

Vitkina v Benalloul

2022 NY Slip Op 31400(U)

April 29, 2022

Supreme Court, New York County

Docket Number: Index No. 156923/2017

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 156923/2017

ANASTASIA VITKINA,

Plaintiff,

MOTION SEQ. NO. 003

- v -

ABRAHAM (ALBERT) BENALLOUL,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DEFAULT JUDGMENT and DISMISSAL.

In this tort action, plaintiff Anastasia Vitkina moves, pursuant to CPLR 3215, for a default judgment against defendant Abraham (Albert) Benalloul. Defendant opposes the motion and cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(8). After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action by filing a summons with notice on August 2, 2017. Doc. 1. Plaintiff thereafter moved, by order to show cause, to seal the court file. Doc. 7. By order entered June 11, 2018, this Court (Freed, J.) denied the motion. Doc. 30. Justice Freed then issued an order, entered December 4, 2018, marking this case disposed based on the June 11, 2018 order. Doc. 39. By order entered May 18, 2021, the Appellate Division, First Department reversed Justice Freed's December 4, 2018 order holding, in pertinent part, that:

to the extent there is a question about whether jurisdiction was properly conferred over [defendant], we exercise our authority in the interest of justice to extend [plaintiff's] time to properly serve the summons with notice and complaint, and direct her to do so within 30 days of entry of this order (*see Pennington v Da Nico Rest.*, 123 AD3d 627 [1st Dept 2014]).

Doc. 63.

Plaintiff thereafter filed a supplemental summons and first amended verified complaint on May 27, 2021. Docs. 45 and 46.

On July 21, 2021, plaintiff filed a "Return of Service" in which Steven Sykes, a process server employed by Roadruck Investigations ("Roadruck"), affirmed that, on July 6, 2021, he posted a copy of the summons and first amended verified complaint "to a conspicuous place on the property of [defendant's] residence at the address of: 2301 Collins Avenue, #1605, Miami Beach, FL 33139" ("the Miami address"). Doc. 48.¹ The Return of Service further indicated that Roadruck received the assignment to serve defendant at the Miami address on June 16, 2021 and that Sykes had previously tried to serve defendant on June 17, 2021 at 8:30 p.m.; June 23, 2021 from 8:30 a.m. until 10:30 a.m., despite being advised by security that defendant had not been seen in weeks; July 5, 2021 from 8:30 a.m. until 10:30 a.m., despite being advised security that defendant had not been seen in weeks; and on July 6, 2021 at 8:30 p.m. Doc. 56.

On July 22, 2021, Kay Stackpole, an employee of plaintiff's attorney, filed an affidavit of service attesting that the prior day, she had served the summons and first amended verified complaint on defendant by first class mail at his Miami address. Doc. 49.

On September 14, 2021, plaintiff filed an affidavit of service reflecting that, on July 9, 2021 at 7 p.m., process server Juan Barroso affixed the summons and amended verified

¹ A document virtually identical to the Return of Service was filed as Doc. 56, although that document was entitled "Affidavit of Service", was sworn by Sykes, and was notarized.

complaint to the door at 300 East 75th Street, Apt. 11 J, New York, New York, defendant's "dwelling house (usual place of abode)" after having been unable to serve defendant at that location on July 7, 2021 at 12:32 p.m. and July 8, 2021 at 7:45 a.m. Doc. 51. Barroso's affidavit reflected that, on July 6, 2021, plaintiff retained him to serve defendant. Doc. 51.

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendant. In support of the motion, plaintiff argues that defendant was served at the Miami address pursuant to CPLR 308(4) on July 6, 2021 and that service was effectuated by attaching the summons and first amended verified complaint "in a conspicuous place on the property." Doc. 53 at par. 9. Plaintiff further asserts that such service was made after Sykes' earlier attempts to serve defendant on June 17 and 23 and July 5, 2021.²

Defendant opposes the motion on the ground that a default judgment cannot be entered in favor of plaintiff given that she failed to properly serve the defendant. Doc. 62. Specifically, defendant argues that plaintiff did not exercise due diligence in attempting to serve him before resorting to affix and mail service pursuant to CPLR 308(4). Doc. 62. He further asserts that plaintiff violated the order of the Appellate Division by failing to serve process within 30 days after entry of its order on May 18, 2021. Doc. 62. Further, defendant submits an affidavit and lease reflecting that, as of May 1, 2021, he moved from the Miami address to a condominium in Boca Raton, Florida. Docs. 62, 74.

Additionally, defendant cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground that there is no personal jurisdiction over him. Docs. 61-62, 76.

² Plaintiff further asserts that she made additional attempts to serve defendant at or about the time of entry of the Appellate Division's order on May 18, 2021. However, plaintiff does not submit an affidavit of service documenting those attempts in support of her motion. Defendant does, however, submit a "Return of Non-Service" reflecting that Sykes made attempts to serve him at the Miami address on May 28 and June 5, 9, 10 and 12, 2021 (Doc. 65), although that document also reflects that Roadruck was retained to serve defendant on May 26, 2021. Thus, the Return of Non-Service contradicts Sykes' Return of Service (Doc. 48), which indicated that Roadruck was retained for this purpose on June 16, 2021.

In opposition to the cross motion and in further support of her motion for default, plaintiff argues that she properly served defendant with process at the Miami address. Doc. 81. Plaintiff argues that Sykes properly served defendant “by attaching true copies of the pleadings in a conspicuous place on the property of defendant’s residence” at the Miami address. Doc. 81. In support of this contention, she maintains that Florida Department of Motor Vehicles (“DMV”) records retrieved January 5, 2022 reflect that defendant was domiciled at the Miami address. Doc. 81. Plaintiff argues that, since Florida law requires one who moves to obtain a new license with the correct address within 30 days of the move, defendant is estopped from asserting that service at the Miami address was defective. Doc. 81. Plaintiff further asserts that defendant’s attorney should be sanctioned for intentional misstatements she made to the court. Doc. 81.

LEGAL CONCLUSIONS

"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" (*Federal Natl. Mtge. Assn. v Alverado*, 167 AD3d 987 [2d Dept 2018] [quotations marks and citation omitted]; *see Ananda Capital Partners, Inc. v Stav Elec. Sys. [1994] Ltd.*, 301 AD2d 430, 430 [1st Dept 2003]).

CPLR 308(4) provides that, if a defendant cannot be served “with due diligence” pursuant to CPLR 308(1) (personal delivery of the summons and complaint to the person to be served) or CPLR 308(2) (service on a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served and then mailing the papers to the person’s last known residence or actual place of business), then plaintiff may “affix[] the summons to the door of either the actual place of business, dwelling place or usual

place of abode within the state . . . and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .”

It is well settled that the due diligence requirement of CPLR 308 (4) must be strictly construed given the reduced likelihood that a summons served pursuant to that section will be received (*see, e.g., McSorley v Spear*, 50 AD3d 652 [2d Dept 2008], *lv denied* 10 NY3d 715 [2008], *rearg denied*, 11 NY3d 751 [2008]; *County of Nassau v Letosky*, 34 AD3d 414 [2d Dept. 2006]). In determining whether “affix and mail” service may be made pursuant to CPLR 308(4), a court must evaluate the circumstances of each case and, among other things, determine whether a plaintiff “made genuine inquiries about the defendant’s whereabouts and place of employment” (*Faruk v Dawn*, 162 AD3d 744, 745-46 [2nd Dept 2018] [citations and internal quotation marks omitted]; *see also O’Connell v Post*, 27 AD3d 630 [2d Dept 2006] [a failed attempt to serve a defendant at his or her dwelling place or usual place of abode may not qualify as due diligence unless the process server has also attempted to ascertain defendant’s place of employment for service at that location]).

Here, plaintiff has failed to demonstrate that reasonable diligence was exercised in serving defendant pursuant to CPLR 308(4) (*See Spath v Zack*, 36 AD3d 410, 412-413 [1st Dept 2007]). None of the attempts to serve defendant was made on a weekend and there is no indication that the process server attempted to locate defendant’s place of business (*Id.*) Although plaintiff argues that Florida DMV records *she obtained in 2022* reflect that defendant failed to change his address with the DMV, there is no indication that Sykes checked with the DMV *prior to attempting service* at the Miami address to determine whether defendant still lived

there (*Id.*). Plaintiff sets forth no authority holding that due diligence can be established retroactively. Nor can this Court locate any.

Although Sykes represents in his Affidavit of Service that, on June 23 and July 5, 2021, “security state[d] [that defendant] has not been observed in weeks” (Doc. 56), his representation is dubious at best given that he provides no description of the individual whom he claims provided this information (*See, Cadlerock Joint Venture, L.P. v. Kierstedt*, 119 AD3d 627 (2d Dept 2014)). This also raises issues regarding the diligence of Sykes’ attempt to serve defendant at the Miami address given that the latter had not been seen at that location for so long.

Additionally, Sykes’ affidavit of service is defective insofar as it refers to defendant’s Miami address as his “residence”, whereas CPLR 308(4) requires that service be made at defendant’s “actual place of business, dwelling place or usual place of abode within the state. . .” Further, although Stackpole purported to serve defendant with an additional copy of the summons and first amended verified complaint (Doc. 57), such service did not comply with the statute since she failed to specify whether the mailing was made to defendant’s “last known residence” or to his “actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication [was] from an attorney or concern[ed] an action against [him].” (*See* CPLR 308[4]).³

Service of the summons and verified amended complaint was also untimely. By order entered May 18, 2021, the Appellate Division directed plaintiff to serve defendant with process

³ In *Feinstein v Bergner*, 48 NY2d 234 [1979], the Court of Appeals, in deeming an affidavit of mailing invalid, held that held that the terms "dwelling place" and "usual place of abode" cannot be equated with the term "last known residence". Since Stackpole’s affidavit of mailing does not even mention the term “last known residence”, it is clearly deficient.

“within 30 days of entry of this order.” Doc. 63. The 30-day period in which to serve defendant thus expired on June 17, 2021. Sykes’ “Return of Service” and Affidavit of Service (Docs 48 and 56) reflect that *plaintiff did not assign Roadruck to serve defendant until June 16, 2021, just one day before the expiration of the 30-day period.*⁴ This, in and of itself, undermines plaintiff’s argument that Sykes acted with due diligence in attempting to serve defendant. Moreover, since Sykes did not resort to affix and mail service until July 6, 2021, such service would have been untimely pursuant to the order of the Appellate Division even if it had been proper.

Service is also deficient because Sykes did not represent that he affixed the summons and amended verified complaint to the door of defendant’s Miami address, as specifically required by CPLR 308 (4).

Nor does Barroso’s affidavit establish that defendant was properly served pursuant to CPLR 308(4). Barroso claims that he served defendant by affix and mail on July 9, 2021 at 7 p.m. at 300 East 75th Street, Apt. 11 J, New York, New York, defendant’s “dwelling house (usual place of abode)” after having been unable to serve defendant on July 7, 2021 at 12:32 p.m. and July 8, 2021 at 7:45 a.m. Doc. 51. However, service by affix and mail after attempts to serve defendant on three consecutive weekdays does not constitute reasonable diligence (*See generally, Wood v Balick*, 197 AD2d 438 [1st Dept 1993]; *Solomon Holding Corp. v Stephenson*, 2015 NY Slip Op 30943[U] [Sup Ct New York County 2015]). Moreover, Barroso’s affidavit reflects that he was assigned to serve defendant on July 6, 2021, after the expiration of the 30-day service deadline imposed by the Appellate Division. Doc. 51.

The parties’ remaining contentions are either without merit or need not be addressed given the findings above.

⁴ As noted above, this conflicts with Sykes’ Return of Non-Service, which reflects that Roadruck was retained to serve defendant on May 26, 2021. Doc. 65.

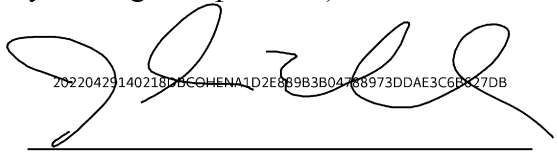
Accordingly, it is hereby:

ORDERED that the motion by Anastasia Vitkina seeking a default judgment against defendant Abraham (Albert) Benalloul pursuant to CPLR 3215 is denied; and it is further

ORDERED that the cross motion by defendant Abraham (Albert) Benalloul seeking to dismiss the complaint pursuant to CPLR 3211(a)(8) is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for defendant Abraham (Albert) Benalloul shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

<p>4/29/2022</p> <hr/> <p>DATE</p>	 <p style="font-size: small;">202204291402187BCOHEA1D2E889B3B04768973DDAE3C66827DB</p> <hr/> <p>DAVID B. COHEN, J.S.C.</p>																				
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