

**Pennant v Salmon**

2019 NY Slip Op 35213(U)

October 18, 2019

Supreme Court, Queens County

Docket Number: Index No. 706276/2017

Judge: Pam Jackman Brown

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This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT - COUNTY OF QUEENS**

**IAS PART 19  
SHORT FORM ORDER**

**Present: Hon. Pam Jackman Brown, JSC**

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**MARCEL ADRIAN PENNANT and THANDIWE  
PENNANT,**

Plaintiffs,

-against-

**VIOLET SALMON and CHARLES JOHNSON,**

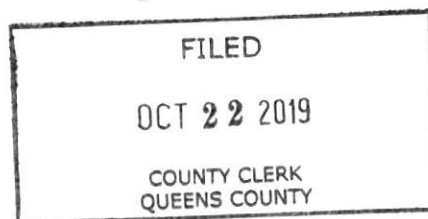
Defendants.  
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**Index No. 706276/2017**

**Motion Date: 3/4/19**

**Cal. No. 45**

**Mot. Seq. No.: 2**



Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 24 to 36 read on this motion by Plaintiffs for an Order: (1) vacating the December 3, 2018 Order by Judge Jackman Brown, dismissing Plaintiffs' complaint against Defendants Violet Salmon and Charles Johnson; and (2) restoring the action against Defendants Violet Salmon and Charles Johnson.

|  | <u>PAPERS E-FILE NUMBERED</u> |          |
|--|-------------------------------|----------|
|  | Papers                        | Exhibits |
| Notice of Motion - Exhibits and Affidavits Annexed | 24-26                         | 27-32    |
| Affirmation in Opposition                          | 33                            |          |
| Reply Affirmation                                  | 34                            | 35-36    |

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

This is an action by Plaintiffs to recover damages for personal injuries allegedly sustained as a result of motor vehicle accident on May 9, 2014. Plaintiffs commenced the instant proceeding with the filing of a summons and complaint on May 9, 2017. On February 8, 2018, Defendants filed an answer with counterclaims, and asserted several affirmative defenses, including lack of personal jurisdiction.

On or about October 31, 2018, Defendants moved by Notice of Motion for an Order pursuant to CPLR §3212 summary judgment on the ground of lack of personal jurisdiction. The Notice of Motion, duly noticed on October 30, 2018 (hereinafter “prior motion”) was returnable on December 3, 2018. Plaintiffs failed to oppose the prior motion or appear on the return date. Thus, Defendants’ prior motion was granted without opposition and the instant proceeding was dismissed.

Plaintiffs now move for an Order (1) vacating the December 3, 2018 Order by Judge Jackman Brown, dismissing Plaintiffs’ complaint against Defendants Violet Salmon and Charles Johnson; and (2) restoring the action against Defendants Violet Salmon and Charles Johnson. Defendants oppose the application.

CPLR § 5015(a) provides that the Court may relieve a party from a judgment or order on the grounds of excusable default, if the motion is made within one year after service a copy of the order with written notice of entry upon the moving party. Courts have held, “to vacate a default, the movant must establish that its default was excusable and that it has a meritorious claim or defense” (*Ricciardi v Sharrin*, 302 AD2d 577, 577 [2d Dept 2003]).

Here, Plaintiffs’ motion was timely filed within one year after service of the Order, dated December 3, 2018. Plaintiffs claim that the default is due to law office failure. Plaintiffs claim a meritorious defense to Defendants’ prior motion, in that they claim that Defendants were properly served. Defendants argue that the Court lacks personal jurisdiction over Defendants.

In considering the merit of Plaintiffs’ defense to Defendants’ prior motion, the Court first turns to the Court record. Plaintiffs commenced the instant proceeding on May 9, 2017, with the filing of a summons and complaint. Defendants interposed a verified answer with counterclaims and affirmative defenses, including the defense of lack of personal jurisdiction on February 8, 2018. On October 31, 2018, Defendants’ filed the prior motion claiming an entitlement to summary judgment on the ground of lack of personal jurisdiction. Defendants’ prior motion was granted without opposition on December 3, 2018. Notice of Entry of the Order, dated December 3, 2018, was filed on January 14, 2019, by counsel for Plaintiff on the counterclaim. Said Notice of Entry is duly noticed on January 14, 2019 (hereinafter “first Notice of Entry”). Notice of entry of the Order, dated December 3, 2018, was filed on January 15, 2019, by Defendants’ counsel. Said Notice of Entry is duly noticed on January 11, 2019 (hereinafter “second Notice of Entry”).

On February 13, 2019, Plaintiffs’ counsel filed two Affidavits of Service, both

sworn to by Irwin D. Abraham on February 1, 2019. In the first affidavit, identified as NYSCEF document no. 19, Irwin D. Abraham avers that he delivered the summons, complaint and notice regarding electronic filing upon Defendant Charles Johnson on Tuesday, September 5, 2017 at 1:42 PM, by delivery to a person of suitable age and discretion, namely "John Doe, Refused Name," at 25904 Craft Avenue, Rosedale, New York 11422. Said documents were subsequently mailed to the same address on September 6, 2017. In the second affidavit, identified as NYSCEF document no. 20, Irwin D. Abraham avers that he delivered the summons, complaint and notice regarding electronic filing upon Defendant Violet Salmon, on Tuesday, September 6, 2017, at 1:05 PM, by delivery to a person of suitable age and discretion, namely, "John Doe, Refused Name," at 19906 104<sup>th</sup> Avenue, Saint Albans, NY 11412. Said documents were subsequently mailed to the same address on September 6, 2017.

CPLR §308(2) provides for personal service upon a natural person by delivery to a person of suitable age and discretion at the actual place of business, dwelling place or usually place of abode of the person to be served. When service is effectuated by delivery to a person of suitable age and discretion, the summons must be mailed to the person to be served at his or her last known residence or actual place of business. Such delivery and mailing must be effected within twenty days of each other and proof of service must be filed with the clerk of the court within twenty days of such mailing or delivery, whichever is later. In accordance with the statute, "service shall be complete within ten days of such filing." The Appellate Division, Second Department has held "the failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004" (*Khan v Hernandez* 122 AD3d 802, 803 [2d Dept 2014]). Recently, in *Estate of Perlman v Kelley*, the court found, "timely filing of the affidavit of service is designed to give notice as to the plaintiff's claim of service and permit the defendant to calculate the time to answer" (2019 NY Slip Op 06475 Page 2).

Here, at the time of Defendants' prior motion, Plaintiff did not have a meritorious defense.

At the time of Defendant's prior motion, service of the pleadings upon Defendants was incomplete. Because the Affidavits of Service, sworn to on February 1, 2019, were not filed until February 13, 2019, since the Affidavits of Service were not filed with the clerk of the court within twenty days of September 6, 2019.<sup>1</sup> Additionally, at the time of the prior motion, Defendants did not have notice of Plaintiffs' claims regarding service,

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<sup>1</sup>The Affidavits of Service indicate that the pleadings were mailed to both Defendants on September 6, 2019.

affidavits annexed to the prior motion, Defendants denied receipt of service of the pleadings.

Notably, where a Defendant moves for summary judgment dismissing a complaint on the ground of lack of personal jurisdiction, Defendant must submit sufficient evidence to establish entitlement to summary judgment as a matter of law (See, *Dreznick v Lenchner*, 41 AD3d 769 [2d Dept 2007]). In the prior motion, duly noticed on October 30, 2018, Defendants submitted sworn affidavits denying receipt of service, to demonstrate an entitlement to summary judgment as a matter of law. Although Plaintiffs claim a meritorious defense to the prior motion, Plaintiffs could not have raised a triable issue of fact regarding the issue of personal jurisdiction, since the Affidavits of Service were not sworn to until February 1, 2019, more than three months after the filing of the prior motion.

Notably, Plaintiffs have not sought to deem the filing of proof of service on the Defendants timely *nunc pro tunc* to February 13, 2019. In light of Defendants' sworn denial of service, the Court declines to cure the defect in service sua sponte.

Since Plaintiffs failed to establish a meritorious defense to the prior motion, the applications of Plaintiffs are denied in entirety. Accordingly, the application is denied.

Dated: October 18<sup>th</sup>, 2019  
Jamaica, NY

  
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HON. PAM JACKMAN BROWN, J.S.C.

