

Pinero v Santiago

2023 NY Slip Op 30950(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 805231/2022

Judge: Kathy J. King

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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. KATHY J. KING PART 06

Justice

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NICOLE PINERO,

Plaintiff,

- v -

KENNIA SANTIAGO, M.D., KENNIA SANTIAGO, N.P.
JACOB LAUER, M.D., JODI LERNER, M.D., MICHELE
LICHT, D.O., CARIDAD FRESNEDA, M.D., NEW YORK
PRESBYTERIAN HOSPITAL, AUDUBON CLINIC FAMILY
PLANNING, LENOX HILL RADIOLOGY

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39

were read on this motion to/for DISCONTINUE.

**DECISION + ORDER ON
MOTION**

Upon the foregoing papers, defendant, Kennia Santiago, N.P. a/s/h/a Kennia Santiago, M.D. (“Santiago”), seeks an Order dismissing the instant action, pursuant to CPLR § 3211(a)(8), based on plaintiff’s failure to effectuate proper service upon defendant. Santiago’s Answer asserts an affirmative defense based on lack of personal jurisdiction. Defendant Santiago further contends that Kennia Santiago is not a medical doctor, and that no such defendant exists, and therefore dismissal as to Kennia Santiago, M.D. is appropriate (Motion Seq. No. 01).

Plaintiff moves for an Order, pursuant to CPLR § 3217(b), requesting that this Court so order a Stipulation of Discontinuance with prejudice as to defendants Michelle Licht, D.O. and Lenox Hill Radiology and Medical Imaging Associates, P.C. s/h/a Lenox Hill Radiology, and to amend the caption deleting those defendants (Motion Seq. No. 02). No opposition has been submitted to either Motion Seq. Nos. 01 or 02.

In support of the motion (Motion Seq. No. 01), Santiago points to the affidavit of service in the within action, upon Kennia Santiago, N.P. and Kennia Santiago, M.D., which shows that the process server served the Summons and Complaint at the home address of Santiago's mother, who lives in Manhattan. Santiago attests in her affidavit in support, that she has not resided with her mother for at least 10 years, and that at the time of the purported service she resided in New Jersey. Santiago further attests that she never received a copy of a Summons and Complaint, either in person or by mail, at her current address.

Defendant argues that the Complaint must be dismissed for failure to comply with the strict requirements of CPLR § 308 (*see Krisilas v Mount Sinai Hosp.*, 63 AD3d 887 [2d Dept 2009]). CPLR § 308(1) requires delivery of the summons within the state to the person to be served. To effectuate substituted service of a summons pursuant to CPLR § 308(2), a process server must complete a three-step process, which requires 1) delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode; 2) mailing the summons to the person to be served 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; and 3) filing proof of service with the clerk of the court.

Based on the affidavit of service and Santiago's affidavit, plaintiff has failed to effectuate proper service upon Santiago, in accordance with CPLR §§ 308 (1) or (2). Santiago was not personally served with the summons within the state as required by CPLR § 308(1), and substituted service, pursuant to CPLR § 308(2), was not proper since service was made upon Santiago's mother at a residence where Santiago has not resided for approximately 10 years.

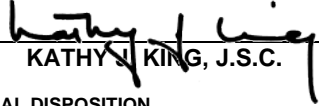
Based upon the foregoing, and no opposition having been submitted to the instant motions, it is hereby

ORDERED, that the Complaint is dismissed without prejudice to renew as to defendants Kennia Santiago, N.P. and Kennia Santiago, M.D., pursuant to CPLR § 3211(a)(8), based on lack of personal jurisdiction; and it is further

ORDERED, that plaintiff's motion is granted, pursuant to CPLR §3217(b), and plaintiff is directed to file a stipulation of discontinuance with prejudice as to defendants Michelle Licht, D.O. and Lenox Hill Radiology and Medical Imaging Associates, P.C. s/h/a Lenox Hill Radiology within 10 days of the date of this Order to be so-ordered (Motion Seq. No. 02); and it is further

ORDERED, that plaintiff is directed to settle an order on notice within twenty (20) days of the date of this Order upon all counsel, which shall include a provision setting forth the amended caption in accordance with this Decision and Order.

This constitutes the Decision and Order of the Court.

<u>3/27/2023</u> DATE		 KATHY KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE