

Ruda v Congregation Beth Yeshaye

2021 NY Slip Op 32206(U)

October 27, 2021

Supreme Court, Kings County

Docket Number: Index No. 509904/2020

Judge: Francois A. Rivera

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At an IAS Term, Part 52 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

HONORABLE FRANCOIS A. RIVERA

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JOSEPH RUDA,

Plaintiff,

DECISION & ORDER
Index No. 509904/2020

- against -

CONGREGATION BETH YESHAYE,

Defendant.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by defendant Congregation Beth Yeshaye (hereinafter CBY) on April 12, 2021, under motion sequence number three, for an order pursuant to CPLR 3211 (a) (8) dismissing the action for lack of personal jurisdiction over the defendant. This motion is opposed by plaintiff Joseph Ruda (hereinafter plaintiff or Ruda).

- Notice of Motion
- Affirmation in Support
- Exhibit A to D
- Affirmation of Samuel Krausz
- Affirmation in Opposition
- Exhibit A to I
- Reply Affirmation
- Exhibit E to F

Recitation in accordance with CPLR 2219 (a) of the papers considered on the order to show cause by the plaintiff under motion sequence number four, seeking an order pursuant to CPLR 2221: (1) granting leave to reargue the order of this Court dated March 4, 2021, which granted the defendant’s motion to dismiss plaintiff’s complaint; and upon re-argument, (2) vacating or modifying the order to the extent of denying

CBY's motion to dismiss the complaint; and (3) extending plaintiff's time to serve the complaint through July 30, 2021. The order to show cause is opposed by CBY.

- Order to Show Cause
- Affirmation and Memorandum of Law in Support
- Exhibits A to E
- Affirmation in Opposition
- Exhibits 1 to 9
- Reply Affirmation
- Exhibit F

BACKGROUND

On June 12, 2020, Ruda commenced the instant action for damages for personal injuries by electronically filing a summons and verified complaint with the Kings County Clerk's office.

The verified complaint contains thirty-five allegations of fact in support of two causes of action and alleges the following salient facts. On June 7, 2017, Ruda was lawfully engaged in the course of his employment on a property located in Kings County, in the State of New York owned by CBY. CBY engaged the services of contractors and the like to perform certain work and services upon its premises.

On that date, Ruda was caused to fall due to a dangerous and defective condition (hereinafter the accident). The first cause of action alleges that despite having actual and constructive notice of the dangerous and defective condition, CBY was negligent in that it did not take the necessary precautions to ensure that its premise was maintained in good repair. The second cause of action is for negligent hiring and supervision. The complaint alleges that CBY failed in its duty to hire competent persons to deliver, furnish and provide equipment and materials to perform work and services on the premises.

Furthermore, CBY failed to train and supervise the duties and activities of its employees and personnel in the performance of work and services on the premises. The accident caused Ruda to suffer serious, permanent, and disabling injuries and loss of earnings.

PRIOR MOTION HISTORY

By notice of motion filed on November 17, 2020, under motion sequence number one, CBY had moved for an order dismissing the complaint pre-answer pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction.

By notice of cross motion filed on February 25, 2021, under motion sequence number two, plaintiff had moved for an order granting, among other things, an extension of time to serve the verified complaint upon CBY.

By order dated March 4, 2021, the Court resolved motion sequence number one and two by granting CBY's motion to dismiss the verified complaint pursuant to CPLR 3211 (a) (8) lack of personal jurisdiction. However, by the same order, the Court extended the plaintiff's time to serve the complaint to April 9, 2021, based on the COVID-19 pandemic and the Governor's Executive Order 202.8, et seq.

THE INSTANT MOTIONS

By notice of motion filed on April 12, 2021, under motion sequence number three, CBY has again moved pursuant to CPLR 3211 (a) (8) for an order dismissing the complaint pre-answer for lack of personal jurisdiction.

By order to show cause signed on June 7, 2021 under motion sequence number four, plaintiff seeks an order pursuant to CPLR 2221: (1) granting leave to reargue the order of this Court dated March 4, 2021, which granted the defendant's motion to dismiss

plaintiff's complaint; and upon re-argument, (2) vacating or modifying the Order by denying CBY's motion to dismiss the complaint; and also (3) if jurisdiction was still wanting, extending plaintiff's time to serve the complaint through July 30, 2021.

LAW AND APPLICATION

CPLR 2221(d) sets forth the procedure for making a motion for leave to reargue a prior order and states the following:

(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

Plaintiff contends that the Court mistakenly overlooked the inherent contradiction in the order of March 4, 2021. On the one hand, the Court granted the defendant's motion to dismiss the verified complaint based on lack of jurisdiction over the defendant, effectively relinquishing its own jurisdiction over the matter. On the other hand, the Court explicitly stated that it was applying its discretionary authority to extend the time for plaintiff to complete service of process based on the ongoing pandemic.

Plaintiff further contends that since the Court would have no jurisdiction to apply its discretionary authority, after ostensibly dismissing the verified complaint, and it was clearly the Court's intention to grant the plaintiff an extension to serve the complaint, the Court should vacate that part of the order which dismissed the complaint.

The defendant has opposed the motion on two grounds. First, the defendant contends that plaintiff's motion is procedurally defective for not including a copy of all

the prior motion papers which yielded the March 4, 2021 Order. Inasmuch as the prior motion papers are available to the Court electronically through the NYSCEF system, the failure to include them with the order to show cause is at most a mere irregularity and may be disregarded pursuant to CPLR 2001 (*see Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello*, 97 AD3d 611, 612 [2nd Dept 2012]; *see* CPLR 2001; *U.S. Bank N.A. v Eaddy*, 109 AD3d 908, 910 [2nd Dept 2013]).

The defendant contends that the March 4, 2021 Order is not internally inconsistent. Defendant contends the Court did not strip itself of jurisdiction by dismissing the complaint and then affording plaintiff a final extension of time to serve the Synagogue. Rather, the defendant contends that the Court issued a conditional order, to wit, that its decision to dismiss would be held in abeyance pending plaintiff's demonstrating to the Court that it properly completed service of process between the March 4, 2021 and the expiration of the extension period.

The defendant further contends that the plaintiff made no attempt to serve the defendant at any time after March 4, 2021, the date of the order, and before the April 9, 2021, the deadline for completing service upon the defendant. On this basis the defendant avers that plaintiff's motion should be denied and its own motion for dismissal of the complaint for lack of personal jurisdiction should be granted.

The parties' respective submissions focus on an ambiguity in the March 4, 2021 Order which requires clarification. The March 4, 2021 order should be understood to mean that the plaintiff was granted an extension to April 9, 2021, to serve the verified

complaint on the defendant, and that if the plaintiff failed to do so, the defendant's cross motion to dismiss the complaint for lack of personal jurisdiction would be granted.

Contrary to the defendant's contention, however, the March 4, 2021 Order should not be read to mean that the attempt at service must occur after March 4, 2021. Rather it merely sets a deadline of April 9, 2021, for completion of service. Therefore, if the plaintiff has successfully accomplished proper service before the April 9, 2021, deadline then the motion to dismiss the complaint for lack of personal jurisdiction should be denied. This is so, even if the service of process was attempted and completed before March 4, 2021.

Plaintiff claims that service of process on the defendant was successfully accomplished on March 2, 2021. Plaintiff's affirmation in support of the order to show cause declares the following facts. At oral argument of the motion conducted on March 4, 2021, plaintiff's counsel noted that another service attempt had been effectuated by plaintiff's process server on March 2, 2021, two days prior, but that plaintiff had yet to definitively confirm the identity of the individual upon whom service had been made. Thereafter plaintiff was able to definitively confirm with its process server, Muataz Ahmad (hereinafter Ahmad) that on March 2, 2021 proper service had, in fact, been effectuated upon Samuel Krausz, the Rabbi of CBY (hereinafter Krausz).

On March 12, 2021, plaintiff filed an affidavit of its process server Ahmad, confirming that service of process had been properly made upon Krausz. On June 7, 2021, plaintiff refiled the same affidavit and annexed it as exhibit C to the instant order to show cause. Plaintiff also filed as exhibit D, another affidavit of Ahmad averring, among

other things, that Ahmad had received a photograph of Krausz and used it to identify Krausz when he personally served him.

Ahmad's affidavit of service signed on March 11, 2021, and annexed as exhibit C to plaintiff's motion, avers the following. On March 2, 2021, at 07:26 p.m., Ahmad went to 227 Rutledge Street, ground floor apartment, Brooklyn, New York 11211 and served the summons and verified complaint with notice of electronic filing on Congregation Beth Yeshaye by leaving a true copy with Mr. Smith, general agent, authorized to receive service. At the time of the service, Ahmad had a photograph of Krausz who he called Mr. Smith, because the Krausz would not confirm his identity.

Ahmad's affidavit of service, signed on May 26, 2021, and annexed as exhibit D to plaintiff's motion, averred the following quoted declaration of facts among others.

"As I was about to leave, "Mr. Smith" arrived and proceeded to completely ignore my presence at his front door. I asked "Mr. Smith" if he was Rabbi Krausz. He did not confirm or deny his identity but instead asked me what the matter was concerning. I showed him papers. Upon seeing the papers, "Mr. Smith" ignored me and proceeded to enter the house. I therefore left the papers on the floor."

In opposition to plaintiff's motion and in support of its own motion CBY submitted, among other things, an affidavit of Krausz. Krausz signed the affidavit on April 12, 2021 and affirmed the following quoted declaration of facts.

"I am also informed that, on or about March 12, 2021, plaintiff filed with the Court an affidavit of service. According to that affidavit of service, the summons and verified complaint in this matter were duly served upon the Synagogue on March 2, 2021."

...

"However, at no time did anyone serve any legal papers on me, either on March 2, 2021 or on any other day. I am not aware of any other representative of the Synagogue who received legal papers that day. Furthermore, nobody

I came into contact with on that day identified himself or herself as a process server who was attempting to serve me or the Synagogue with legal papers. The affidavit of service also suggests that the person served with the papers was wearing a yarmulke. I never wear a yarmulke outside of my home or when I answer the door of my home, or even when I simply look out a window if somebody knocks at the door or rings the doorbell. I always wear a hat (a traditional hat, not the kind that can be seen in the photograph, which is called a shtreimel). In short, the summons and complaint were never served on me, either before March 4, 2021 or during the extension period between March 4 and April 9 that was granted by the Court.”

CPLR 311 provides in pertinent part that personal service upon a corporation ... shall be made by delivering the summons ... to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service (CPLR 311 [a] [1]). Pursuant to CPLR 311 [a] [1], Krausz, as Rabbi of CBY, was authorized to receive service on behalf of CBY.

The affidavit of Ahmad demonstrates proper service upon CBY through the personal delivery of the summons and complaint upon Krausz. The affidavit of a process server constitutes a prima facie showing of proper service (*Deutsche Bank Nat'l Tr. Co. v Patisso*, 193 AD3d 814 [2nd Dept 2021]). The affirmation of Krausz contained specific allegations of fact refuting Ahmad’s claim of proper service upon him. A sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing (*Rosemark Contractors, Inc. v Ness*, 149 AD3d 1115, 1116 [2nd Dept 2017]). Such is the case here. Accordingly, the matter is stayed pending a Traverse Hearing to determine whether the Court has personal jurisdiction over the defendant.

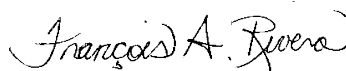
CONCLUSION

The motion by defendant Congregation Beth Yeshaye for an order pursuant to CPLR 3211 (a) (8) dismissing the action for lack of personal jurisdiction is granted to the extent that the action is stayed pending a determination of Traverse Hearing ordered by this decision and order.

The motion by plaintiff Joseph Yuda for an order pursuant to CPLR 2221 granting leave to reargue the Order of this Court dated March 4, 2021, and upon re-argument, vacating or modifying that part of the order which granted the prior motion of Congregation Beth Yeshaye to dismiss the complaint is granted to the extent that the action is stayed pending a determination of the Traverse Hearing ordered by this decision and order.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.