

Bengtsson v St. Surin

2025 NY Slip Op 30645(U)

January 31, 2025

Supreme Court, Kings County

Docket Number: Index No. 522165/2020

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 31st day of January 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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ANNE THERESE BENGTTSSON, and NIKKOL IRENE WADE
Plaintiff(s)

Index No: 522165/2020
Motion Seq. 2-3

-against-

BRHONSON LEXIER ST. SURIN D/B/A/ S. LEXICON
PRODUCTIONS D/B/A/ QUANTUM MEDIA
PRODUCTIONS, INC. D/B/A SCARLET LEXICON D/B/A
LEX D/B/A/ Q MEDIA GROUP NETWORK
Defendant(s)

ORDER

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The following e-filed papers read herein:
Notice of Motion/Affidavits Annexed
Exhibits Annexed/Reply.....
Notice of Cross-Motion/Affirmation in Support/Affidavits Annexed
Exhibits Annexed.....

NYSCEF Nos.:

27-33; 43
34-41

In this matter, Anne Therese Bengtsson (“Bengtsson”) and Nikkol Irene Wade (“Wade”) (Collectively “Plaintiffs”) move (Motion Seq. 2) pursuant to CPLR 3025(b) to submit a Second Amended Complaint, and to extend the time to file and compel acceptance of the Second Amended Complaint pursuant to CPLR 3012(d). Brhonsion Lexier St. Surin D/B/A S. Lexicon Productions D/B/A Quantum Media Productions, Inc. D/B/A Scarlet Lexicon D/B/A/ Lex D/B/A Media Group Network (“Defendant”) has opposed the motion. Additionally, Defendant cross-moves (Motion Seq. 3) to dismiss Plaintiff’s complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), improper service pursuant to CPLR 306-b, or alternatively for abandonment of the action pursuant to CPLR 2218. Defendant also moves to conduct a fact-finding inquiry to resolve any genuine issues of triable fact pursuant to CPLR 2218, and for costs and sanctions against Plaintiffs’ counsel. Plaintiffs have opposed the motion.

In this case, Plaintiffs filed their initial Summons and Complaint on November 10, 2020. Based on a stipulation dated November 17, 2020, the parties agreed to service pursuant to CPLR 312-a, and “upon fulfilling Plaintiffs’ mailing obligations under CPLR § 312-a(a), Plaintiffs shall, within three-days of performing service by mail, send a notification email to Defendant at the address indicated below Defendant’s signature. The notification email shall state the date that personal service by mail was performed and identify the documents that were mailed to Defendant; said notification email shall contain an attached copy of a USPS Certificate of Mailing as proof of mailing.” Additionally, “upon receiving service by mail, Defendant shall acknowledge service pursuant to CPLR § 312-a(b). If Defendant fails to acknowledge service within the time prescribed by law, then Defendant shall waive the additional service

requirements.” Plaintiffs filed an affidavit of service dated November 23, 2020, which stated that Defendant was served a copy of the Summons, Complaint, and Exhibits via US mail. On January 15, 2021, Defendant filed a motion to dismiss in part asserting improper service pursuant to the stipulation and lack of personal jurisdiction. Plaintiffs opposed the motion on the grounds that Defendant waived his right to personal service and agreed to service by mail to an alternate address other than what was listed on the stipulation in email between the parties. Defendant’s motion to dismiss was marked off on December 9, 2021, for failure to appear. Thereafter, on June 14, 2023, Plaintiffs filed an amended complaint without leave of the court. Defendant filed a notice of rejection on June 29, 2023.

Plaintiffs now move herein to submit a Second Amended Complaint to replace the first Amended Complaint. In support of their motion, Plaintiffs seek to assert new claims, as to Plaintiff Wade for Intentional Infliction of Emotional Distress, Workplace Harassment under NY Civ. Rights 8-5021, Assault, and False Imprisonment. Plaintiffs assert that per the New York Senate Bill 66A also known as the Adult Survivor’s Act (“ASA”), the statute of limitations in this action should be re-set as to Plaintiff Wade. Plaintiffs state that there is no prejudice or surprise to Defendant in asserting these new claims because they are based on the same conduct in the underlying complaint originally filed and based off the litigation history between the parties which includes two separate lawsuits commenced by the Defendant. Plaintiff have submitted a proposed Second Amended Complaint showcasing its changes. Additionally, Plaintiffs request that, if necessary, the court should extend the time and compel the Defendant to accept the Second Amended Complaint. Plaintiff argues that Defendant lacked proper grounds to reject the first Amended Complaint.

In opposition to Plaintiff’s motion and in support of his cross-motion, Defendant argues that the Plaintiffs’ motion should be denied on the grounds that Plaintiffs’ commencement papers were improperly served and that the court lacks personal jurisdiction. Defendant resubmits his initial motion to dismiss papers. Defendant contends that pursuant to the stipulation, the parties agreed to effectuate service of the commencement papers by mail pursuant to CPLR 312-a. Defendant states that Plaintiffs’ attorney failed to mail the summons and complaint together with two copies of a statement of service by mail and acknowledgement of receipt, and that Plaintiffs’ affirmation of service is defective on its face since it fails to specify the address, or sufficient facts to show that service was made in an authorized manner. Additionally, Defendant argues in favor of dismissal because Plaintiffs failed to serve the summons and complaint in time. Defendant contends that the threshold for service of the summons and complaint expired on March 10, 2021. Moreover, Defendant asserts that Plaintiffs have abandoned this action warranting dismissal. Defendant states that Plaintiff failed to seek leave to enter a default judgment within one year after the Defendant’s default in failing to appear for his initial motion to dismiss which was marked off the court’s calendar on December 9, 2021. Defendant states that it has been over a year and a half since the

time of his default to the time that the Plaintiffs amended their complaint, and that Plaintiffs have failed to demonstrate both a reasonable excuse for the delay and a meritorious cause of action. Plaintiff also requests that the court compel Plaintiff to provide a factual basis for the operative complaint in this action. Defendant argues that Plaintiffs should have in their possession affidavits from Anne Therese Bengtsson, Sini Kangasmaki, and Nikkol Irene Wade from their participation in a separate 2019 lawsuit. Defendant also seeks costs and sanctions against Plaintiffs' counsel for dilatory conduct.

CPLR 312-a(a) provides "an alternative to the methods of personal service authorized" elsewhere in the CPLR by permitting service of a summons and complaint "by first class mail, postage prepaid ... together with two copies of a statement of service by mail and acknowledgment of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender." "Service is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender" (CPLR 312-a[b][1]). "Where a complaint or petition is served with the summons ... the defendant shall serve an answer within twenty [20] days after the date the signed acknowledgement of receipt is mailed or delivered to the sender" (CPLR 312-a[b][2]). Service is complete only if the defendant returns a signed acknowledgment of receipt (*Carney v Metro. Transportation Auth.*, 221 AD3d 447, 449 [1st Dept 2023]; *Ananda Capital Partners v. Stav Elec. Sys.* [1994], 301 A.2d 430 [1st Dept. 2003]). "[N]otice received by means other than those authorized by statute cannot serve to bring [defendants] within the jurisdiction of the court" (*Carney* at 449; *Macchia v Russo*, 67 NY2d 592 [1986]; *Hudson Valley Bank, N.A. v Eagle Trading*, 208 AD3d 648 [2d Dept. 2022]).

CPLR 3211(e) provides, in relevant part, that at any time before service of a responsive pleading is required, a party may move to dismiss a pleading on one or more grounds set forth in CPLR 3211(a), and that no more than one such motion shall be permitted (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738 [2d Dept 2015]). Accordingly, this "single motion rule," generally prohibits parties from making successive motions to dismiss a pleading" pursuant to CPLR 3211(a) as well as subsequent motions to dismiss that pleading on alternate grounds (*Id.*; see CPLR 3211 [e]; *Ramos v. City of New York*, 51 AD3d 753 [2d Dept. 2008]; see also *McLearn v. Cowen & Co.*, 60 NY2d 686 [1983]; *Reilly v. Prentice*, 141 AD2d 520 [2d Dept. 1988]; *Ultramar Energy v. Chase Manhattan Bank*, 191 AD2d 86 [1st Dept. 1993]). However, the failure of counsel to appear in support of an initial motion which resulted in its being marked off the calendar does not bar a second motion because marking a matter off the calendar does not operate to establish the law of the case or dismiss it on its merits (*Lewis v New York City Tr. Auth.*, 100 AD2d 896, 869 [2d Dept 1984]; citing *Aridas v Caserta*, 41 NY2d 1059 [1977]; *Bernard-Moses v Chick-Fil-A, Inc.*, 81 Misc. 3d 1241(A) [Sup Ct. Kings County 2024; *Pallotta v Saltru Assoc. Joint Venture, N.Y.*, 32 Misc 3d 1208(A) [Sup Ct Kings County 2011]).

Here, the courts finds that Plaintiffs have failed to fully comply with the service requirements under either CPLR 312-a or the stipulation between the parties. As an initial matter, while the language in the stipulation requires that service be completed pursuant to CPLR 312-a, additional requirements of the stipulation conflict with the requirements of the statute. For instance, CPLR 312-a requires that service be made via first class mail, postage prepaid ... together with two copies of a statement of service by mail and acknowledgment of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender. However, the stipulation permits that upon mailing, Plaintiffs shall send a notification email to Defendant at the address indicated below Defendant's signature as opposed to attaching an acknowledgement receipt form for Defendant's signature. Parties thereafter agreed via email to service at an alternate address. Additionally, the stipulation requires that the notification email state the date that personal service by mail was performed and identify the documents that were mailed to Defendant and contain an attached copy of a USPS Certificate of Mailing as proof of mailing, which is not required by the statute.


While the Defendant is unable to agree to modifications of service and then challenge service on statutory requirement grounds, the record does not reflect that Plaintiffs sufficiently completed service pursuant to either method. Here, Plaintiffs served the Defendant by priority mail. Plaintiffs did not submit evidence demonstrating that the copies of the summons and complaint were sent to the defendants, by first-class mail, together with, inter alia, two copies of a statement of service by mail and acknowledgment of receipt, and that the signed acknowledgment of receipts were mailed or delivered to the Plaintiff pursuant to CPLR 312-a. Similarly, Plaintiffs have not demonstrated that, pursuant to the stipulation, that a notification email identifying the documents and containing an attached copy of the USPS Certificate of Mailing was sent to Defendant. In the absence of proper service, no personal jurisdiction was acquired over the Defendant.

Accordingly, it is hereby,

ORDERED, that Plaintiffs' motion (Motion Seq. 2) is denied without prejudice; and it is further, ORDERED, that Defendant's motion (Motion Seq. 3) is granted to the extent that the action is dismissed for lack of personal jurisdiction. The court in its discretion declines to impose sanctions or costs upon Plaintiffs.

All matter not discussed herein are either without merit or moot.

This constitutes the decision and order of the court.


Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice