

Zelaya v Irizarry

2022 NY Slip Op 32303(U)

July 14, 2022

Supreme Court, New York County

Docket Number: Index No. 159763/2021

Judge: Shlomo Hagler

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This opinion is uncorrected and not selected for official publication.

manner with the intent to cause intimidation, harm and fear to plaintiff” (Complaint, ¶¶ 4-5 [NYSCEF Doc. No. 1]). It is undisputed that defendant was also a candidate in the primary election for a position as a Civil Court Judge (*see* Defendant’s Affidavit, sworn to on November 15, 2021 at ¶ 12 [NYSCEF Doc. No. 5]).¹

There are disputed issues regarding the subject Affidavits of Service. An Affidavit of Service, sworn to on November 5, 2021, attests that defendant was served pursuant to CPLR § 308 (2) on November 4, 2021 at 11:38 a.m. by service on “John Irizarry, Relative of the Defendant,” a person of suitable age and discretion at “80 Bank St Apt 5, New York, NY 10014” (“80 Bank St”), that address described as both the last known residence and usual place of abode of defendant [NYSCEF Doc. No. 2] (the “November 5 Affidavit of Service”).

After this motion was filed, plaintiff made a second attempt to serve defendant. An Affidavit of Service, sworn to on December 13, 2021, attests to service on defendant pursuant to CPLR § 308 (4) by service on defendant on December 10, 2021 at 10:38 a.m. after two prior attempts at 80 Bank St (the “December 13 Affidavit of Service”). The process server, Andre Meisel, also submits a further affidavit describing his aforementioned service attempts (the “Meisel Affidavit”) [NYSCEF Doc. No. 13].²

In support of defendant’s motion, defendant submits Affidavits disputing the assertions made in both the November 5 and the December 13 Affidavits of Service (Defendant Affidavit,

¹ Plaintiff commenced a prior action against defendant (*Zelaya v Irizarry* [Index No. 153505/2021] which was dismissed by Order, dated October 25, 2021 [Hon. David B. Cohen, J.S.C.] for failure to serve a complaint [NYSCEF Doc. No. 13]. Said Order provided that the dismissal was not on the merits and plaintiff may refile the action “should she be so advised.”

² Although the Meisel Affidavit states that 80 Bank St is defendant’s last known residence rather than actual dwelling place or usual place of abode, defendant admits that he “has resided in apartment 5 at 78 Bank Street (also known as 80 Bank Street), New York, New York, for the past 24 years, including on November 4, 2021” (Defendant’s Affidavit, sworn to on November 15, 2021 [NYSCEF Doc. No. 5]). In his Affidavit, sworn to on December 27, 2021, defendant attests that he was “home” on the dates that the process server purportedly made his CPLR § 308 (4) attempts and affixed the summons and complaint to defendant’s door.

sworn to on November 15, 2021 [NYSCEF Doc. No. 5] (“Defendant’s November 15 Affidavit”) and Defendant Affidavit, sworn to on December 27, 2021 [NYSCEF Doc. No. 17] (“Defendant’s December 27 Affidavit”). In Defendant’s November 15 Affidavit, defendant disputes the service purportedly made on November 4, 2021 pursuant to CPLR § 308 (2) by claiming he was the only person home at the time of service, there was nobody living in his apartment named John Irizarry and he does not have a relative with that name, and he found the summons and complaint taped to his door but prior thereto there was neither a knock on the door nor did he hear a doorbell ring. Defendant further attests that the process server failed to actually serve him on grounds that the description provided of ‘John Irizarry’ does not comport with defendant’s appearance. In Defendant’s December 27 Affidavit, defendant disputes the service purportedly made on December 10, 2021. Defendant attests that at the dates and times of the alleged prior attempts and on the day of affixation, defendant was home with his son (with a description of their activities), and did not hear a doorbell ring or a knock on the door.³

Defendant’s Affidavits “sufficiently rebut[] the presumption of service” created by the subject Affidavits of Service (*HSBC Bank USA, N.A. v Russo*, 202 AD3d 647, 647 [1st Dept 2022]; see *NYCTL 2012-A Trust v Colbert*, 146 AD3d 482, 483 [1st Dept 2017]). As such, a traverse hearing is warranted.

On the basis of the foregoing it is

ORDERED, that the motion is granted to the extent of directing a traverse hearing on the issue of personal service on defendant Edward Irizarry; and it is further


³ In the Meisel Affidavit, Meisel contends that while attempting service in December 2021, he rang the doorbell on the attempted service dates but that nobody answered.

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court on the issue of personal service on defendant Edward Irizarry; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

7/14/2022
DATE


SHLOMO HAGLER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE