

Stevens v City of Albany
2024 NY Slip Op 35612(U)
December 10, 2024
Supreme Court, Albany County
Docket Number: Index No. 904119-24
Judge: Peter A. Lynch
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ANTOINETTE STEVENS,

Plaintiff,

v.

CITY OF ALBANY, AND JASPER MCCOY,

Defendants.

DECISION

And ORDER

Index No.: 904119-24

(Hon. Lynch, J.)

INTRODUCTION

The is a personal injury action based on a premises liability claim.

FACTS

Plaintiff alleged defendant Jasper McCoy is the owner of the premises located at 555 Washington Avenue, Albany, New York (the premises).¹ Plaintiff also alleged that defendant Jasper McCoy resides at 123 Mulberry Street, Springfield, MA.²

Plaintiff alleged that a prior street sign had been improperly removed from the sidewalk in the area along the Ontario Street side of the premises, leaving a metal stump protruding from the sidewalk, an area also being maintained by the City of Albany.³ Plaintiff alleges that on December 29, 2023, she was lawfully walking along the sidewalk, was caused to trip and fall on the metal protrusion, and sustained injuries.⁴

¹ NYSCEF Doc. No. 1 – Verified Complaint ¶ 7 and 12.

² NYSCEF Doc. No. 1 – Summons and Verified Complaint ¶ 3.

³ NYSCEF Doc. No. 1 – Verified Complaint ¶ 7 and 8.

⁴ NYSCEF Doc. No. 1 – Verified Complaint ¶ 18; NYSCEF Doc. No.12- Stevens affidavit ¶ 4 .

SERVICE/ANSWER/RESPONSIVE PLEADINGS

On May 10, 2024, Plaintiff attempted to serve Defendant Jasper McCoy by means of substituted service in accord with CPLR § 308 (4), i.e., affix and mail.⁵ The Court notes that the summons and complaint were reportedly affixed to the front exterior door of 555 Washington Avenue, Albany, New York, and mailed to same address.⁶ Proof of service was timely filed on May 13, 2024, and service was completed on May 23, 2024. In the ordinary course, Defendant McCoy's answer or responsive pleadings were due on or before June 23, 2024, in accord with CPLR R 320 (a). A notice of default was mailed via certified mail return receipt requested and first-class mail to defendant McCoy at 123 Mulberry Street, Springfield, MA 01105 on September 3, 2024; no receipt of service was filed.⁷ To date, Defendant has failed to submit any response to the Complaint.

MOTION FOR A DEFAULT JUDGMENT

Plaintiff filed a motion for a default judgment against defendant McCoy on November 12, 2024, returnable December 10, 2024.⁸ Plaintiff claims she served the motion papers via certified mail return receipt requested on defendant McCoy at 555 Washington Avenue; no receipt evidencing service was filed.⁹

STATEMENT OF LAW

CPLR § 308 (4) provides:

“Personal service upon a natural person shall be made by any of the following methods: where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the

⁵ NYSCEF Doc. No.4 – Affidavit of Service.

⁶ NYSCEF Doc. No. 4.

⁷ NYSCEF Doc. No. 10 – Ahn Affirmation ¶ 6; NYSCEF Doc. No. 15.

⁸ NYSCEF Doc. No. 9

⁹ NYSCEF Doc. No. 17.

person to be served and by either mailing the summons to such person 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 in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law.” (Emphasis added)

In Bank of Am., N.A. v. Fischer, 220 A.D.3d 722, 724-725 [2d Dept. 2023], the Court recognized the need for due diligence in effecting service via affix and mail, holding,

“Service of process must be made in **strict compliance** with [the] statutory ‘methods for effecting personal service upon a natural person’ pursuant to CPLR 308. Here, the plaintiff purportedly served the defendant by the “affix and mail” method pursuant to CPLR 308 (4). Service pursuant to CPLR 308 (4) may be used only where service pursuant to CPLR 308 (1) or (2) cannot be made with “due diligence”. **“The due diligence requirement of CPLR 308 (4) must be strictly observed**, given the reduced likelihood that a summons served pursuant to that section will be received... Under the **totality of the circumstances**, the plaintiff failed to demonstrate that the process server acted with **due diligence before resorting to affix and mail service** pursuant to CPLR 308 (4).” (Emphasis added; citations omitted)

The issue distills to whether Plaintiff strictly complied with CPLR § 308 (4). I think not!

Clearly, Plaintiff knew that Defendant McCoy resided at 123 Mulberry Street, Springfield, MA upon the action commencement, since she listed that address on the summons, and sent the subsequent default notice to that address. Yet, Plaintiff attempted to complete the substituted service on May 10, 2024, by mailing the pleadings to the Washington Avenue

address, which is clearly not Defendant McCoy's last known residence address. Worse, Plaintiff mailed the motion for a default judgment to the Washington Avenue address.

It is the determination of the Court that Plaintiff failed to strictly comply with CPLR § 308 (4). Accordingly, the motion for a default judgment is denied.

The foregoing notwithstanding, Plaintiff's time to effect service on defendant McCoy is hereby extended to March 1, 2025, in accord with CPLR § 306-b (See Hall v. L&A Operational, LLC, 228 A.D.3d 846 [2d Dept. 2024]).

CONCLUSION

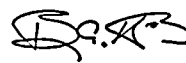
For the reasons more fully stated above, Plaintiff's motion for a default judgment against defendant McCoy is denied, and it is further,

ORDERED, Plaintiff's time to effect service on defendant McCoy is extended to March 1, 2025, in accord with CPLR § 306-b.

This memorandum constitutes both the decision and order of the Court.¹⁰

Dated: Albany, New York
December 10, 2024


PETER A. LYNCH, J.S.C.



12/10/2024

¹⁰ Plaintiff is required to comply with the provisions of CPLR 2220.

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.

NYSCEF Doc. Nos. 1- 18.

To: Moses Ahn, Esq.
MORGAN & MORGAN NY PLLC
Attorneys for Plaintiff
199 Water Street, Suite 1500
New York, New York 10038

JASPER MCCOY
555 Washington Avenue
Albany, NY 12206
And
123 Mulberry Street
Springfield, MA 01105

Robert Magee, Esq.
Deputy Corporation Counsel
CITY OF ALBANY
City Hall, Room 106
24 Eagle Street
Albany, New York 12207