

<b>Motor Veh. Acc. Indem. Corp. v Rizo-Siles</b>
2020 NY Slip Op 30345(U)
February 6, 2020
Supreme Court, New York County
Docket Number: 450368/2019
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 450368/2019

MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION,

MOTION DATE 11/06/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

YUBELKA RIZO-SILES, JOHN DOE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that defendant Yubelka Rizo-Siles' motion to dismiss for lack of personal jurisdiction pursuant to CPLR §3211(a)(8) is denied for the reasons set forth below.

Here, defendant moves to dismiss this action alleging that she was not properly served, and, thus, the Court does not have personal jurisdiction over her. Plaintiff opposes the motion and cross-moves to extend the time to serve as well as for alternate service. Defendant opposes plaintiff's cross-motion, and plaintiff replies.

In support of the motion, defendant argues that service was not properly effectuated pursuant to Vehicle Traffic law §253(2), as the return receipt from the certified mailing was returned to plaintiff unsigned and without notation. Thus, according to defendant, the certified mailing was never refused or unclaimed such that plaintiff could not avail itself of the option to serve the summons and complaint upon defendant by regular mail.

Vehicle Traffic law §253 states that the use of a vehicle, by a non-resident of the state, within the state constitutes an appointment by the non-resident of the secretary of state to accept service of papers in an action regarding such use of the vehicle. Vehicle Traffic law §253(2), states that:

[s]ervice of such summons shall be made by mailing a copy thereof to the secretary of state at his office in the city of Albany...and such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending...an affidavit of compliance herewith, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant...or, if acceptance was refused by the defendant or his agent, the original envelope bearing a notation by the postal authorities that receipt was refused...or, if the registered or certified letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail.

It is undisputed that plaintiff served the summons and complaint pursuant to VTL§253(2) by mailing to the secretary of state. Thereupon, plaintiff obtained defendant's address through her motor vehicle registration and complied with VTL §253(2) by mailing the requisite documents to defendant's address by certified mail with return receipt requested. It is further undisputed that the return receipt was returned to plaintiff and that plaintiff thereafter mailed documents to defendant by regular mail.

Here, defendant alleges that despite these mailings, service was not properly effectuated pursuant to VTL §253(2) as plaintiff failed to proffer the original envelope with the notation by the post office that the mailing was refused or unclaimed. According to defendant, without the original envelope, plaintiff failed to establish that defendant refused the mailing or that it was unclaimed. While defendant is not wrong that service was not complete pursuant to VTL §253(2), the Appellate Division, First Department, has explicitly held that "misrepresentation of

an address estops the defendants from claiming defective service under Vehicle Traffic Law §253”. *Squire v Greenberg*, 173 AD2d 362, 362 (1<sup>st</sup> Dep’t 1991). In *Squire*, the Appellate Division, First Department, specifically found that providing an erroneous address estops the defendant from raising a personal jurisdiction defense. *See id.*

Defendant argues that the registration address proffered by plaintiff is unreliable and specifically has a disclaimer which states that the “[d]ata is sometimes entered poorly, processed incorrectly and is generally not free from defect.” Notice of Cross-Motion, Exh. A, LexisNexis Motor Vehicle Registration, p. 2. However, plaintiff’s Affidavit of Compliance with VTL §253 attaches the receipt for service from the State of New York – Department of State which lists the party served as well as her registered address. Notably, such registered address is the same address that appears on the LexisNexis motor vehicle registration search proffered by plaintiff in the cross-motion. Moreover, such address is also the same address on the certified mailing receipt, the return receipt, and the affidavit of compliance. In fact, defendant concedes that they do not know what defendant’s current address is. *See* Affirmation in Opposition to Plaintiff’s Cross-Motion, ¶11. Thus, as defendant failed to provide a correct and current address in the registration, defendant is now estopped from alleging that service pursuant to VTL §253 was defective. As such, defendant’s motion to dismiss is denied and service is deemed effectuated on defendant. As service is deemed effectuated, plaintiff’s cross-motion to extend the time for service and for alternate service is denied as moot.

Accordingly, it is

ORDERED that defendant’s motion to dismiss is denied in its entirety, and service upon defendant is deemed effectuated; and it is further

ORDERED that plaintiff's cross-motion seeking to extend the time to serve and for alternate service is denied as moot; and it is further

ORDERED that all parties shall appear for a preliminary conference on March 20, 2020 at 9:30am in room 106 of 80 Centre Street, New York, NY 10013.

This constitutes the Decision/Order of the Court.



2/6/2020

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE