

Q.M. v Lawton

2020 NY Slip Op 32171(U)

May 26, 2020

Supreme Court, Queens County

Docket Number: 703831/2015

Judge: Lourdes M. Ventura

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

FILED
5/27/2020
9:25 AM
COUNTY CLERK
QUEENS COUNTY

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

-----X
Q.M., Infant by his mother and natural guardian
YATIMA MITCHELL, and YATIMA MITCHELL,
Individually,

Index
Number: 703831/2015

Plaintiffs,

Motion
Date: March 2, 2020

-against-

ROBERT LAWTON,

Motion
Seq. No.: 3

Defendant.

-----X
The following numbered papers read on this Motion by Defendant Robert Lawton, for an Order: dismissing the within complaint/action, pursuant to CPLR §3211(a), based upon lack of Personal Jurisdiction, and for such other and further relief as it deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	43 - 44
Opposition to Motion - Affirmation - Exhibits.....	45 - 49

Upon the foregoing papers, it is Ordered that Defendant’s Motion is determined as follows:

Service of process must be made in strict compliance with statutory ‘methods for effecting personal service upon a natural person’ pursuant to CPLR 308” (*Estate of Waterman v. Jones*, 46 A.D.3d 63, 65, 843 N.Y.S.2d 462, quoting *Macchia v. Russo*, 67 N.Y.2d 592, 594, 505 N.Y.S.2d 591, 496 N.E.2d 680; see *Emigrant Mtge. Co., Inc. v. Westervelt*, 105 A.D.3d at 896–897, 964 N.Y.S.2d 543; *Gottesman v. Friedman*, 90 A.D.3d 608, 609, 934 N.Y.S.2d 436). “A defendant’s eventual awareness of pending litigation will not affect the absence of jurisdiction over him or her where service of process is not effectuated in compliance with CPLR 308” see *Washington Mut. Bank v. Murphy*, 127 A.D.3d 1167, 1174, 10 N.Y.S.3d 95, 101 (N.Y. App. Div. 2015) citing (see *De Zego v. Donald F. Bruhn, M.D., P.C.*, 67 N.Y.2d 875, 877, 501 N.Y.S.2d 801, 492 N.E.2d 1217; *Macchia v. Russo*, 67 N.Y.2d at 595, 505 N.Y.S.2d 591, 496 N.E.2d 680; *Feinstein v. Bergner*, 48 N.Y.2d 234, 241, 422 N.Y.S.2d 356, 397 N.E.2d 1161; *Krisilas v. Mount Sinai Hosp.*, 63 A.D.3d at 889, 882 N.Y.S.2d 186; *Bankers Trust Co. of Cal. v. Tsoukas*, 303 A.D.2d 343, 344, 756 N.Y.S.2d 92).

CPLR 308 sets forth the different ways in which service of process upon an individual can be performed in order for the court to obtain jurisdiction over that person. CPLR 308(2) provides, in pertinent part, that personal service upon a natural person may be made “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business,

dwelling place, or usual place of abode of the person to be served and by ... mailing the summons to the person to be served at *his or her last known residence*” (emphasis added). “Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with” (*Gray-Joseph v. Shuhai Liu*, 90 A.D.3d 988, 989, 934 N.Y.S.2d 868; see *Daguerre, S.A.R.L. v. Rabizadeh*, 112 A.D.3d 876, 878, 978 N.Y.S.2d 80, *Munoz v. Reyes*, 40 A.D.3d 1059, 1059, 836 N.Y.S.2d 698; *Ludmer v. Hasan*, 33 A.D.3d 594, 594, 821 N.Y.S.2d 661). It “is a two-step form of service in which a delivery and a mailing are both essential” (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C308:3).

“Ordinarily, a process server's affidavit of service constitutes prima facie evidence that the defendant was validly served” (*U.S. Bank, N.A. v. Peralta*, 142 A.D.3d 988, 988, 37 N.Y.S.3d 308; see *1138 *Fuentes v. Espinal*, 153 A.D.3d 500, 501, 60 N.Y.S.3d 81; *Citibank, N.A. v. Balsamo*, 144 A.D.3d 964, 964, 41 N.Y.S.3d 744). “However, when a defendant submits a sworn denial of receipt of service containing specific facts to refute the statements in the affidavit of the process server, the prima facie showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of the evidence at a hearing” (*U.S. Bank, N.A. v. Peralta*, 142 AD3d at 988-989; see *Fuentes v. Espinal*, 153 AD3d at 501; *Citibank, N.A. v. Balsamo*, 144 AD3d at 964).

Here, Defendant Robert Lawton (hereinafter “Defendant Lawton”) filed the instant motion seeking an Order dismissing the within complaint/action, pursuant to CPLR §3211(a), based upon improper service and lack of Personal Jurisdiction. Defendant Lawton submits an affidavit in support of his motion and the affidavit, in pertinent part states:

3. I am the owner of 150-49 119th Road, Jamaica, N.Y. 11434, (hereinafter “the Premises”) which is a two (2) family house and a rental/investment property. (Please see deed annexed hereto as Exhibit “A”)
4. Plaintiff, YATIMA MITCHELL was a tenant on the 1st floor of the premises, where she resided from February, 2008 through March, 2017.
5. YATIMA MITCHELL's cousin, Keisha Merced, resided on the 2nd floor of the premises.
6. Your affiant never resided at 150-49 119th Road, Jamaica, N.Y. 11434. My residence/domicile is located at 224-16 144th Avenue, Springfield Gardens, NY 11413, which I also own, and where I have resided since September, 2008. (Please see deed annexed hereto as Exhibit “B”)
7. According to the Summons and Complaint, dated April 18, 2015, (Exhibit “C”) the infant Plaintiff, Q.M., allegedly sustained an injury on February 15, 2015, after allegedly slipping and falling on ice and snow, which the Plaintiffs' maintain had accumulated on the sidewalk of the premises.
8. I discovered the existence of the within action after receiving an Information Subpoena and Restraining Notice and Subpoena Duces Tecum & Restraining Notice, and a cover letter, from Plaintiff's judgment enforcement attorney, Bernard D'Orazio & Associates,

P.C., in the mailbox. Prior to receiving them, I had no knowledge that this action existed or that the infant Plaintiff was allegedly injured. I immediately contacted my attorney.

9. With regard to the alleged service of the Summons and Complaint in the within action, according to the affidavit of service of Michael Ballato, sworn to on May 8, 2015, (Exhibit "D") a copy of the pleadings, (which lists 150-49 119th Road Jamaica N.Y. 11434 as the Plaintiffs' AND Defendant's address) was allegedly served on May 6, 2015 at 150-49 119th Road Jamaica N.Y. 11434, on Jane Doe, who is described as a forty-eight (48) year old black female, standing 5'7" tall and weighing 160-170 pounds.

10. There are two (2) front doors at the premises, and each door leads to a separate apartment.

11. I believe/suspect that the Plaintiff YATIMA MITCHELL (who was residing on the first floor of the premises on the alleged date of service) or someone else who was residing in one (1) of the two (2) units, received the pleadings and that the existence of the lawsuit was intentionally concealed.

12. The affidavit of service does not indicate which floor of the premises the Summons and Complaint was allegedly served at, but in the "other" section of the affidavit, the process server indicated that Jane Doe stated that "Defendant owns the house."

13. Being that the premises is a two (2) family house, and no floor was indicated on the Summons and Complaint or the affidavit of service, and most importantly, the fact that your affiant does not, and has never resided at the premises, service of process was ineffective and improper, and the within action should be dismissed.

14. On July 8, 2016, a default Judgment was granted by the Honorable Denis J. Butler, in the within action, which was entered on July 15, 2016. Thereafter, on April 19, 2017, an inquest was conducted by the Honorable Salvatore J. Modica, resulting in an Order Granting Damages after Inquest, dated July 10, 2017. (Exhibit "E").

15. On February 7, 2019, Plaintiffs' attorney filed and recorded a Judgment in the amount \$391,568.19 on behalf of Plaintiff Q.M., and \$12,955.45 on behalf of Plaintiff, Yatima Mitchell. (Exhibit "F")

16. On May 17, 2019, Bernard D'Orazio & Associates, P.C. filed a Notice of Petition and Petition in the Supreme Court, Queens County, under Index #708718/19 and for the very first time, listed my home address, 224-16 144th Avenue Springfield Gardens, NY 11413. I found the Notice of Petition and Petition, Request for Judicial Intervention and Memorandum of Law taped on my door.

17. That Petition was seeking to enforce the aforementioned default judgment, entered on February 7, 2019, by asking the Court to authorize the sale of my home; the same home that I was never served at. The Petition was dismissed, pursuant to a Decision and Order, dated September 19, 2019, by the Honorable Salvatore J. Modica. (Exhibit "G")

18. On September 17, 2019, the Default Judgment in this action was vacated for lack of Personal Jurisdiction. The Honorable Salvatore J. Modica found "that service of process was improper" based upon the "fact-filled affidavit" in support of my Order to Show Cause, dated June 12, 2019, and my attorney's "cogent affirmation." (Please see decision, annexed hereto as Exhibit "H")

19. A verified Answer, dated October 1, 2019, was filed in this Honorable Court, on October 24, 2019. Please see Answer and e-file confirmation notice, annexed hereto as Exhibit "I")."

Plaintiff opposes Defendant's motion and asserts that Defendant's motion to dismiss should not be denied because Defendant has received the Summons and Complaint. The Court does not find Plaintiff's assertions persuasive as the Second Department, Appellate Division has held that "actual receipt of the summons with notice does not preclude the defendant from challenging personal jurisdiction on the ground of improper service" *Avakian v. De Los Santos*, 183 A.D.2d 687, 687, 583 N.Y.S.2d 275, 275 (1992) citing (*see, Raschel v. Rish*, 69 N.Y.2d 694, 512 N.Y.S.2d 22, 504 N.E.2d 389).

Plaintiff further asserts that the Plaintiff was formerly an infant and reached the age of majority in 2019 and as a consequence, the statute of limitations runs in the year 2022. Plaintiff contends that dismissing the underlying Complaint will serve no actual purpose other than to cause needless delay and expense and that Plaintiff requests before dismissing the instant action, that Plaintiff be granted additional time to serve the Summons & Complaint on Defendant. Plaintiff further asserts it understands the importance of procedure, the interests of judicial economy, and prejudice must also be weighed. Lastly, Plaintiff avers that Defendant stands to gain no benefit by having this action dismissed.

" 'An extension of time for service is a matter within the court's discretion' " *Kowlessar v. Darkwah*, 172 A.D.3d 837 (N.Y. App. Div. 2019) citing (*Estate of Fernandez v. Wyckoff Hgts. Med. Ctr.*, 162 A.D.3d 742, 743, 80 N.Y.S.3d 271, quoting *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 101, 736 N.Y.S.2d 291, 761 N.E.2d 1018). "Such a motion may be granted upon 'good cause shown or in the interest of justice' " . *Kowlessar v. Darkwah*, 172 A.D.3d 837 (N.Y. App. Div. 2019) citing (*Estate of Fernandez v. Wyckoff Hgts. Med. Ctr.*, 162 A.D.3d at 743, 80 N.Y.S.3d 271, quoting CPLR 306-b; *see Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 104-105, 736 N.Y.S.2d 291, 761 N.E.2d 1018). " 'To establish the requisite good cause, reasonable diligence in attempting service must be shown, but the interest of justice is a broader standard, which does not require a showing of good cause, and permits the court to consider many factors' " . *Kowlessar v. Darkwah*, 172 A.D.3d 837 (N.Y. App. Div. 2019) citing (*Hourie v. North Shore-Long Is. Jewish Health Sys., Inc.-Lenox Hill Hosp.*, 150 A.D.3d 707, 708, 54 N.Y.S.3d 53, quoting *Spath v. Zack*, 36 A.D.3d 410, 413, 829 N.Y.S.2d 19). "When deciding whether to grant an extension of time to serve a summons and complaint in the interest of justice, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request

for the extension of time, and prejudice to defendant' ”. *Kowlessar v. Darkwah*, 172 A.D.3d 837 (N.Y. App. Div. 2019) citing (*Furze v. Stapen*, 161 A.D.3d 827, 828, 77 N.Y.S.3d 506, quoting *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018).

The Court finds that Plaintiff failed to establish good cause or an interest in justice warranting an extension. The Court notes that on September 17, 2019, Honorable Salvatore J. Modica rendered a Decision and Order holding that “Service of process as improper based on Mr. Lawton’s fact-filled affidavit and Mr. Harris’s Cogent affirmation” and as a result, vacated the default judgment against Defendant Lawton. At that time, Plaintiff was aware that service on Defendant Lawton was improper and Plaintiff at that time could have moved for an extension. However, Plaintiff now seeks an extension after Defendant Lawton moves to dismiss the complaint. *Kowlessar v. Darkwah*, 172 A.D.3d 837, 842, 101 N.Y.S.3d 154, 159 (N.Y. App. Div. 2019).

Moreover, it is well established that evidence submitted in support of, or in opposition to, a N.Y. C.P.L.R. 3211(a) motion must consist of admissible evidence, not mere conjecture or hearsay. Therefore, affidavits and affirmations must be made by persons with personal knowledge of the facts alleged in those affidavits and affirmations. *Feratovic v. Lun Wah, Inc.*, 284 A.D.2d 368, 369 [2nd Dept 2001]).

Here, Plaintiff’s opposing papers do not refute Defendant’s affidavit nor does Plaintiff submit an affidavit from someone with personal knowledge of the facts. Plaintiff only relies upon an attorney affirmation who does not allege to have personal knowledge of the facts therein and thus, does not have any evidentiary value. *Feratovic v. Lun Wah, Inc.*, 284 A.D.2d 368, 369 [2nd Dept 2001]).

Accordingly, Defendant Lawton’s motion to dismiss pursuant to CPLR 3211 is granted and the Complaint is dismissed insofar as asserted against him. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: May 26, 2020



LOURDES M. VENTURA, J.S.C.

FILED
5/27/2020
9:25 AM
COUNTY CLERK
QUEENS COUNTY