

McCrimmon v City of New York
2020 NY Slip Op 32128(U)
March 16, 2020
Supreme Court, Bronx County
Docket Number: 22412/2018E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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SKYLER T. MCCRIMMON,

Plaintiff,

-against-

THE CITY OF NEW YORK, NYC DEPARTMENT
ENVIRONMENTAL PROTECTION, and
HECTOR ADORNO,

Defendants.

-----x
Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion for Summary Judgment:

Papers Numbered

Plaintiff's Notice of Motion,	
Affirmation in Support and Exhibits	<u>1</u>
Defendant's Cross-Motion,	
Affirmation in Opposition and Exhibits.....	<u>2</u>
Plaintiff's Affirmation in Opposition.....	<u>3</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Plaintiff moves for an order directing defendants THE CITY OF NEW YORK (hereinafter "City"), NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION (hereinafter "DEP"), and HECTOR ADORNO, (hereinafter "Adorno"), to interpose an answer to plaintiff's summons with notice and verified complaint within 30 days, or in the alternative for default judgment against defendants, or alternatively, directing an inquest, and/or permitting plaintiff to file late affidavits of service is granted in part. The City's cross-motion for dismissal pursuant to CPLR §3211(e), CPLR §306-b, and CPLR §3215 (c) is denied.

This action stems from an alleged motor vehicle accident which took place on December 2, 2016 on Burke Avenue, Bronx, New York. Plaintiff served a notice of claim on March 2, 2017. (Pl. Ex. B). Thereafter, plaintiff filed a summons with notice via e-file on March 1, 2018. (Pl. Ex. C). Plaintiff served the summons with notice and a verified complaint on the City, DEP, and Adorno on June 28, 2018 and June 29, 2018. (Pl. Ex. E, F, G). According to the e-file print out annexed as Ex. B to the City's motion, plaintiff did not e-file his verified complaint until July

6, 2019, for the first time, as an exhibit to the within motion. Further, plaintiff's complaint is not verified. Lastly, plaintiff did not file his affidavits of service with the court until he filed the within motion.

The City contends that the plaintiff is not entitled to a default judgment because plaintiff did not submit the facts constituting the claim, as plaintiff did not commence this action with a complaint. The City argues that service was not effectuated on the defendants City, DEP, and Adorno and therefore, the Court has no jurisdiction over them. Further, the City avers that plaintiff did not serve the City with the within default motion until July 20, 2019, which was one day after the return date of the motion and more than 1 year and 20 days from the date plaintiff alleges service was completed, therefore making the motion untimely.

CPLR §306-b allows for a plaintiff to serve a summons with notice within 120 days of commencement of the action. Per CPLR §320, a defendant appears by serving an answer or a notice of appearance. Pursuant to CPLR §3012, if a complaint is not served with a summons, the defendant may serve a written demand for a complaint within the time prescribed by CPLR §320. Thereafter, plaintiff has 20 days to serve a complaint. If no demand is made, plaintiff must serve a complaint within 20 days after the service of notice of appearance. A demand or motion does not constitute an appearance. For the purposes of this motion, with respect to Adorno, service is effectuated on a person pursuant to CPLR §308(4), by affixing the summons to the door the persons actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing to his last known address or actual place of business. Service on the City can be effectuated pursuant to CPLR §311(a)(2) by serving the corporation counsel.

Here plaintiff alleges she filed her summons with notice on March 1, 2018, and served both the summons with notice and her verified complaint on June 28, 2018 and June 29, 2018. A review of the e-file printout shows that the City did not interpose an answer or file a notice of appearance in this matter. Pursuant to the above CPLR sections, plaintiff was not required to serve a complaint until either a demand for a complaint was served, an answer was served, or when a notice of appearance was made by the City. However, the City must have been served properly to trigger their need to file a demand for a complaint, a notice of appearance, or an answer.

Turning to the question of whether service is proper. Pursuant to the affidavits of service annexed to plaintiff's motion, on June 29, 2018 at 3:12 pm, the City and DEP were served at 100 Church Street, New York, New York. Service was accepted by Ms. Diaz and a physical description of Ms. Diaz is provided within the affidavit. The affidavit of service indicates that the summons with notice and the verified complaint were served at that time. DEP was also served on June 28, 2018, at 59-17 Junction Blvd., Flushing, New York and service was accepted by Mr. Howard. Service was attempted on Mr. Adorno on Saturday, June 23, 2018, at 7:40pm, Tuesday, June 26, 2019, at 4:38pm, Wednesday, June 27, 2018, at 9:30am, and Friday, June 29, 2019, at 11:50am. On June 29, 2018, the process server affixed the summons with notice and verified complaint on the door of 1500 Noble Avenue, Apt. 14M, Bronx, New York after confirming the address with a neighbor and thereafter mailed a copy.

The City argues that service was not effectuated on Mr. Adorno because pursuant to CPLR §308(4), service is not complete until 10 days after plaintiff files his affidavit of service with the clerk of the Court which was to be done 20 days after affixing and mailing. The City also argues that the plaintiff did not use due diligence in attempting to serve Mr. Adorno. Pursuant to the aforementioned affidavit of service, plaintiff attempted service on Mr. Adorno 4 times, on a Saturday and week days at different times from 9:30am to 7:30pm. Further, service was attempted on Mr. Adorno at the address listed on the police report, which was obtained from Mr. Adorno's drivers license. However, plaintiff did not file the affidavit of service within twenty days of affixing the summons with notice and verified complaint to Mr. Adorno's last known address. The Court may, in its discretion, cure this defect *nunc pro tunc*, as "a delay in filing proof of service is merely a procedural irregularity and not jurisdictional." "The purpose of requiring filing of proof of service, along with the 10-day grace period, pertains solely to the time within which the defendant must answer, and does not relate to the jurisdiction acquired by service of the summons. (*Lancaster v. Kindor*, 98 AD2d 300 [1st Dep't 1984]). Therefore, the plaintiff made a prima facie showing that she served defendant Adorno. Additionally, the Court finds that plaintiff made a prima facie showing of service upon the City of New York and the City of New York s/h/a DEP, as well. The affidavit of service submitted is not facially defective. Plaintiff claims that he served the summons with notice and the verified complaint at the office

of the corporation counsel at 100 Church Street and the office of DEP. Plaintiff provides the date, time, name of the person who accepted service, and the description of such person.

As a result, plaintiff's motion is granted only to the extent that defendant's shall serve and file an answer within thirty (30) days of receipt of a copy of this order. Said answer, if it is so advised, may contain jurisdictional defenses which the Court will address if properly brought before it. The branch of plaintiff's motion seeking a default is denied. Moreover, plaintiff is directed to file the affidavits of service within fifteen (15) days of the date of this order.

This constitutes the decision and order of the Court.

Dated:

3/16/20
Bronx, New York


HON. MITCHELL J. DANZIGER, J.S.C.