

**Weaver v Hatem**

2020 NY Slip Op 35757(U)

September 10, 2020

Supreme Court, Westchester County

Docket Number: Index No. 65564/2019

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

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EVERETTE WEAVER,

Plaintiff,

DECISION & ORDER  
Index No. 65564/2019  
Seq. Nos. 1,2,3,4,6,7,8

ALBERT A. HATEM, ESQ.  
GRACE EDWARDS-SIMON  
ANFERNEE SIMON  
MARLENE DENNIS &  
TRACY PARDO, Clerk of Bronx County

Defendants.

-----X  
**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 2-17,29-35, 40-42, 47-49,60-102, were read in connection with:  
(Seq 1)- Tracy Pardo’s motion to dismiss;  
(Seq 3&4)- Plaintiff’s motions: to disqualify Albert Hatem from representing defendants Grace Edwards-Simon and Anfernee Simon (“Simons”) and to Strike the answer and counterclaims filed on February 22, 2020, and granting plaintiff a default judgment pursuant to CPLR §3215 for defendant Albert Hatem;  
(Seq 6)- Simons and Hatem’s motion to dismiss; and  
(Seqs 7&8)- Plaintiff’s motions to vacate the order issued by this court on June 11, 2020 which adjourned the return date for motions # 3 and # 4 to July 31, 2020 and further granted Hatem permission to file a cross motion to dismiss, a Strike the cross motion to dismiss filed by Albert Hatem on July 9, 2020, Doc. No. 60, Disqualify Hatem for his failure to have a Brick and mortar office in the State of New York, and sanction Hatem for misconduct.

Plaintiff asserts that “this case is about a racket in the Bronx County Supreme Court where lawyers are currently stealing the homes of their clients and some Judges in the Bronx County Supreme Court aware of the racket, but because the Judges receive campaign contributions from these lawyers, the Judges look the other way” (NYSCEF #27).

Plaintiff, in part, seeks an order instructing the Chief Clerk Tracy Pardo to expunge from public records the alleged false affirmation of Albert A. Hatem dated June 27, 2019, along with exhibit No. 11, which is a photo of Weaver, and a photo of Weaver's automobile displaying his license plate number, along with the alleged false affidavit executed by defendant Marlene Dennis which sought to place plaintiff in a false light.

Based upon the foregoing, the motions are decided as follows:

Pursuant to CPLR 3211 (a)(7) “upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory”<sup>1</sup> (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingraio, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]), If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a)(7), it may “freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v

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<sup>1</sup>Internal citations omitted.

Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]; Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]). More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Env'tl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

In the first instance, plaintiff alleges that he did not receive Defendant Tracy Pardo's Motion to Dismiss (Motion Seq 1). Generally, a process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR §308 (Lattingtown Harbor Property Owners Ass'n, Inc. v Agostino, 34 AD3d 536 [2d Dept 2006]; ACT Prop., LLC v Ana Garcia, 102 AD3d 712, [2d Dept 2013]; Deutsche Bank Natl. Trust Co. v Pietranico, 102 AD3d 724, [2d Dept 2013]). A defendant can rebut the process server's affidavit by offering a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (Bank of N.Y. v Espejo, 92 AD3d 707 [2d Dept 2012]); Bankers Trust Co. of California, NA v Tsoukas, 303 AD2d 343 [2d Dept 2003]). Bare, conclusory and unsubstantiated denials of receipt of process are insufficient to

rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (U.S. Bank N.A. v Tate, 102 AD3d 859 [2d Dept 2013]). In New York, the term "traverse" in civil litigation means a pre-trial hearing used to determine whether the defendants in that action were properly served with process so as to invoke a court's jurisdiction (Barnaby v Coreman, Inc., 25 Misc3d 855 [Sup Ct, Queens County 2009]).

"Although a defendant's sworn denial of receipt of a copy of the summons and complaint generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (Chichester v Alal-Amin Grocery & Halal Meat, 100 AD3d 820 [2d Dept 2012]).

Here, the Attorney General's Office offers the Affidavit of Service of Yihan Hsueh, that reflects that the Notice of Motion and supporting papers were served on plaintiff on November 7, 2019 (NYSCEF #22). Plaintiff's unsworn, conclusory statement is insufficient to rebut the prima facie evidence of the affidavit of service and the presumption of mailing.

Further, it is well-settled that the Court of Claims has exclusive jurisdiction over actions for money damages against officials, and employees, such as defendant Tracy Pardo, acting in their official capacity in the exercise of governmental functions. The claims in this case arise from acts performed by a State employee in the course of her official duty and therefore, this court has no jurisdiction over plaintiff's action as against defendant Tracy Pardo (Byvalets v State, 171 AD3d 1125 [2d Dept 2019])(internal citations omitted). Contrary to plaintiff's contentions, a read of the Summons and Complaint shows that plaintiff was seeking monetary damages from defendant Tracy Pardo.

The record also shows that plaintiff mistakenly identified Defendant Pardo as the Bronx County Clerk, which she is not. Since the filing agent for the Supreme Court, Bronx County is the Bronx County Clerk, defendant Tracy Pardo cannot perform the relief that plaintiff seeks, which is to expunge certain public records.

For these reasons, this action against defendant Tracy Pardo is dismissed in its entirety.

Turning to plaintiff's Motions Seqs 3 and 4, on a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default" (U.S. Bank Nat'l Ass'n v Gilchrist, 172 AD3d 1425, 1427, [2d Dept 2019]). Generally, a defendant who fails to timely answer the complaint or appear in the action is in default (U.S. Bank Nat'l Ass'n v Gilchrist, 172 AD3d at 1427).

This instant action was commenced by the filing of a Summons and Complaint in the Westchester County Clerk's Office on September 30, 2019. According to the Affidavit of Service, the process server attests that service was effectuated upon Defendants Grace and Anfemee pursuant to CPLR 308(2) (service upon a person of suitable age and discretion) by delivery of the summons and complaint on or about October 4, 2019, with a subsequent mailing allegedly made on October 9, 2019.

Proof of service upon Defendants Grace and Anferee was not filed with the Court until November 14, 2019. (NYSCEF 15 & 17). Defendants Grace Edwards-Simon and Anfernee Simon answer was served upon plaintiff by electronic filing recorded on NYSCEF on November 25, 2019. (Dkt 18). Plaintiff served a Notice of Rejection of Answer.

CPLR 308(2) provides that "proof of such service shall be filed with the

Clerk of the Court designated in the summons within Twenty (20) days of either such delivery or mailing, whichever is affected later; service shall be complete Ten (10) days after such filing. Upon completion of service, the Defendant(s) have Twenty (20) days to appear or otherwise move".

“Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with ” (Estate of Perlman v Kelley, 175 AD3d 1249, 1251, [2d Dept 2019]). 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” (Estate of Perlman v Kelley, 175 A.D.3d at 1251

Since these defendants filed their answer on November 25, 2019, their answers are timely, pursuant to CPLR 320 that provides when service is made pursuant to CPLR 308(2), the defendant has 30 days from the time service is complete to answer the complaint.

Likewise, the answer interposed by defendant Albert A. Hatem, Esq was timely filed. Service was effectuated by the mailing of January 21, 2020, The affidavit of services were filed on February 3, 2020, having served under CPLR 308(2), service was complete on February 13, 2020, and this defendant electronically filed his answer and affidavit of service upon plaintiff on February 22, 2020.

Based upon the affidavits of service, all appearing Defendants have timely answered the Complaint, and are not in default, resulting in denial of plaintiff’s applications for Default Judgments under CPLR 3215 without merit as a matter of law.

The remaining contentions by plaintiff in motions Seqs 3 and 4, are academic in light of this court’s granting of Motion Seq 6 by the Simon Defendants and defendant Hatem, in which

plaintiff has failed to file any opposition to Defendants' Cross Motion to Dismiss (NYSCEF 60-75) . In any event, the Complaint fails to state a proper cause of action under Civil Rights Law §50 and §51, and/or state any legally sufficient cause of action upon which any relief can be granted.

Turning next to Seqs 7 and 8, defendant Albert A. Hatem responds to plaintiff's motion as follows:

“plaintiff has filed yet another Motion which the undersigned a named Defendant is being forced to defend simply because Plaintiff has no regards for the law, this Court and the overall judicial system. Plaintiff Weaver continues his baseless accusations of misconduct and disciplinary complaint against me, just as he has and continues to do against Judges, Clerks of the Court and any party that crosses his path. If not stopped, Plaintiff will continue to use Court system to bombard and harass the parties in the instant actions and others with utter impunity. Plaintiff Weaver has demonstrated his lack of any respect for the authority of the Courts and is content to continue his abuse of the judicial process in an attempt to satisfy his own petty ends.”

Upon due consideration of plaintiff's motion and papers, and opposition papers, the court denies motion Seqs 7 &8, as academic.

Accordingly, it is hereby

ORDERED, that defendant Tracy Pardo's motion to dismiss (Seq 1) is granted, and the complaint is dismissed as against this defendant; and it is further

ORDERED, that plaintiff's Motions (Seqs 3 and 4) are denied; and Simon Defendants and Albert Hatem's cross-motion to dismiss is granted, (Seq 6) and the complaint is dismissed as against these defendants; and it is further

ORDERED, that plaintiff's motions (Seqs 7 and 8) are denied as academic; and it is further

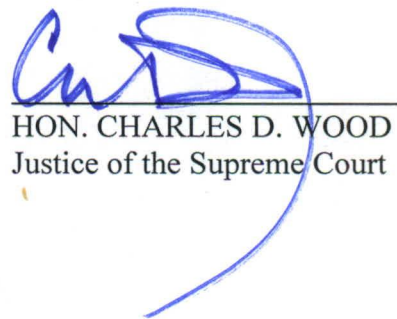
ORDERED, the Stay Order of Justice Giacomo in this matter is continued, specifically

effecting Motion (Seq 2) regarding remaining Defendant Marlene Dennis, as her bankruptcy case before Judge Sean Lane under Docket No: 16-23114, is still open and pending.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: September 10, 2020  
White Plains, New York



HON. CHARLES D. WOOD  
Justice of the Supreme Court

To: All Parties by NYSCEF