

Riordan v Garces

2020 NY Slip Op 34169(U)

December 16, 2020

Supreme Court, New York County

Docket Number: 161142/2017

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: <u>HON. BARBARA JAFFE</u> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> JOHN RIORDAN and KIRK BIGELOW, <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- v -</p>	PART	IAS MOTION 12 INDEX NO. <u>161142/2017</u> MOTION DATE _____ MOTION SEQ. NO. <u>006</u>
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ALBERTO GARCES, individually; ALBERTO GARCES, as president of AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3369 SSA, and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

Defendants.

-----X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80-109 were read on this motion to _____ dismiss _____.

By notice of motion, defendant American Federation of Government Employees, AFL-CIO, Local 3369 SSA (Local) moves pursuant to 3211(a)(8) for an order dismissing the action against it on the ground that it was never served with the pleadings. Plaintiffs oppose and, by notice of cross motion, move pursuant to CPLR 3012(d) and/or 2004 for an order deeming Local served as of May 2, 2019 and extending their time to move for a default judgment or, alternatively, pursuant to CPLR 306-b and 3012(d) for an order extending their time to serve Local if service is found to be improper. Local opposes the cross motion.

I. PERTINENT BACKGROUND

In December 2017, plaintiffs commenced this action against defendant Garces in his individual capacity only. (NYSCEF 1). In January 2018, Garces filed an answer with counterclaims. (NYSCEF 3).

In April 2018, Hanan B. Kolko, Esq. and Hampton H. Stennis, Assistant General Counsel, American Federation of Government Employees, Office of General Counsel, were substituted for Garces's former counsel. (NYSCEF 14).

In February 2019, plaintiffs' motion to amend the complaint to add additional defendants, including Local, was granted without opposition. (NYSCEF 43). The amended complaint was filed in March 2019 (NYSCEF 44) and served on Garces.

In May 2019, Kolko filed a notice of appearance on behalf of Garces (NYSCEF 45), and by email dated May 2, 2019, advised plaintiffs' counsel that he was accepting "email service of the amended complaint on the of the remaining defendants (the Union and the Local)." He acknowledged that plaintiffs had "kindly agreed to provide those defendants with 45 days to answer or otherwise respond to the amended complaint, as they will need to retain counsel." He also indicated that as he was in possession of the amended complaint, there was no need to send it to him again, and that "[w]e will simply deem it to have been served on those defendants today, and their 45 days starts to run today." (NYSCEF 90).

On May 30, 2019, another attorney, Joseph Cannavo, emailed plaintiffs directly and asked, on behalf of Local, for counsel's name so that he could request an additional extension of time to answer the amended complaint (NYSCEF 91). He again emailed plaintiffs directly in June 2019, with a copy to Local's current president, attempting to settle the action on behalf of Local. (NYSCEF 92). On June 11, 2019, Cannavo emailed plaintiff's counsel advising that he was writing "on behalf of" Local, and fruitlessly asked that counsel stipulate to discontinue the action against Local. (NYSCEF 93). Then, by email dated June 14, 2019, with Local's president copied on it, Cannavo informed plaintiffs' counsel that he was "confirming our agreement that [Local], in the above captioned matter, shall be granted until July 10, 2019 to file an answer to

the summons and complaint.” He signed it “Joseph Cannavo on behalf of [Local].” (NYSCEF 95).

Between June and December 2019, plaintiffs’ counsel and Cannavo communicated on various issues, including the drafting and filing of an affidavit in January 2020 by Local’s current president, who confirmed therein that Local was a party to the action but had not yet answered the amended complaint. (NYSCEF 96, 97). Cannavo also signed an affidavit in January 2020, in which he states that he “has acted as counsel for American Federation of Government Employees, AFL-CIO, Local 3369 SSA (‘Local 3369’ or the ‘Local’).” (NYSCEF 98).

In March 2020, plaintiffs and Garces entered into a preliminary discovery conference order; there was no appearance by AFGE and/or Local. (NYSCEF 73).

By email dated June 10, 2020, Cannavo wrote to plaintiffs’ counsel that he felt “very responsible” for Local having failed to file an answer and asked for an extension to do so until July 27, 2020 if plaintiffs were unwilling to discontinue against Local. (NYSCEF 103).

In July 2020, another attorney filed an appearance for Local. (NYSCEF 75), and in August 2020, he filed the instant motion to dismiss (NYSCEF 80).

II. CONTENTIONS

A. Local (NYSCEF 81, 82)

Local denies having been served with the amended complaint, alleging that service of the original complaint on Garces was ineffective service on Local as Garces had ceased serving as Local’s president a few days before he was served, that the amended complaint had never been served on Local, and that Garces’s counsel had appeared in response to that complaint only on behalf of Garces individually and not on behalf of Garces as Local’s president. Local denies having appeared or answered in this matter and observes that the preliminary conference order of

March 2020 specifically reflects that it did not appear.

Local also contends that an unincorporated association, such as a labor union, may only be sued in the name of one of its members, and that as Garces was no longer its president when he was served with the original complaint, neither it nor the amended complaint was properly served on Local. Local further argues that it would be prejudiced if plaintiffs were permitted to serve their complaint on it now as discovery has begun.

B. Plaintiffs (NYSCEF 84-106)

Plaintiffs' counsel contends that after filing the amended complaint, Kolko agreed to accept service on Local's behalf, and that, thereafter, Cannavo presented himself as Local's counsel and acted on its behalf in obtaining several extensions of time to answer and in otherwise communicating with plaintiffs' counsel about this matter. Based on Kolko's agreement and Cannavo's conduct, plaintiffs' counsel argues that he reasonably believed that Kolko had the authority to accept the amended complaint on Local's behalf and that Cannavo had the authority to represent Local and were doing so, and reasonably relied on their representations.

Plaintiffs also observe that the other defendants also apparently understood that Cannavo represented Local, based on a notice of appearance and notice of motion filed by the other defendants in June 2019, which identify him as Local's attorney. (NYSCEF 50). They also maintain that he participated on Local's behalf in court-ordered mediation. (NYSCEF 102, 104).

C. Reply (NYSCEF109)

Local denies that either attorney had authority to accept service or that plaintiffs' counsel reasonably believed that they had such authority. It advances new arguments as to why service was improper, which are not considered as they are raised for the first time in reply.

III. ANALYSIS

Kolko, as an officer of the court, indicated to plaintiffs' counsel that he had the authority to accept service on Local's behalf, as did Cannavo, and each used that apparent authority to seek and obtain numerous extensions of time for Local to answer and to participate in court-ordered mediation. Having held themselves out to the other parties and to the court as the attorneys for Local for over a year without any objection by Local and with its president's knowledge AND apparent blessing, Local is bound by their representations.

Moreover, in contrast to the authority cited by Local, plaintiffs' counsel did not only serve process on Local's attorney without ascertaining whether the attorney had been authorized to accept service but Kolko represented to counsel that he was so authorized, presumably after discussing the matter with Local. Thus, it is reasonably inferred that Kolko accepted service on Local's behalf after being given the authority to do so. (*Cf. Howard B. Spivak Architect, P.C. v Zilberman*, 59 AD3d 343 [1st Dept 2009] [no evidence defendants designated their attorney as their agent for service of process]; *Broman v Stern*, 172 AD2d 475 [2d Dept 1991] [same, where process was merely sent to defendant's attorney]).

The president's attempt to disavow that he had authorized anyone to accept service on his behalf cannot be credited, given his knowledge that Local's counsel was communicating with plaintiffs and their counsel with a view to either settling the action with Local or obtaining an extension of time to answer. Moreover, the president was on notice that the attorney had effectively accepted service of the pleadings as he had been copied on the email in which plaintiffs' counsel was asked for additional time to answer the complaint and by the statement in his January 2020 affidavit that Local was a party but had not yet answered. There can have been no doubt in the president's mind, and thus by Local, that the attorney was representing Local in

this action, which is what distinguishes this matter from the authority cited by Local. (*Cf Broman*, 172 AD2d at 476 [“representations made by an individual who accepts the service of process are not binding on the defendant in the absence of proof that the defendant himself knew of such representations.”]).

In essence, the president and Local appear to be seeking to take advantage of plaintiffs’ reasonable belief that they were served, had appeared, and were represented by counsel, and to capitalize further on plaintiffs’ resulting willingness to discuss settlement, proceed to mediation, and provide Local with numerous extensions of time to answer. And yet, after obtaining such concessions from plaintiffs, Local takes the diametrically opposed and disingenuous position that it was never served.

While Local did not answer timely, plaintiffs were warranted in abstaining from moving for a default judgment, given the parties’ continuing settlement discussions and Cannavo’s participation in the mediation. Moreover, Local fails to show any prejudice resulting from a finding that it was properly served as discovery has only begun and depositions have not been held.

For all of these reasons, Local fails to establish that it is entitled to dismissal for lack of proper service.

Even if it were determined that Local had not been properly served, plaintiffs would be entitled to an order granting them an extension of time to serve the amended complaint on Local, given their reasonable belief that Local had been served and Local’s conduct over the last year in acknowledging that it had been named as a defendant in this action, in attempting to settle the case, and in requesting extensions of time to answer. (*See eg Fernandez v McCarthy*, 183 AD3d 539 [1st Dept 2020] [court providently granted extension of time to serve process as, among

others, defendants did not establish they would suffer substantial prejudice from extension as they had actual notice of action and allegations against them from early on in action]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion to dismiss is denied; and it is further

ORDERED, that plaintiffs’ cross motion is granted to the extent of deeming defendant to have been served timely and properly on May 2, 2019, and granting them an extension of time to move for a default judgment, and is otherwise denied.

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BARBARA JAFFE, J.S.C.

12/16/2020

DATE

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