

**Mosley v Restani Constr. Corp.**

2025 NY Slip Op 34935(U)

December 16, 2025

Supreme Court, Kings County

Docket Number: Index No. 518423/2024

Judge: Anne J. Swern

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 16<sup>th</sup> day of December 2025.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

OSIRIS MOSLEY,

*Plaintiff,*

- against -

RESTANI CONSTRUCTION CORPORATION; SUNBELT RENTALS, DOES 1-10,

*Defendants.*

**DECISION & ORDER**

Index No.: 518423/2024

Motion Seq.: 002 and 003

*Recitation of the following papers as required by CPLR 2219(a):*

	<b>Papers Numbered</b>
MS002 Notice of Motion, Affirmations and Exhibits .....	NYSCEF 13-22
Affirmation in Opposition to Plaintiff’s Cross-Motion and in Reply .....	NYSCEF 84-87
Plaintiff’s Affirmation in Reply of Cross-Motion.....	NYSCEF 92
MS003 Sunbelt’s Notice of Motion, Affirmation, Exhibits and Memorandum of Law .....	NYSCEF 23-34
Affirmation in Opposition and in Further Support of Plaintiff’s Cross-Motion .....	NYSCEF 93
Sunbelt’s Affirmation and Memorandum of Law In Opposition to Plaintiff’s Motion and in Further Support of Motion to Dismiss.....	NYSCEF 78-80

*Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:*

## **Introduction**

This is an action for personal injuries allegedly sustained by plaintiff in an accident on 8/5/21 while an employee of Restani Construction Corporation (Restani). Plaintiff served the summons and complaint on Sunbelt Rentals (Sunbelt) and Restani on 7/10/24 (NYSCEF 3 and 65). On 8/8/2024, Restani served an answer with an affirmative defense of lack of personal jurisdiction per CPLR § 3211 [a] [8] (NYSCEF 4). Sunbelt notified plaintiff verbally in July 2024 and in writing on 8/7/24 that service was improper (NYSCEF 7, ¶8; NYSCEF 40). The statute of limitations expired on 8/5/24.

Plaintiff did not move (1) to extend the time to serve the summons and complaint as to both defendants or (2) for a default judgment against Sunbelt until after the expiration of the statute of limitations. Restani moved to dismiss plaintiff's complaint on 10/7/2024<sup>1</sup> and Sunbelt moved to dismiss the complaint on 11/12/2024 per CPLR § 3211 [a] [8].

By an order dated 5/19/2025, this Court issued an interim order scheduling a traverse hearing before rendering a final decision on the motions. The order also denied plaintiff's (1) motion for a default judgment against Sunbelt (MS001) and (2) motion to extend plaintiff's time serve the summons and complaint *nunc pro tunc* (MS004).

## **Traverse Hearing on 8/13/2025**

Before the traverse hearing commenced, plaintiff's attorney requested a conference. The attorney informed the Court that the process server, Bruce Eastwood, had suffered a stroke and was currently unavailable to testify. He was bedridden and permanently residing in Michigan. The attorney advised the Court that he was requesting an adjournment of the hearing to have

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<sup>1</sup> Pursuant to CPLR § 3211 [e], a motion to dismiss pursuant to subdivision [a] [8] must be served within sixty (60) days after service of service of the answer. Restani's time to serve the motion expired on Sunday, 10/6/24 and was extended to the next business day (General Construction Law 25-A).

another witness from the process service company testify at the hearing. Both Sunbelt and Restani objected because the burden of proof rests with plaintiff and any testimony by a witness other than Mr. Eastwood would constitute impermissible hearsay. Therefore, they argued that the case must be dismissed. Following the conference, the Court directed plaintiff to place his application on the record.

On the record, plaintiff's attorney requested an adjournment based on Mr. Eastwood's unavailability and provided an affidavit from Vincent Vanasseo, the Office Manager of Lawson's Legal Services. The affidavit was provided to defendants' counsel for the first time in Court because plaintiff's attorney had difficulty contacting Lawson's Legal Services before the hearing. Plaintiff did not provide a copy of the affidavit to the Court to mark as a court exhibit. Plaintiff's attorney explained that when he finally made contact with Lawson's Legal Services, the affidavit was provided to him on the morning of 8/13/2025. However, he was advised that Mr. Vanasseo was unavailable to appear in Court.

Plaintiff's attorney placed a statement on the record that in the affidavit, Mr. Vanasseo stated that he spoke with Mr. Eastwood's family. His family informed Mr. Vanasseo that Mr. Eastwood had a stroke and was permanently residing in Michigan. Therefore, it was plaintiff's position that the CPLR permits a substitute witness under these circumstances.

Defendants objected to the adjournment. Restani's counsel argued that he reviewed the affidavit and in paragraph "5," Mr. Vanasseo referred to a logbook that was not provided to defense counsel in Court and since defendants would be unable to cross-examine the Mr. Eastwood's affidavit of service, the action must be dismissed. Likewise, Sunbelt responded that since Mr. Eastwood is presently bedridden and unable to testify, plaintiff cannot meet his burden, and the action should be dismissed. Over objection, the Court adjourned the traverse

hearing for plaintiff to determine whether Mr. Eastwood could appear remotely. If he could not testify, the Court advised plaintiff's attorney that it would entertain plaintiff's legal argument that he could meet his burden without Mr. Eastwood's testimony.

The Court adjourned the hearing to 11/12/2025 at 10:30 a.m. over defendants' objections. The Court directed plaintiff to notify the parties in writing on or before 09/10/2025 how he intended to proceed and prove his case. Defendants were directed to submit a response by 10/08/2025 and plaintiff's reply was due by 10/22/2025. Receiving no response from plaintiff by 11/7/2025, the Court notified the parties that the traverse hearing was canceled, and the motions would be decided on the papers. In response, plaintiff's attorney filed a letter in NYSCEF on 11/10/2025 stating that, 1) Mr. Eastwood had suffered a stroke and was unavailable to testify in any capacity, 2) he was unable to verify the logbook and would not rely on it to prove his case, and 3) the affidavit of service should be admitted as *prima facie* evidence of service (citing *Deutsch v Fischer*, 246 AD2d 263 [2d Dept 1998] and CPLR § 4531).

### **The Order dated 5/19/25**

The summons and complaint were filed on 7/8/2024. According to the affidavit of service, Mr. Eastwood served "Jane Doe – [who] Refused to Provide a Name" at 12:00 **a.m.** on 7/10/2024 [emphasis added] on behalf of Sunbelt. The description of the person served was listed as "Female, White Skin, Black Hair, Age 36-50, Height 5'2-5'5, Weight 131-160."

In opposition to plaintiff's motion for a default judgment, Sunbelt submitted, *inter alia*, the affirmation of Laura Campagna, the only female who works in Sunbelt's office located at One 12<sup>th</sup> Street, Brooklyn, New York. Ms. Campagna is 56 years old, weighs approximately 137 pounds, is about 4'11" and has white skin and blonde hair. She worked for Sunbelt since 11/2021 in the front-end office answering the phone and taking and completing rental orders. On

the date of the service, no one came into the Sunbelt branch during her normal working hours of 7:00 a.m. and 5:00 p.m. However, assuming service was actually made on Ms. Campagna, she was not “an officer, director, manager or managing agent, cashier or assistant cashier or any other agent authorized by appointment or by law to receive service” (CPLR § 311 [a] [1]).

Further, service at the 12<sup>th</sup> Street office was also improper because Sunbelt is not a domestic corporation as asserted in the affidavit of service. Sunbelt is a foreign corporation incorporated in the State of North Carolina (NYSCEF 31, ¶7). Sunbelt’s attorney advised plaintiff’s attorney of this fact orally in July 2024 and in writing in August 2024. Plaintiff re-served Sunbelt through the Secretary of State on 11/25/2024, more than 120 days after the filing of the summons and complaint (NYSCEF 50).

Lastly, Sunbelt argued that the motion was substantively defective because plaintiff’s affirmation of merit does not comply with CPLR § 2106 and the attorney verified complaint cannot substitute for an affidavit of merit (CPLR § 3215 [f]).

The motion for a default judgment was denied because plaintiff’s affirmation did not comply with requirements of CPLR § 2106. The affirmation constituted an unnotarized affidavit because it did not contain the requisite language to submit an affirmation in lieu of an affidavit. Additionally, the affirmation was insufficient because it did not state plaintiff reviewed the complaint and the allegations against Sunbelt were true to the best of his knowledge. Therefore, the attorney verified complaint constituted “hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215 (*Beltre v. Babu*, 32 AD3d 722, 723-724 [1<sup>st</sup> Dept. 2006]).

The same affirmations and arguments in opposition to plaintiff’s motion for a default judgment were relied upon in support of Sunbelt’s motion to dismiss. Restani advanced similar

arguments, *i.e.*, “low level employees are not managing agents or general agents or otherwise authorized [to accept service] for the purposes of CPLR § 311 [a] [1].” Therefore, service upon Bryon Peralta, a mechanic working in Restani’s garage, was improper and the action must be dismissed. In support of the motions, Restani submitted the affirmations of Byron Peralta and Darwin Birjue, Restani’s Office Manager.

A joint decision on the motions to dismiss was held in abeyance pending the outcome of a traverse hearing because the Court could not judge the credibility of the process server, and the persons ostensibly served on 7/10/24. It is noted that the Court may deny a motion to dismiss for lack of proper service without an evidentiary hearing when defendant “fails to swear to specific facts to rebut the statements in the process server’s affidavit [of service]” (*City of New York v Miller*, 72 AD3d 726, 727 [2d Dept. 2010]). Here, defendants’ affirmations from the individuals served for Restani and Sunbelt, swore to specific facts to rebut the *prima facie* presumption of proper service in the affidavit of service (*id.*). Therefore, an evidentiary hearing was necessary.

### **Legal Framework and Analysis**

To constitute *prima facie* evidence of service of process, the affidavit of service must contain “sufficient and undisputed detail as to the type of service, the time and place of service, and the person accepting service so as to constitute prima facie evidence that the plaintiff obtained jurisdiction over the defendant” (*Deitsch v Fischer*, 246 AD2d 623). However, “where this *prima facie* showing is rebutted, [plaintiff] must establish at a hearing personal jurisdiction by a preponderance of the evidence” (*Matter of Erika G. v Jason B.*, 184 AD3d 639, 640 [2d Dept 2020] [internal quotations and citations omitted]). However, the burden of proof does not shift to defendant during the hearing and “remains at all times upon the [plaintiff].” (*Id.*).

Defendants' motions to dismiss are granted. The affidavits of service lack sufficient detail to determine what transpired at the time of service to establish *prima facie* proof of service (*Compare, Deitsch v Fischer*, 246 AD2d 623). The affidavits do not establish what, if any, inquiries Mr. Eastwood conducted to determine that the persons served were "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (CPLR § 311 [a] [1]).

Defendants' affirmations submitted in support of the motions to dismiss rebutted the facts recited in the affidavits of service and established that the persons ostensibly served were not authorized to accept service on behalf of Sunbelt and Restani (*Matter of Erika G. v Jason B.*, 184 AD3d 640). Although Mr. Vanasseo may have testified to lay the proper foundation and authenticate the affidavits of service as business records of Lawson's Legal Services (CPLR 4518), neither he nor anyone else could testify as to inquiries and interactions between Mr. Eastwood and defendants at the time of service. Since the burden would not shift to defendants during the hearing once the affidavits of service were admitted into evidence, defendants did not have the burden to (1) testify at the hearing unless subpoenaed by plaintiff on his direct case or (2) present evidence beyond that submitted in support of their motions to dismiss. (*Matter of Erika G. v Jason B.*, 184 AD3d 640).

Further, the hearing was marked "final" on 8/13/2025 and plaintiff did not serve subpoenas on defendants' witnesses to permit this Court to judge their credibility and establish proper service beyond a preponderance of the evidence. Therefore, the traverse hearing was unnecessary because the Court would still be only deciding the issues by judging the sufficiency of the affidavits of service. Additionally, plaintiff failed to comply with the Court's deadline of 9/10/2025 and provide the necessary information for the Court to determine whether a transverse

hearing was still appropriate, given the Court’s granting of the adjournment over the defendants’ objection, to allow him to do so. Mr. Vanasseo’s affidavit was not attached to plaintiff’s letter dated 9/10/2025 and not e-filed until 11/10/2025 in response to the Court’s inquiry.

The Court has considered plaintiff’s remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that defendant, RESTANI CONSTRUCTION CORPORATION’s motion to dismiss this action pursuant to CPLR § 3211 [a] [8] is GRANTED, and it is further

ORDERED that defendant, SUNBELT RENTALS’s motion to dismiss this action pursuant to CPLR § 3211 [a] [8] is GRANTED, and it is further

ORDERED that this action is dismissed in its entirety and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

ENTER:



**Hon. Anne J. Swern, J.S.C.**

**Dated: 12/16/2025**

<p>For Clerks use only:</p> <p>MG _____</p> <p>MD _____</p> <p>Motion seq. # _____</p>
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