

Mceachin v Rothfeld

2023 NY Slip Op 31726(U)

May 23, 2023

Supreme Court, New York County

Docket Number: Index No. 155677/2022

Judge: James G. Clynnes

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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. JAMES G. CLYNES PART 22M

Justice

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JAMAL MCEACHIN, INDEX NO. 155677/2022
Plaintiff, MOTION DATE 12/22/2022,
01/30/2023
- v - MOTION SEQ. NO. 001 002

MICHAEL ROTHFELD, JOHN DOE
Defendant. **DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 were read on this motion to/for EXTEND - TIME.

Upon the foregoing documents, the motion by Defendant Michael Rothfeld to dismiss Plaintiff’s Complaint pursuant to CPLR 3211 (a) (8) and 3211 (a) (5) on the grounds that the Court lacks personal jurisdiction over Defendant and the statute of limitations has expired (Motion Seq No 1), and the motion by Plaintiff to extend Plaintiff’s time to serve the Summons and Complaint nunc pro tunc (Motion Seq No 2), are decided as follows:

Plaintiff commenced this action by filling a Summons and Complaint on July 7, 2022 alleging he sustained serious personal injuries as a result of a July 16, 2019 motor vehicle accident between a vehicle operated by Plaintiff and a vehicle operated by “John Doe” and owned by Defendant Michael Rothfeld. Plaintiff alleges Defendant left the scene of the accident.

A motion to dismiss pursuant to CPLR 3211 (a) (8), is based on lack of jurisdiction over the defendant. In opposing a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff is only required to demonstrate that there are facts that may exist to establish there is personal jurisdiction (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463 [1974]). Service of process under CPLR 308 (2) requires that the summons be delivered within the state to a person of suitable age and discretion at the defendant’s actual place of business, dwelling place or usual place of abode, along with a mailing of the summons to the defendant’s last known residence or actual place of business.

Here, Defendant argues that delivery was not made upon an individual of suitable age and discretion as required under the first prong of CPLR 308 (2) and that the second prong similarly fails as the alleged mailing of the Summons and Complaint was sent to an improper address, containing two apartment numbers, and was therefore never received by Defendant. In support of his motion, Defendant relies on the purported affidavit of service, Plaintiff's affidavit, and an unsworn email by the manager of Defendant's building.

As an initial matter, the unsworn email by the manager of Defendant's building is hearsay and is therefore inadmissible (*Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582 [1st Dept 2018]). As such, the Court will not consider the email in its determination.

The purported affidavit of service states that the Summons and Complaint was delivered to John Doe (Doorman), and it provided a physical description of that individual, at 1220 Park Avenue, New York, NY 10128, and it was mailed to Defendant at 1220 Park Avenue, Apt 4N or 10D, New York, NY 10128. Defendant contends that the service upon the Doorman was never completed and that since the mailing address includes two apartment numbers, it is improper and was never received.

In his affidavit, Defendant avers that he and his wife are shareholders in the 1220 Park Avenue cooperative apartment corporation as well as residents of that corporation's Apartment 10D at 1220 Park Avenue, New York, New York and previously tenants of that corporation's Apartment 4B. He further avers that he did not receive personal service or a mailed copy of the Summons and Complaint and was informed of this matter by his insurance company.

A process server's affidavit constitutes prima facie evidence of proper service (*Nazarian v Monaco Imports, Ltd.*, 255 AD2d 265 [1st Dept 1998]). It has been established that service on a doorman is proper (*Hill Dickinson LLP v Il Sole Ltd.*, 149 AD3d 471, 471 [1st Dept 2017] [Substitute service on the doorman was proper]; *F. I. Du Pont, Glore Forgan & Co. v Chen*, 41 NY2d 794 [1977]). However, a defendant's "sworn, nonconclusory denial of service" is sufficient to dispute the veracity or content of the process server's affidavit (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). However, Plaintiff has shown that he has made sufficient efforts to serve Defendant (*Solano v Mendez*, 114 AD3d 614 [1st Dept 2014]).

On a motion to dismiss, pursuant to CPLR 3211 (a) (5), asserting a cause of action is barred by the statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired; then the burden shifts to the plaintiff to raise a question of fact as to whether the

statute of limitations has been tolled or that the plaintiff actually commenced the action within the applicable limitations period (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530 [1st Dept 2020]).

The statute of limitations for a personal injury action is three years (CPLR 214). Defendant contends that the three-year statute of limitations from accrual of the cause of action on July 16, 2019 has now expired. However, Defendant failed to address the unprecedented tolling of all actions due to the COVID-19 pandemic.

On March 20, 2020, the Governor signed Executive Order No. 202.8 in response to the COVID-19 public health crisis. The Executive Order “tolled” any “specific time limit for the commencement, filing, or service of any legal action...until April 19, 2020” (9 NYCRR 8.202.8). That toll was extended through several subsequent executive orders, the last of which remained in effect until November 3, 2020 (*see Gabin v Greenwich House, Inc.*, 210 AD3d 497 [1st Dept 2022]; *Murphy v Harris*, 210 AD3d 410, 2022 NY Slip Op 06086 [1st Dept 2022]). A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the time in which the claimant can commence an action (*Foy v State of NY*, 71 Misc 3d 605, 606 [Ct Cl 2021], quoting *Chavez v Occidental Chem. Corp.*, 35 NY3d 492 [2020]). The amount of time covered by the original executive order and all extensions is 228 days.

Here, the statute of limitations was tolled from March 20, 2020 until November 4, 2020, extending Plaintiff’s time to initiate the action until March 1, 2023. As such, the statute of limitations had not expired at the time of filing this motion.

With regard to Plaintiff’s motion for an extension of time to effect service (Motion Seq No 2), Plaintiff timely commenced this action within the relevant statute of limitations period. Plaintiff demonstrated that the interest of justice would be served by extending the time for service of the Summons and Complaint against Defendant (*Leader v Maroney*, 97 NY2d 95 [2001]). The statute of limitations has now expired and granting Plaintiff the opportunity to pursue his action is consistent with the Court’s strong interest in deciding cases on the merits where possible (*Henneberry v Borstein*, 91 AD3d 493 [1st Dept 2012]). Plaintiff’s efforts were reasonably diligent, and Defendant failed to establish that he was prejudiced by any delay in service (*Hernandez v Abdul-Salaam*, 93 AD3d 522 [1st Dept 2012]; *Stryker v Stelmak*, 69 AD3d 454 [1st Dept 2010]). There is nothing in the record suggesting that Plaintiff’s complaint lacks facial merit.

As such, Defendant’s motion to dismiss the complaint is denied, and Plaintiff’s motion for an extension of time to serve the summons and complaint for good cause shown and in the interests of justice is granted. Accordingly, it is

ORDERED that Defendant’s motion to dismiss Plaintiff’s Complaint pursuant to CPLR 3211 (a) (8) and 3211 (a) (5) on the grounds that the Court lacks personal jurisdiction over Defendant and the statute of limitations has expired (Motion Seq No 1) is denied; and it is further

ORDERED that Plaintiff’s motion for an extension of time to serve the Summons and Complaint nunc pro tunc (Motion Seq No 2) is granted; and it is further

ORDERED that Defendant’s motion pursuant to CPLR 3211 (a) (8) and 308 (2) for an Order dismissing Plaintiff’s Complaint as against him is denied without prejudice to renew should Plaintiff fail to effect service within 30 days of this Order’s entry; and it is further

ORDERED that Plaintiff’s motion pursuant to CPLR 306-b for an order extending Plaintiff’s time to serve Defendant with the Summons and Complaint is granted to the extent that Plaintiff may serve Defendant within 30 days of this Order’s entry; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon all Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

5/23/2023
DATE


JAMES G. CLYNES, J.S.C.

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