

**Gabriel v City of New York**

2023 NY Slip Op 32968(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 152639/2020

Judge: J. Machelle Sweeting

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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. J. MACHELLE SWEETING PART 62**

*Justice*

-----X  
ROBERT GABRIEL, INDEX NO. 152639/2020  
Plaintiff, MOTION DATE 09/28/2021  
06/22/2023  
- v - MOTION SEQ. NO. 003, 004

THE CITY OF NEW YORK, NEW YORK CITY HOUSING  
AUTHORITY, STEVEN TRIEBES

**ORDER + DECISION  
ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 60, 61

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65

were read on this motion to/for ALTERNATE SERVICE

In the underlying action, plaintiff claims to have sustained personal injuries as the result of a trip and fall that occurred on July 9, 2019 on the sidewalk adjacent to the premises located at 546 West 148th Street, New York, New York. Upon information and belief, the premises is owned by defendant STEVEN ROBERT TRIEBES (“Triebes”).

Plaintiff initially filed the Summons and Complaint (NYSCEF Doc. No. 1) against defendants The City of New York (the “City”) and the New York City Housing Authority (“NYCHA”). On February 24, 2021, NYCHA filed Motion Sequence #001 seeking an order, pursuant to Civil Practice Law and Rules (“CPLR”) 3211(a)(1) and (7), dismissing plaintiff’s complaint against NYCHA. On April 16, 2021, the undersigned issued an order (NYSCEF Doc. No. 22) granting this motion as unopposed.

On April 13, 2021, plaintiff filed Motion Sequence #002 seeking, *inter alia*, an order, pursuant to CPLR 1003 and 3025(b), granting plaintiff leave to amend the caption and serve a Supplemental Summons and Amended Verified Complaint to add Triebes as a defendant. On May 20, 2021, the undersigned issued an order (NYSCEF Doc. No. 25) granting this motion as unopposed.

On September 16, 2021, Triebes filed, through his then-attorney Barry Rothman, Esq., Motion Sequence #003 seeking an order, pursuant to CPLR 3211(a)(8), dismissing the Amended Complaint against Triebes, on the basis that the court lacks personal jurisdiction over him because of improper service (NYSCEF Doc. 33). In the motion, Triebes contends that he was improperly served by "nail and mail" on August 2, 2021 at 32 Forces Hill Road, Washington, New Jersey 07882. Triebes contends that service was improper because he is not a resident of New Jersey but has been a resident of Germany since 2000.

Also pending under Motion Sequence #003) was a cross-motion in which plaintiff sought an order:

- i. extending plaintiff's time to serve the supplemental summons and amended verified complaint on defendant STEVEN ROBERT TRIEBES, pursuant to CPLR 306-b and 2004; and
- ii. compelling counsel for defendant STEVEN ROBERT TRIEBES to accept service of process on his behalf, pursuant to CPLR 308(5); or
- iii. compelling counsel for defendant STEVEN ROBERT TRIEBES to produce defendant's current address in response to plaintiff's supplemental demand for discovery and inspection, pursuant to CPLR 3124.

Motion #003 was filed on September 16, 2021 and the cross-motion was filed on January 7, 2022. Subsequently, on February 22, 2022, Triebes and his attorney, Barry Rothman, Esq., executed a Consent to Change Attorney<sup>1</sup> (NYSCEF Doc. No. 51), wherein it was agreed that Triebes would represent himself *pro se* in the above-entitled action. The Consent to Change Attorney form did not set forth an address or any contact information for Triebes, who is now self-represented.

On June 7, 2022 and June 29, 2022, counsel for plaintiff submitted two letters to the court (NYSCEF Doc. Nos. 52-53) seeking:

- (1) leave of court to withdraw the pending cross-motion, on the basis that it was now moot, as it was filed when defendant Triebes was represented by Attorney Rothman; and
- (2) leave of court to file a new and different cross-motion based on the current circumstance of defendant Triebes representing himself *pro se*; and
- (3) an order directing Attorney Rothman to serve the new cross-motion on defendant Triebes, on the basis that defendant Triebes' actual address is unknown.

On July 26, 2022, the undersigned issued an order (NYSCEF Doc. No. 54) authorizing plaintiff to withdraw his cross-motion and to re-file a new and different cross-motion with service on defendant's former counsel (Attorney Rothman); and directing Attorney Rothman to either: (i) accept service on behalf of Triebes OR (ii) decline service and instead file with the court the last known address for service on Triebes. Disclosure of such address was to be filed within 10 days from the date of the order. Triebes was also ordered to file an updated address with the court within 10 days from the date of the order.

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<sup>1</sup> Attorney Rothman did not seek leave of court to be relieved; instead, he merely submitted a change of counsel form.

On August 1, 2022, plaintiff filed a new cross-motion (under Motion Sequence #003) (NYSCEF Doc. No. 56) seeking an order, pursuant to CPLR 306-b and 2004, extending plaintiff's time to serve the supplemental summons and amended verified complaint on *pro se* Triebes to 120-days from the disclosure of a valid service address for Triebes.

On August 2, 2022, one day after the cross-motion on Motion Sequence #003 was filed, Attorney Rothman filed a letter declining to accept service on Triebes' behalf and disclosing Triebes' last known address as: Textorstr, 99, 60596 Frankfurt, Germany (NYSCEF Doc. No. 59).

On February 22, 2023, the undersigned issued an order (NYSCEF Doc. No. 60) granting the cross-motion on Motion Sequence #003 in which plaintiff sought to extend the time in which to serve the supplemental summons and amended verified complaint on Triebes at his address at: Textorstr, 99, 60596 Frankfurt, Germany. The order also provided that plaintiff was to serve Triebes on or before June 22, 2023; that Triebes was to serve and file any reply to his pending motion to dismiss (Motion Sequence #003) on or before July 6, 2023; and that such motion shall be returnable on that date.

On June 22, 2023, plaintiff filed Motion Sequence #004 seeking an order:

(i) pursuant to CPLR 308(5), allowing service of the supplemental summons and amended verified complaint on defendant *pro se* STEVEN ROBERT TRIEBES in such manner as the Court directs; and

(ii) pursuant to CPLR 306-b and 2004, extending plaintiff's time to serve the supplemental summons and amended verified complaint on defendant *pro se* STEVEN ROBERT TRIEBES.

In Motion Sequence #004, plaintiff argues that on March 6, 2023, he engaged in a "complicated, lengthy, and expensive process" of serving Triebes at the address in Germany that had been provided by Attorney Rothman. Plaintiff argues that two months later, on May 4, 2023, he received notice from the District Court of Frankfurt that the German authorities were unable to

serve Triebes because “The addressee could not be found at the specified address. Another address could not be determined. The attempt to serve failed on 03.24.2023” (notice from the German court at NYSCEF Doc. No. 65). Plaintiff argues that Triebes is clearly trying to frustrate the legal process by intentionally hiding his address, and that Triebes should not be permitted to derive the benefits of ownership of real property in New York and simultaneously avoid the responsibilities concomitant to that ownership.

### Conclusions of Law

Plaintiff is correct in arguing that due process with respect to service does not require the impossible or even the impactable, but rather, the test is one of reasonableness under the circumstances. *See, e.g. Dobkin v Chapman*, 21 NY2d 490 (NYS Ct. of Appeals 1968):

Since the defendants' whereabouts were unknown, rendering normal prescribed methods of service of process upon them impossible [...]

Due process is not, however, a mechanical formula or a rigid set of rules. Increasingly in modern jurisprudence, the term has come to represent a realistic and reasonable evaluation of the respective interests of plaintiffs, defendants and the state under the circumstances of the particular case [...]

Plaintiffs, in cases of that kind, have been expected to do what they reasonably could to inform defendants [...] but, having done so, the negligible likelihood that the methods remaining to them would actually succeed has not deprived plaintiffs of effective rights of action [...]

Undeniably, there are situations in which insistence on actual notice, or even on the high probability of actual notice, would be both unfair to plaintiffs and harmful to the public interest [...]

We recognized that in some cases it might not be reasonably possible to give personal notice, for example, where people are missing or unknown [...]

[internal citations omitted];

LTD Trading Enterprises v Vignatelli, 176 AD2d 571 (1st Dept 1991):

[...] with respect to the individual defendant, Alberto Vignatelli, a resident of Forli, Italy, the IAS court properly directed such service. The record indicates that at considerable expense plaintiff employed the services of an international service company, which was unable to serve this defendant despite many attempts. Considering the facts and circumstances of this case, authorization of service pursuant to CPLR 308 (5) was warranted;

Franklin v Winard, 189 AD2d 717 (1st Dept 1993):

Order, Supreme Court, New York County [...] unanimously affirmed, with costs [...] We find no basis to vacate the order directing service upon defendant-appellant's attorneys pursuant to CPLR 308(5). A showing of impracticability under CPLR 308(5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to subdivisions (1), (2) or (4) of CPLR 308 [...]. In this case, the evidence demonstrates that plaintiff had information regarding the appellant's last known residence, which is not equivalent to the actual dwelling place or usual place of abode so as to allow for service pursuant to subdivisions (2) or (4) of CPLR 308 [...]. Further, plaintiff has demonstrated that her efforts to obtain information regarding the appellant's current residence or place of abode through ordinary means, such as a motor vehicle registration search, had proven ineffectual. This sufficiently demonstrates that service under the other methods provided would be "impracticable".

Here, this court's order dated July 26, 2022, provided that Triebes was to file an updated address with the court within 10 days from the date of the order. As of today, over a year after the deadline, Triebes has yet to comply.

This court's order dated February 22, 2023, further provided that Triebes was to serve and file any reply to his pending motion to dismiss (Motion Sequence #003) on or before July 6, 2023. As of today, over a month after the deadline, Triebes has yet to comply with this order.

Motion Sequence #004 is unopposed, and Triebes has not communicated with the court in any way indicating that he opposes the relief being sought.

Given the above, it is hereby:

**ORDERED** that Motion Sequence #003 filed by Triebes, where Triebes seeks an order dismissing the Amended Complaint on the basis that the court lacks personal jurisdiction over Triebes, is **DENIED**; and it is further

**ORDERED** that the cross-motion filed by plaintiff under Motion Sequence #003, where plaintiff seeks an order extending plaintiff's time to serve the supplemental summons and amended verified complaint on Triebes, is **GRANTED**; and it is further

**ORDERED** that Motion Sequence #004, where plaintiff seeks an order allowing alternate service of the supplemental summons and amended verified complaint, and extending plaintiff's time to serve the supplemental summons and amended verified complaint, is **GRANTED**; and it is further

**ORDERED** that plaintiff shall timely submit to the court a Proposed Order detailing the alternate method of service plaintiff seeks. Such Proposed Order shall be uploaded to NYSCEF, with a courtesy copy emailed to Chambers at: ([bbuliu@nycourts.gov](mailto:bbuliu@nycourts.gov)).

8/28/2023

DATE

  
J. MACHELLEE SWEETING, 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