

| |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Kisel v Wong |
| 2022 NY Slip Op 32038(U) |
| June 28, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 152327/2022 |
| Judge: Richard G. Latin |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

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

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>PRESENT: <u>HON. RICHARD LATIN</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>VIKTORIIA KISEL,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>ANDY WONG,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p> | <p>PART 46V</p> <p>INDEX NO. <u>152327/2022</u></p> <p>MOTION DATE <u>06/17/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ordered that pro se plaintiff's motion for reconsideration, essentially looking to vacate the prior order entered on May 26, 2022, so that she may oppose defendant's motion to dismiss, is determined as follows:

In order to vacate her prior default, plaintiff must demonstrate a reasonable excuse and that she has meritorious causes of action (*see* CPLR 5015[a][1]; *Morales v Marion Ave. Mgt. LLC*, 188 AD3d 466 [1st Dept 2020]). Here, pro se plaintiff set forth a reasonable excuse for her failure to timely oppose defendant's motion to dismiss through the letter of her psychologist. Further, there was no evidence of any intent to delay or abandon her action (*see DePompo-Seff v Genovese Drug Stores, Inc.*, 13 AD3d 109 [1st Dept 2004]), or that defendant is prejudiced by the delay, and public policy supports resolving this case on the merits (*see Genao v Salcedo Maintenance Corp.*, 168 AD3d 528 [1st Dept 2019]).

Thus, pro se plaintiff must demonstrate that her case has merit to avoid dismissal. On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the non-movant is accorded the benefit of every possible favorable inference, and

the court's function is to determine only whether the facts alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

Here, pro se plaintiff commenced this case alleging that she was injured by way of malpractice in service of process, invasion of privacy, negligence, and negligent infliction of emotional distress stemming from defendant's attempt to serve divorce commencing documents on plaintiff at plaintiff's husband's ("Doudy") behest. It is undisputed that defendant is not a licensed process server by profession, and that he was performing this task as a friend and associate of Doudy.

Pro se plaintiff alleged that her bank account was suspiciously cancelled while she was away on a one-week vacation. She stated that upon returning to her trip, Doudy locked her out of her residence and ignored her for many days in a row. According to the NYPD Domestic Incident Reports submitted, pro se plaintiff maintains that Doudy locked her out of their marital home from approximately January 22, 2022 to March 9, 2022 and deprived her of access to her clothes, money, and other valuables, which in turn left her without food or shelter during the winter.

She further claimed that Doudy did not respond to any of her texts until February 6, 2022, when Doudy told her that he was in upstate New York until tomorrow, and that she should come by the apartment tomorrow evening. The following day he texted her at approximately 9:15pm and told her that she could come by now to pick up stuff, but not to stay late, because he wanted to get to sleep before midnight, otherwise she could come another time. Thereafter, she recalled that she knocked on their door at approximately 10:50PM and after Doudy opened the door, she stepped inside and was handed an envelope from the defendant. Pro se plaintiff then proceeded to have a conversation with Doudy about what just transpired. Pro se plaintiff later claimed that the

envelope contained some, but not all, of the necessary documents required to commence a divorce action. Additionally, she alleged that defendant later submitted affidavits of service that were defective.

Pro se plaintiff's first cause of action sounds in malpractice in service of process. In order to sustain a claim for malpractice, generally, there must be actual privity among the parties, or a relationship that close resembles privity (*see generally AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]). Here, there is no privity between the pro se plaintiff and defendant Wong. Moreover, even assuming that defendant Wong did incorrectly fill out affidavits of service, there are still no actual damages attributable to these defects. Pro se plaintiff's proper recourse is to contest proper service in the divorce proceeding. Therefore, this cause of action cannot stand.

Pro se plaintiff's second cause of action is based on invasion of privacy. The crux of her argument is that the defendant invaded her privacy by serving her with process within her home. Nevertheless, it is undisputed that defendant Wong was invited into the home by the pro se plaintiff's husband, Doudy, and that he did not take it upon himself to infiltrate their home by some improper means. Inasmuch as defendant Wong was authorized by Doudy to be present within his home, this cause of action must be dismissed (*see Kucker v Kanisnky & Rich*, 7 AD3d 491 [2d Dept 2004]; *Mascia v Maresco*, 39 AD3d 504 [2d Dept 2007]).

Pro se plaintiff's third cause of action sounds in negligence. It is well settled that in order to have a cause of action for negligence, the injured party must be owed a duty from the tortfeasor (*see Sheila C. v Povich*, 11 AD3d 120 [1st Dept 2004]). While a process server's negligence may bind the firm that hired them in a legal malpractice action (*see generally Kleeman v Rheingold*, 81 NY2d 270 [1993]), this Court knows of no such cases, nor were any provided in opposition to

defendant's motion, where a party served was able to recover damages from a process server for defects in an affidavit of service. A process server owes its duty to its client. Again, pro se plaintiff's proper recourse is to contest proper service in the divorce proceeding.

Pro se plaintiff's fourth cause of action is based on negligent infliction of emotional distress. In order to sustain this cause of action, defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*see Sheila C.*, 11 AD3d at 130-131). Here, defendant's service of the summons and complaint on pro se plaintiff at her home and the accompanying defective affidavits of service that followed were not so extreme and outrageous in character to sustain this cause of action. Moreover, even if pro se plaintiff alleged medical injuries, it would be impossible to demonstrate that it was the service that was the cause of the injuries and not being locked out of her home by Douady for a prolonged period of time, that prevented her from accessing her clothing and money for food and clothes during the winter, and the divorce itself from Douady that was the proximate cause. Even pro se plaintiff's psychologist, James Colasurdo, Psy.D., opines that her condition is the result of the "dissolution of her marriage and her transient, forced housing situation."

This Court has tremendous sympathy for the pro se plaintiff, but that does not mean that she has valid claims against defendant Wong. If this matter were allowed to survive, this Court would be permitting the pro se plaintiff to "shoot the messenger." Thus, there being no meritorious causes of action, and for reasons of judicial efficiency, this matter must remain dismissed.

The Court further declines, at this juncture, to consider any sanctions pursuant to 22 NYCRR 130-1.1.

Accordingly, it is ORDERED that the plaintiff's motion, essentially to vacate a prior order is denied; and it is further

ORDERED that the Court adheres to its prior order of dismissal; and it is further

ORDERED that this matter is dismissed with prejudice.

This constitutes the decision and order of the Court.

6/28/2022

DATE



Richard G. Latin, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE