must be "strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (McSorley v Spear, supra at 653, quoting Gurevitch v Goodman, 269 AD2d 355 [2d Dept. 2000]; see Estate of Waterman v Jones, supra at 66; County of Nassau v Letosky, 34 AD3d 414, 415 [2d Dept. 2006]). If due diligence has been satisfied must be "determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality" (McSorley v Spear, supra at 653; see Estate of Waterman v Jones, supra at 66). Specifically, "it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment" (Estate of Waterman v Jones, supra at 66; see Serraro v Staropoli, 94 AD3d 1083, 1085 [2d Dept. 2012]; McSorley v Spear, supra at 654).

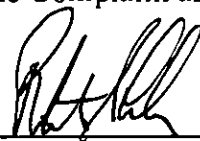
Here, the Process Server did not state in the Affidavit of Service whether she made any attempt to locate defendant Duran's place of employment so she could attempt to effectuate service there (see Serraro v Staropoli, supra at 1085; McSorley v Spear, supra at 654; Estate of Waterman v Jones, supra at 66; County of Nassau v Long, supra at 788). Notably, plaintiff failed to submit an affidavit from the Process Server specifying what, if any, attempts were made to locate Duran's place of employment. Under these circumstances,

the Court finds that the plaintiff failed to establish that he exercised due diligence in attempting to effectuate service pursuant to CPLR 308(1) or (2) before resorting to service pursuant to CPLR 308(4) upon defendant Duran (see Serraro v Staropoli, 94 AD3d at 1085; McSorley v Spear, 50 AD3d at 654; Estate of Waterman v Jones, 46 AD3d at 66; County of Nassau v Long, 35 AD3d at 788; Gurevitch v Goodman, 269 AD2d 355 [2d Dept. 2000]). Accordingly, the branch of the motion seeking to dismiss the Complaint as against defendant Duran pursuant to CPLR 308(4) and 3211(a)(5) is granted (Faruk v Dawn, 162 AD3d 744 [2d Dept. 2018]).

In light of the foregoing, the remaining branch of defendants', Pinos and Duran, motion and plaintiff's cross-motion for a default judgment against defendants Pinos and Duran are denied as academic.

Based upon the foregoing, the motion by defendants' Pinos and Duran is granted, and the cross motion by plaintiff is denied. Accordingly, the Complaint as against defendants' Pinos and Duran is dismissed.

Dated: November 18, 2019



ROBERT I. CALORAS, J.S.C.

