

Bank of Am., N.A. v Dollar Phone Corp.
2022 NY Slip Op 31211(U)
April 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 518380/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BANK OF AMERICA, N.A.,

Plaintiff,

Decision and order

- against -

Index No. 518380/2021

DOLLAR PHONE CORP., MOSES GREENFIELD,
DOLLAR PHONE ENTERPRISE, INC., GLOBAL
SWITCHING, INC., DPE LABEL HOLDING CORP.,
DOLLAR PHONE SERVICES, INC. and
PINMONSTER, INC.,

Defendants,

April 7, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendant Moses Greenfield moves seeking to dismiss the lawsuit on the grounds he was not adequately served with process. The plaintiff opposes the motion. Papers were submitted by all parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

As recorded in a prior decision this lawsuit concerns unpaid loans in the form of lines of credit the plaintiff claims are owed by the defendants. The defendant Greenfield asserts he was not served with process.

It is well settled that pursuant to CPLR §308(4) commonly known as 'nail and mail' service, the plaintiff must exercise due diligence to demonstrate that personal service or service upon someone of suitable age and discretion could not be made. Thus, this method of service is not available if someone is present at the location where service is attempted (Kambour v. Farrar, 188 AD2d 719, 590 NYS2d 586 [3rd Dept., 1992]). Therefore, in Bossuk

v. Steinberg, 58 NY2d 916, 460 NYS2d 509 [1983] the Court of Appeals held that where a person of suitable age and discretion (and surely the defendant himself) refuses to open the door for a process server and "resists" service then service can be effectuated by leaving the summons and complaint outside the door and informing the individual the summons has been left there. Further, in Ramirez v. Romualdo, 25 AD3d 680, 808 NYS2d 733 [2d Dept., 2006] the court held that where an individual answers the door but refuses to accept service then the process server may not resort to service pursuant to CPLR §308(4) service. The court explained that "the affidavit of service indicated that the process server spoke to a person of suitable age and discretion at the defendant's actual dwelling place when he attempted service. Since service pursuant to CPLR 308(2) could have been made with due diligence, the process server's resort to 'nail and mail' service pursuant to CPLR 308(4) was improper and did not confer personal jurisdiction over the defendant" (id).

Furthermore, one attempt at personal service is insufficient (see, Markoff v. South Nassau Community Hospital, 91 AD2d 1064, 458 NYS2d 672 [2d Dept., 1983]). Likewise, service at the same times of the day is equally insufficient. Moreover, in Serrano v. Staropoli, 94 AD3d 1083, 943 NYS2d 201 [2d Dept., 2012], the court held that due diligence included trying to ascertain the business address of the party to effectuate service there.

Therefore, where the affidavit from the process server fails to indicate efforts to locate defendant's business address for personal service there then service is improper (see, also, County of Nassau v. Letosky, 34 AD3d 414, 824 NYS2d 153 [2d Dept., 2006]). This requirement is not merely a technical rule but emerges from an understanding that the purpose of serving process is to try and ensure that process is received.

In this case the process server's affidavit states that the summons and complaint was affixed to the door without any indication that any due diligence regarding personal service was attempted at all. Furthermore, there is no evidence the process server made additional attempts to serve the defendant personally. The plaintiff has submitted an unsigned authorization which states that the defendant could not be served because the servee did not live there. However, that authorization does not explain the basis for that determination, how that determination was reached and whether due diligence concerning personal service was ever attempted. Thus, that authorization hardly establishes the defendant evaded service.

In any event, in order to effectuate service, the process server was required to leave the papers in the vicinity and effectuate service pursuant to CPLR §308(1). Remaining there and serving the summons and complaint utilizing nail and mail service was improper and did not confer any service upon Moses


Greenfield (see, Plycon Transportation Group LLC v. Kirschenbaum, 36 Misc3d 1232(A), 959 NYS2d 91 [Supreme Court Suffolk County, 2012]).

Consequently, there was no service upon Moses Greenfield. Therefore the motion seeking to dismiss for the lack of service is granted. However, the plaintiff shall be afforded 120 days from receipt of this order to effectuate and file proper service and proof of service (Murphy v. Hoppenstein, 279 AD2d 410, 720 NYS2d 62 [1st Dept., 2001]).

So ordered.

ENTER:

DATED: April 7, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC