

**Noel v Joseph**

2021 NY Slip Op 30795(U)

March 3, 2021

Supreme Court, Kings County

Docket Number: 507045/2019

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 3<sup>rd</sup> day of March 2021.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

-----X

ELIZABETH PIERRE NOEL

Plaintiff,

Index No.: 507045/2019

DECISION & ORDER

-against-

NADIA JOSEPH and MARGARET BLANC

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

NYSCEF Doc. No.:

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed \_\_\_\_\_

4-10, 13-19

Opposing Affidavits (Affirmations) \_\_\_\_\_

Reply Affidavits (Affirmations) \_\_\_\_\_

**Introduction**

Defendants Nadia Joseph and Margaret Blanc move pursuant to CPLR § 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction. Plaintiff cross-moves for “leave to enter default judgment against the defendants[] and pursuant to CPLR 2001 deeming the Amended Affidavit of Service filed on 6/2/19 as duly filed *nunc pro tunc* to April 15, 2019” (NYSCEF Doc # 14).

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### *Background*

Plaintiff commenced this action pursuant to RPAPL Article 15 by filing a summons and complaint on March 30, 2019. An affidavit of service of the summons and complaint on defendants, Nadia Joseph and Margaret Blanc, was e-filed on April 15, 2019. Plaintiff allegedly served defendants by affixing the documents to the door of 64 Paerdegat 3<sup>rd</sup> Street, in Brooklyn, New York, and subsequently mailing a copy (*see* NYSCEF Doc. # 3, 7, 10). This Court notes that there are numerous inconsistencies in this affidavit of service. The papers were allegedly affixed to the door of defendants' residence on April 6, 2018, approximately one year prior to commencement of this action. Further, the affidavit indicates service on "Pimentel Jean-Carlos and Pimentel Jonathan", not Nadia Joseph and Margaret Blanc and contains the incorrect index number of 506522/2018.

Although no affidavits from defendants were provided herein in support of this motion, counsel for defendant contends that his "client" "found a copy of the papers on her lawn" (NYSCEF Doc. # 8).

### *Discussion*

"The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process. In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and void" (*US Bank Nat'l Ass'n v. Joseph*, 190 A.D.3d 878, 136 N.Y.S.3d 757 [2 Dept., 2021], quoting *Bank of N.Y. Mellon v. Lawson*, 176 A.D.3d 1155, 111 N.Y.S.3d 337 [2 Dept., 2019]). However, "[a]n improperly executed affidavit of service is a mere irregularity

and not a jurisdictional defect [and] “[t]he crucial question is whether or not [the party being served] was in fact served with process” (*Tanash v. Amien*, 82 A.D.3d 1252, 919 N.Y.S.2d 392 [2 Dept., 2011], quoting *Mendez v. Kyung Yoo*, 23 A.D.3d 354, 806 N.Y.S.2d 67 [2 Dept., 2005] [where the trial court erred in dismissing the complaint for lack of jurisdiction where the affidavit of service filed named the incorrect party served with process]).

CPLR § 2001 provides “[a]t any stage of an action...the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid”.

“In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” (*id.* at 582, 915 N.Y.S.2d 204, 940 N.E.2d 909 [internal quotation marks omitted] ). As the Court of Appeals noted in *Ruffin*, a defendant's “actual receipt of the summons and complaint is not dispositive of the efficacy of service” (*id.* at 583, 915 N.Y.S.2d 204, 940 N.E.2d 909). “For example, simply mailing the documents to defendant or e-mailing them to defendant's Web address would present more than a technical infirmity, even if defendant actually receives the documents, inasmuch as these methods in general introduce greater possibility of failed delivery” (*id.*).

(*Estate of Perlman v. Kelley*, 175 A.D.3d 1249, 108 N.Y.S.3d 28 [2 Dept., 2019], quoting *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 940 N.E.2d 909 [2010]).

In the instant case, the defect in service is merely technical. It is indisputable that the affidavit of service filed on April 15, 2019, contains numerous errors. In addition to listing the incorrect parties, the affidavit contends to have served process of documents under a different cases index number, on a date which occurred before this action was even commenced. Although this Court was not provided with affidavits from defendants confirming that they reside at the address served, this fact was not disputed by counsel, who represented that defendants received process when the papers were found on their lawn. Further, there is no question, that the defendants were timely apprised of the action, as the instant motion was filed one month after purported service took place. Additionally, there is no evidence or prejudice as no activity had occurred in the action in the one month between original service and defendants' instant motion.

However, this Court notes that the amended affidavit of service on Margaret Blanc, dated May 30, 2019, indicates that Blanc was served by affixing a copy to the door of her residence and then subsequently mailing a copy to Nadia Joseph (*see* NYSCEF Doc. # 18). Therefore, even assuming that this Court denied defendant's motion to dismiss and granted the cross-motion to deem the corrected affidavits of service as timely filed, *nunc pro tunc*, there is still no proof in the record that Margaret Blanc was properly served.

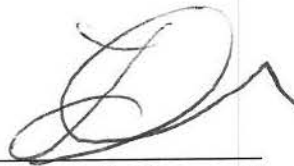
### *Conclusion*

Accordingly, that branch of plaintiff's motion (sequence number two) seeking default judgment against defendants is denied, as plaintiff failed to set forth any arguments with respect to CPLR § 3215. That branch of plaintiff's motion pursuant to

CPLR § 2001 to correct the mistake in the original affidavit and deem the affidavit of service filed on June 2, 2019 timely filed *nunc pro tunc* is granted.

Based on the amended affidavits of service, defendant's motion to dismiss pursuant to CPLR § 3211[a][8] for failure to obtain jurisdiction (sequence number one) is denied as to Nadia Joseph and granted as to Margaret Blanc.

ENTER:



Hon. Lara J. Genovesi  
J.S.C.

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