

<b>Tapia v Wide</b>
2021 NY Slip Op 31285(U)
April 14, 2021
Supreme Court, Kings County
Docket Number: 508596/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

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**ADRIAN MACARENO TAPIA,**  
**Plaintiff,**

**DECISION / ORDER**

**-against-**

**Index No. 508596/2020  
Motion Seq. No. 1  
Date Submitted: 2/11/21**

**KATHERINE WIDE and FREDERIK WIDE,**  
**Defendants.**

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*Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendants' motion to dismiss the complaint.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>6-12</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>16-24</u>
Reply Affirmation.....	<u>26</u>

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

This is a personal injury action arising from a slip/trip and fall accident which took place on May 29, 2018 on the front steps to 132 South 1<sup>st</sup> Street, Brooklyn, NY. The action was commenced on May 29, 2020 by filing a summons and complaint. An affidavit of service on Frederik Wide was filed on June 26, 2020. On October 13, 2020, defendants' answer was electronically filed. Therein, defendants assert an affirmative defense [Par. 98] that service of process was improper. On November 11, 2020, an affidavit of service on Katherine Wide was filed. This motion timely followed [60 days, pursuant to CPLR 3211(e)].

Defendants move for an order pursuant to Civil Practice Law and Rules ("CPLR")

§ 3211 (a) (8), CPLR § 308, and/or CPLR § 306-b, dismissing the plaintiff's verified complaint. Counsel avers in his affirmation in support that only an affidavit of service on defendant Frederik Wide was filed within 120 days of the date the action was commenced, so service on co-defendant Katherine Wide was not effectuated at all, and the service on Frederick Wide was improper, as it was not made on a co-tenant who refused his name, as stated, as "no such person identified as a "co-tenant" could have possibly accepted such service on their behalf as same was not authorized at said location to which neither had any affiliation to [Par 11]." Concerning service on Katherine Wide, counsel states that "no service of the pleadings was attempted upon Katherine Wide within the 120 proscribed period." Therefore, counsel urges the court to conclude that the court lacks personal jurisdiction over both of the defendants. Movants support their motion with an affirmation from each of the defendants, which state that they were, on the date in November 2020 that the affirmations were signed, in Costa Rica. They both aver that they do not own the property where Frederik Wide was served, 141 North 3<sup>rd</sup> Street, Brooklyn, New York, nor did they live there on the date that service was made. Neither affirmation (Doc 12) mentions the address where plaintiff had his accident, which is the address where defendant Katherine Wide was served. Nothing is attached to these affirmations to support their claims, such as a driver's license or other documentation.

Plaintiff opposes the motion and provides several documents to refute defendants' claims. Counsel also disputes that CPLR 2106 permits defendants to submit affirmations if they are out of the country. With regard to Frederik Wide, Doc. 18 is a DMV search done on June 17, 2020, a few days before service was made, which states that Frederik Wide's driver's license indicates his address as 141 North 3<sup>rd</sup> Street, Brooklyn, NY 11249,

that he was born in 1973, and has blue eyes. With regard to Katherine Wide, Doc. 19 is a print-out from the NYC Department of Finance website, which indicates that defendant Katherine Wide owns 132 South 1<sup>st</sup> Street, the location of plaintiff's accident, and Doc 21 is a copy of the deed which indicates that Katherine Wide is the sole owner of 132 South 1<sup>st</sup> Street, and has been the sole owner since she acquired the property in 2013.

The New York City Department of Finance ACRIS website indicates that 141 North 3<sup>rd</sup> Street is part of a condominium, which includes several buildings, including 248 Bedford Avenue and 195 Berry Street. Defendants owned unit TH6 ("Townhouse 6," Block 2351 Lot 1078) which they sold on May 28, 2019, a year before service on Frederik Wide was allegedly made, by deed recorded June 11, 2019 at CRFN 2019000182557. The unit in question is a townhouse, with a separate street address, and there is no common building entrance. Thus, the absence of an apartment number on the affidavit of service is not a defect. It is clear to the court from this public website, that, on the date service was made, Frederik Wide no longer owned the condominium, even if he did not change his address on his driver's license. In fact, the court has no idea if he ever lived at this address, as it could have been rented out and not been owner-occupied. However, as Frederick Wide has no ownership interest in the property where plaintiff had his accident, service on him was not required as he is not a proper party defendant.

The court must conclude that Katherine Wide is the only proper defendant, as she is the sole owner of the property where plaintiff had his accident. There is an affidavit of service filed on November 11, 2020 [Doc 5], which reflects nail and mail service on Katherine Wide at 132 South 1<sup>st</sup> Street, Brooklyn, NY on October 27, 2020, after two prior attempts at personal service were unsuccessful.

Defendants argue that this service [under CPLR 308 [4]) was not made within 120 days of the date the action was commenced, as is required by CPLR 306-b, and plaintiff did not seek an extension of time from the court, and as such, is void. Counsel is not correct, as plaintiff's counsel points out in his opposition. We are in the midst of the COVID-19 Pandemic. This action was commenced shortly after the court re-opened to the filing of new lawsuits. On March 20, 2020, Governor Cuomo issued Executive Order 202.8 tolling "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state" from the entry of the Executive Order through a specified date, which date was then extended by subsequent executive orders. On October 4, 2020, the Governor issued Executive Order 202.67, which continued the tolling period through November 3, 2020, the date on which tolling ceased (see EO 202.72 [confirming there is no further tolling period after 11/03/2020]). Therefore, the argument by defendants' counsel that the service of process upon Katherine Wide was untimely is incorrect.

The court next turns to plaintiff's claim that the affirmations of defendants were not properly prepared pursuant to CPLR 2106 (b) and should not be considered. He is incorrect. The CPLR was amended to permit a person who is outside the U.S. and its territories and needs to provide an affidavit for a New York matter to provide an affirmation instead of an affidavit. Here, defendants did so, and their affirmations (Doc 12) contain the language which the statute provides "shall be [included] in substantially the following form."

Counsel for defendants argues in his reply affirmation for the first time that if service was not untimely, that service upon Katherine Wide at the building that she owns

was invalid because “nail and mail service is improper at an address when the process server admits he cannot confirm the residency of the defendant at said address.” Counsel continues “the purported nail and mail service was ineffective since the process server admits he could not confirm Mrs. Wide lived at 132 1<sup>st</sup> Street, Brooklyn, NY in his Affidavit of 8/25/20, and therefore plaintiff failed to comply with the ‘due diligence’ requirement of CPLR 308 (4).” Finally, in his affirmation in support at Paragraph 7, he avers that “the courts have held that a defendant is not estopped from raising defective service as a defense where he did not engage in conduct calculated to prevent plaintiff from learning his new address, even where he “neglected to contact authorities to inform them of his change of address, since potential defendants ordinarily have no affirmative duty to keep those who might sue them abreast of their whereabouts.” Counsel quotes and cites *Feinstein v Bergner*, 48 NY2d 234, at 241-242 and states there is “no basis here upon which to invoke an estoppel.” That case stands for the proposition that although due diligence had been exercised in the plaintiffs’ preliminary efforts to effect service by personal delivery, the substitute service was defective since, while the summons may be mailed to defendant’s last known residence, only the actual dwelling place is sufficient for “nailing” purposes, and that there could be no estoppel in the absence of fraud or misrepresentation on the part of defendant.

The court does not need to reach the issue of whether there was fraud or misrepresentation on defendant Katherine Wide’s part. This is not because the issue is raised for the first time in reply. The principles applicable to ascertaining proper service should be applied by the court on a motion claiming service was improper, regardless of the parties’ arguments. The court must deny the motion on more basic legal principles.

While plaintiff's counsel submitted a number of documents in order to prove that due diligence had taken place in order to locate the defendants, defendants' counsel's reference to them (Docs 20, 22, 23), all dated prior to the date service was made on Katherine Wide, is of no value in relation to this motion. The affidavit of service, Doc 5, states that service was made by nail and mail service after two prior attempts were made to serve Katherine Wide. It states, "address confirmed per the direction and instructions of the attorney." The property is a two-family house, and defendant does not provide any evidence, by affirmation or by documentation, that this is not defendant Katherine Wide's residence address.

It is black letter law that "[a] process server's sworn affidavit of service attesting to the proper delivery of the summons and complaint constitutes prima facie evidence of service in the manner described, and therefore, gives rise to a presumption of proper service (see *Deutsche Bank Natl. Trust Co. v Patisso*, \_\_\_AD3d\_\_\_, 2021 NY Slip Op 02273 [2021]; *Nationstar Mtge., LLC v Cohen*, 185 AD3d 1039, 1040; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589; *Federal Natl. Mtge. Assn. v Alverado*, 167 AD3d 987, 988).

Here, the four corners of the affidavit of service give rise to a presumption of proper service. Defendant Katherine Wide provides an affirmation which does not say one word about this address. Even though it is dated November 16, 2020, it seems her attorney did not inform her about the affidavit of service filed on November 11, 2020 which reflects service upon her. "A sworn denial of receipt of service containing detailed and specific contradiction of the allegations in the process server's affidavit may defeat the presumption of proper service" (*Nationstar Mtge., LLC v Cohen*, 185 AD3d at

1040 [internal quotation marks omitted]; *HSBC Bank USA, N.A. v Whitter*, 159 AD3d at 945). Here, defendant Katherine Wide's affirmation is insufficient to rebut the presumption of proper service raised by the process server's affidavit of service. She does not specifically contradict the allegations in the process server's affidavit, as she solely addresses the affidavit of service on Frederick Wide, and states that on the date he was allegedly served, June 22, 2020, she was not at 141 North 3<sup>rd</sup> Street, Brooklyn, NY, did not live there, and did not own that property. Her affirmation completely omits any mention of the affidavit of service for service upon her at 132 South 1<sup>st</sup> Street, Brooklyn, NY. She therefore does not dispute that this was her residence on the date of service.

Accordingly, it is **ORDERED** that the defendants' motion is granted with regard to defendant Frederik Wide, and the complaint is dismissed as against him, and it is further **ORDERED** that the defendants' motion is denied with regard to defendant Katherine Wide.

This constitutes the decision and order of the court.

As preliminary conferences are not being held during the Pandemic, an *ex parte* preliminary conference order shall be uploaded to E-file by the court shortly so discovery can commence.

Dated: April 14, 2021

ENTER:



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Hon. Debra Silber, J.S.C.