

Tzivin v Boymelgreen
2021 NY Slip Op 32163(U)
October 27, 2021
Supreme Court, Kings County
Docket Number: Index No. 504693/2019
Judge: Ingrid Joseph
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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of October 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
PRESENT: HON. INGRID JOSEPH, J.S.C

-----X
Nathan Tzivin

Index No. 504693/2019

Plaintiff,

-against-

Jeshayahu Boymelgreen

Defendants,

-----X

Recitation, as required by CPLR '2219(a), of the papers considered in the review of Plaintiff's and Defendants' Motion(s):

Papers Numbered

- Notice of Motion and Affidavits/Affirmations Annexed..... 1, 2, 3, 6, 7
- Affirmation in Opposition Papers..... 4, 5
- Reply to Opposition Papers.....

Plaintiff, Nathan Tzivin, ("Plaintiff") moves (MS 1) this court for summary judgment in lieu of a complaint for an order directing entry of judgment for the Plaintiff and against the Defendant, Jeshayahu Boymelgreen, ("Defendant") in the amount of three hundred thirty-five thousand twenty-five dollars (\$335,025) plus Israeli value-added tax pursuant to CPLR Article 53. Defendant cross moves (MS2) to dismiss the complaint against him pursuant to CPLR §§ 306-b, 3211(a)(2) and (8) for failure to serve summons and complaint and lack of subject matter jurisdiction. Plaintiff also cross moves (MS 3) for an order extending the time to serve pursuant to CPLR §§ 306-b and 2004.

Plaintiff contends that he holds an authenticated judgment against Defendant that was entered by the County Court of Tel Aviv-Yafo, Israel. Plaintiff asserts that the Defendant cannot proffer any defense to the judgment. Plaintiff claims he demonstrated his entitlement to a judgment pursuant to CPLR §§ 5302, 5303, and 5304 since he submitted proof that the County Court of Tel Aviv-Yafo, Israel on July 2, 2013 entered a judgment

against Defendant in favor of the Plaintiff that is not a listed judgment proscribed¹ by the CPLR.

In opposition to plaintiff's motion for summary judgment and in support of the cross-motion to dismiss, Defendant claims that this action should be dismissed since the court lacks personal jurisdiction over the Defendant. Defendant maintains that Plaintiff failed to serve the summons and complaint within 120 days of commencing this action. Defendant asserts that Plaintiff's process server's affidavit of service contains inconsistencies since it states that the summons and motion in lieu of a complaint were served on defendant by nail and mail on March 25, 2019 but the process server's affidavit attesting to that fact has a sworn service date of March 23, 2019 and a filing date of March 24, 2019, which is two days and one day, respectively, before the date of actual service.

Plaintiff in his reply to Defendant's opposition to the motion and in opposition to Defendant's cross motion contends that Defendant's cross-motion was filed in violation of CPLR 2215 and the stipulation between counsel for the parties. Plaintiff avers that a cross-motion must be served seven (7) days prior to the return date and since Defendant violated CPLR 2215 by serving his cross-motion two days prior to the July 10, 2019 return date the cross motion should be denied. Plaintiff further argues that Defendant's cross-motion should be denied on the grounds that he failed to comply with the parties' stipulated briefing schedule which required a cross-motion or opposition to be filed ten (10) days before the return date. Plaintiff further asserts that the process server did effectuate service upon Defendant. Plaintiff asserts that there was a typographical error in the process server's affidavit which was cured by the filing of an amended affidavit on July 9, 2019 which stated that the summons and motion were mailed on March 23, 2019 instead of March 25, 2019. Plaintiff highlights the fact that Defendant did not oppose the motion for summary judgment on the merits but chose to only oppose the motion and the action on procedural grounds.

¹ Parties may not seek enforcement of a foreign judgment that is a judgment for taxes, a fine, a penalty, or a judgment rendered in connection with domestic relations (CPLR 5302)

Plaintiff in his cross motion seeks leave to extend the time to complete service on Defendant and for an order compelling Defendant's in-house counsel to accept service on Defendant's behalf. Plaintiff argues that Defendant has knowledge of this lawsuit and is not prejudiced by the granting of an extension of time to serve him. In support of his argument Plaintiff cites *Dhuler v. ELRAC, INC*, 118 A.D.3d 937, 939 (2d Dept. 2014) where the second department overturned the Supreme Court denial of a second extension of time to serve finding that the defendant had knowledge of the action, filed an answer, and no prejudice existed. Plaintiff maintains that defendant has knowledge of this action since defendant's counsel contacted plaintiff's counsel to enter a stipulation adjourning the return date of this motion and setting up a briefing schedule. Moreover, Plaintiff requests that the court order defendant's in-house counsel for his business to accept service on his behalf.

The Second Department in *JPMorgan Chase Bank, N.A. v Grinkorn*, affirmed a Supreme Court decision that the typographical error... was a nonjurisdictional defect, which in the absence of prejudice to the defendant was subject to correction and that the extension of time granted was warranted under CPLR 306-b... validating the subsequent service, nunc pro tunc (*JPMorgan Chase Bank, N.A. v Grinkorn*, 172 AD3d 1183 [2d Dept 2019]). The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004 (*First Federal Savings & Loan Association of Charleston v Tezzi*, 164 AD3d 758, 760 [2d Dept 2018]). Pursuant to CPLR 306-b, a court may, in the exercise of its sound discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice (*Bank v Estate of Robinson*, 144 AD3d 1084, 1085 [2d Dept 2016]). Good cause requires a showing of reasonable diligence in attempting to effect service (*Id*).

After oral argument, and a review of the documents submitted and the applicable statutes the Court finds that Defendant sufficiently rebutted the presumption of service since he highlighted the fact that the date of purported service occurred on a date after the affidavit of service was notarized and filed. However, Plaintiff has demonstrated good cause for an order granting leave for an extension of time to effectuate service since he stated that the date provided in the original affidavit of service was a typographical error

and there is no prejudice to the Defendant. Plaintiff's untimely attempt to correct the alleged typographical error without leave of the Court was improper.

Accordingly, Plaintiff's motion for an order granting summary judgment in lieu of a complaint is denied without prejudice. Plaintiff's cross-motion for leave for an extension of time to effectuate service is granted. Defendant's cross motion to dismiss the complaint is denied Plaintiff shall personally serve Defendant with the summons and complaint within 30 days of this order with notice of entry.

This constitutes the decision and order of the Court.

ENTER,



HON. INGRID JOSEPH, JSC

Hon. Ingrid Joseph
Supreme Court Justice