

Cauchi v Martinez

2021 NY Slip Op 30492(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 159193/2019

Judge: Adam Silvera

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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: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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JOSEPHINE CAUCHI,

Plaintiff,

- v -

NELSON A. MARTINEZ and FIRST SERVICE NETWORKS,

Defendants.

-----X

INDEX NO. 159193/2019

MOTION DATE 11/30/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 20, 21, 23, 24, 25, 26, 30, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISS.

Before the Court is defendants Nelson A. Martinez and First Service Networks’ motion for an order granting the dismissal of plaintiff’s complaint pursuant to CPLR 3211 due to lack of personal jurisdiction over the defendants due to lack of service.

This matter stems from a motor vehicle accident, which occurred on October 24, 2016, when a vehicle operated by defendant Nelson A. Martinez and owned by defendant First Service Networks struck pedestrian plaintiff Josephine Cauchi, which allegedly led to her serious injury. Plaintiff commenced this action by service of Summons and Complaint on September 20, 2019. Defendants allege that plaintiff failed to serve both defendants with the summons and complaint in a proper manner. Defendants claim that no affidavits of service upon the defendants were ever produced or filed with the Court within the time prescribed by the CPLR.

CPLR § 308 specifically provides that to effectuate service, delivery must be made “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.” The service must be made within 120 days following

commencement of the action under CPLR § 306- b. Pursuant to CPLR § 306, the affidavits of service must “specify the papers served, the person who was served and the date, time, address,” as well as “a description of the person to whom it was so delivered, including, but not limited to, sex, color of skin, hair color, approximate age, approximate weight and height.”

Here, defendants attach a copy of Blanca Nieves, who denies being served in this action and claim that service has not been made effective pursuant to the CPLR (Aff in Op, Exh C). Ms. Nieves is defendant Martinez’s wife and affirms to have been home on December 17, 2019 at 747 10th Avenue, Apt 16L, New York, NY as stated in the affidavit of service. Defendants point to the affidavits of service that were completed by Erika Tejada, who swore that on December 17, 2019, at 12:26 PM she served notice of electronic filing, summons and verified complaint “with JANE DOE (REFUSED FULL NAME), a person of suitable age and discretion,” who Ms. Tejada further describes as a female of brown skin color, and black hair, approximately 25 years old, 5 feet and 5 inches tall, and weighing 130 pounds (Aff in Op, Exh A&B). Ms. Tejada further states that on December 18, 2019, she mailed another copy of the documents to defendants at the same address (*id.*). Ms. Nieves affirms that on the date in question, she was at the apartment where she resides with husband and that no other individuals were present. Ms. Nieves noted that Ms. Tejada’s affidavit does not accurately describe what Ms. Nieves looks like, as she is sixty-four years old (Aff in Op, Exh C, ¶6). As such, defendants argue that plaintiff failed to serve both defendants in a proper manner and has no personal jurisdiction over both defendants.

In opposition plaintiff demonstrates that plaintiff’s complaint was properly served on both defendants pursuant to the CPLR. Defendants’ motion fails to deny that service was made on the female “Jane Doe” as described in Ms. Tejada’s affidavits. Plaintiff notes that defendants

merely state that they were not served and are essentially denying receipt of the process from the authorized person who received the papers. Plaintiff has demonstrated that the Certified Police Accident Report indicated that both defendants reside at 747 10th Avenue, Apt. 16L, New York, NY 10019 (Mot Exh C). Here, service was made in accordance with CPLR 306 and CPLR 308. As mentioned above, Ms. Tejada's affidavit contained a description of whom she served and at defendants actual dwelling place as noted in the Police Accident Report.

In reply, defendants argue that plaintiff's sole opposition to the present motion is that the affidavits of service have now been filed which purportedly evidence service upon defendants. Defendants aver that the affidavits of service in this case were not filed until after the instant motion was filed. Defendants note that the instant motion was filed on February 5, 2020 and that because the affidavits of service were not filed, defendants were unable to dispute the service that was purportedly made as detailed in the now filed affidavits of service. Defendants argue that the December 17, 2019 service is improper as the affidavits were filed on March 13, 2020 when the time to do so expired on or about January 7, 2020. Defendants attach the affidavits of Ms. Nieves and defendant Martinez and note that both of them denied receipt of service (Mot, Exh A&B).

Defendants argue that 'while a process server's affidavit might constitute prima facie evidence of proper service, "a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing"' (*David v. Singletary*, 180 A.D.3d 993 [2nd Dept. 2020]). Here, Ms. Nieves and defendant Martinez affidavits state that they were not served at home and further state that they did not receive a copy of the summons and complaint although it was purportedly served via

first class mail (Mot, Exh A&B). As to defendant First Service Networks, defendants argue that the purported service was also deficient.

Defendants note that First Service Networks was served at the same address as defendant Martinez. Defendants submit the affidavit of Deanna Pickering, vice president and general counsel to Vixxo, formerly known as First Service Networks, Inc. who swore that the company is headquartered in Scottsdale, Arizona, and maintains no office in New York State (Reply, Exh D). Ms. Pickering notes that defendant Martinez is employed as a technician for the company and was never authorized to accept service on behalf of the company (*id.*). Defendant designated Business Fillings Incorporated, 187 Wolf Road, Suite 101, Albany, New York as agent to accept service of process in the state of New York for the company (*id.*). Ms. Pickering notes that this information is easily accessible on the New York State Division of Corporations website (*id.*).

Plaintiff filed a Supplemental Affirmation in Opposition to address defendants arguments raised for the first time in their Reply, which plaintiff was unable to address in the initial Affirmation in Opposition. Plaintiff attaches an affidavit by the process service, Erika Tejada, which further elaborates on her service, in direct response to defendants' denials of receipt of service (Supp Aff in Op, Exh A). Ms. Tejada explains that she served a concierge at the service address because she was not let upstairs at the apartment to serve defendant and that she inadvertently did not identify the recipient as a concierge when she entered the service information (*id.*). The Court notes that even defendants concede that "the case law is clear in that substituted service via a doorman/security personnel in the lobby of a building cannot be utilized unless the process server is not permitted access to the apartment" (Reply to Sur Reply, ¶26 citing *McCormack v Goldstein*, 204 AD2d 121 [1st Dept 1994]). Here, plaintiff has demonstrated that Ms. Tejada was not granted access to defendants' apartment.

Plaintiff also notes that defendants' argument that service on defendant First Service Networks was improper because it was made at the wrong address is without merit. Plaintiff attaches the certified police accident report from the present matter which demonstrates that defendant First Service Networks is listed on the report as registered owner of defendants' vehicle, with the same address as defendant Martinez at 747 10th Avenue, 16L, New York, New York (Supp Aff in Op, Exh C). Further plaintiff attaches the result of a license plate search of defendants' vehicle on the New York State Department of Motor Vehicles website which shows the registered agent of the vehicle as defendant First Service Networks, with the same above address (Supp Aff in Op, Exh D).

Plaintiff argues that because defendant First Service Networks provided the same address as defendant Martinez, as their address to the Commissioner of Motor Vehicles, they are estopped from challenging the propriety of service made to that address. "It is the car registrant's obligation to keep his or her address current. 'Vehicle and Traffic Law § 505 (5) requires that every motor vehicle licensee notify the Commissioner of Motor Vehicles of any change of residence within 10 days of the change. A party who fails to comply with this provision will be estopped from challenging the propriety of service which is made to the former address'" (*Ortiz v. Santiago*, 303 A.D.2d 1, 4-5 [1st Dept. 2003] citing *Pumarejo-Garcia v. McDonough*, 242 A.D.2d 374 [1997]). As such, plaintiff has demonstrated that defendants were properly served.

Plaintiff successfully demonstrates that proof of service was filed and that the Court has personal jurisdiction over defendants. Plaintiff notes that defendants' Reply asserted for the first time that the Court lacks personal jurisdiction because proof of service was not filed within 20 days of mailing of service. Plaintiff points to the Appellate Division's ruling in *Matter of Savitt*, 161 AD3d 109 [1st Dept 2018] where the Court, quoting *Lancaster v Kindor*, 98 AD2d 300, 306

[1st Dept 1984], found that “(d)elay in filing proof of proper service under CPLR 308 is merely a procedural irregularity, not jurisdictional, and may be corrected nunc pro tunc by the court.” This Court finds that late filing of proof of service is insufficient to warrant dismissal of the complaint against the defendants. Defendants have failed to demonstrate prejudice or injury arising out of the untimely filing of proof of service. As such, plaintiff has proven, by a preponderance of evidence, that service was properly made on defendants and that this Court has personal jurisdiction on defendants. Defendants’ motion is denied.

Accordingly, it is

ORDERED that defendants Nelson A. Martinez and First Service Networks’ motion for an order granting the dismissal of plaintiff’s complaint pursuant to CPLR 3211 due to lack of personal jurisdiction over the defendants due to lack of service is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This Constitutes the Decision/Order of the Court

2/22/2021
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	