

Matter of Tafari v Fischer

2011 NY Slip Op 33217(U)

June 30, 2011

Supreme Court, Franklin County

Docket Number: 2011-0084

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
INJAH TAFARI, #89-A-4807,

Plaintiff,

**DECISION AND ORDER
RJI #16-1-2011-0038.09
INDEX # 2011-0084
ORI #NY016015J**

-against-

**BRIAN S. FISCHER, GAYLE HAPONIK,
CARL KOENIGSMANN, RITA GRINBERGS,
MARK LEONARD, LUCIEN LECLAIRE, DAVID
ROCK, GERARD OTIS, MICHAEL LIRA, RICHARD
ADAMS, GLENN SCHROYER, ROBERT AUSTIN and
GLENN ALLOVCE,**

Defendants.

X

This is a combined action for declaratory judgment (CPLR §3001) and civil rights action (42 U.S.C. §1983) seeking compensatory/punitive damages and injunctive relief. The plaintiff's initial complaint, verified on January 24, 2011, was filed in the Franklin County Clerk's office on January 15, 2011 without a summons. Along with the initial complaint plaintiff sought the issuance of an Order to Show Cause authorizing him to effect service upon the defendants by regular mail. In addition, the plaintiff submitted an application pursuant to CPLR §1101 for poor person status. By Letter Order dated February 8, 2011 the Court found that this action had not been properly commenced in the absence of the filing of a summons. The Court directed that no order would be issued with respect to plaintiff's application for an Order to Show Cause until a summons was filed in the Franklin County Clerk's office. On February 25, 2011 plaintiff filed in the

Franklin County Clerk's office a summons and amended complaint, dated February 23, 2011.¹

Before addressing plaintiff's application for the issuance of an Order to Show Cause authorizing him to effect service upon the defendants by regular mail, the Court notes several defects in the summons filed in the Franklin County Clerk's office on February 25, 2011. Of primary concern to this Court is the confusing/misleading identification of the Court in which this action is pending (*see* CPLR §2101(c)), as set forth on the summons. In this regard it is noted that the heading of the summons contains the following designation: "United States District Court State of New York: Supreme Court District of Franklin County: Special Term." This action, however, is pending in the Supreme Court of the State of New York, Franklin County. Petitioner's mixed reference to federal district court can only serve to confuse the defendants as to whether this action is pending in state or federal court. Of additional concern to this Court is the apparently ink-stamped notation set forth on the summons as follows: "Defendant(s) shall reply (answer or move) to this complaint within the time set forth on this summons. Prison Litigation Reform Act §7(2)(g)(2). SO ORDERED." This notation clearly suggests Court involvement in the issuance of the summons, which is the practice in federal, but not state, courts. There is simply no reason or basis for the stamped notation in question to appear on any summons filed in this Court.

For the reasons set forth in the preceding paragraph, this Court finds that an amended summons must be filed before this action can move forward. When filing an amended summons the plaintiff should also take note of the provisions of CPLR §305(a) which state, *inter alia*, that "[a] summons shall specify the basis of venue designated and

¹ Although plaintiff sought leave of the Court to file the amended complaint, no such leave is required at this juncture. *See* CPLR §3025.

if based upon the residence of the plaintiff it shall specify the plaintiff's address, and also shall bear the index assigned and the date of filing with the clerk of the court.”

Turning to plaintiff's application for the issuance of an Order to Show Cause authorizing him to effect service upon the defendants by regular mail, the Court notes, as a technical matter, that although it may issue an Order to Show Cause in lieu of a notice of petition in a special proceeding (*see* CPLR §403(d)), there is no statutory provision authorizing the issuance of an Order to Show Cause as an initiatory paper in an action, such as this. What the plaintiff really seeks is an order pursuant to CPLR §308(5) directing an alternative method of service of the summons and amended complaint where service is “impracticable” under CPLR §308(1), (2) or (4). As discussed below, the distinction is not insignificant.

A notice of petition in a special proceeding serves a similar function as a summons in an action and must be served in the same manner as a summons. CPLR §403(c). As alluded to previously, however, CPLR §403(d) authorizes the Court wherein a special proceeding is pending to “. . . grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein.” A petitioner in a special proceeding is not obligated to make any particular showing before the court may issue an Order to Show Cause in lieu of a notice of petition. The issuance of the Order to Show Cause and the provisions for the time and manner of service specified therein are left to the sound discretion of the Court. This Court handles numerous special proceedings - habeas corpus proceedings (CPLR §7001) and CPLR Article 78 proceedings (CPLR §7804(a)) - commenced by inmates confined in various DOCS facilities. It is the routine practice of this Court to issue Orders to Show Cause in such proceedings directing service of process on respondents, and an office of New York State Attorney General, by ordinary

first class mail. It is noted, however, that the respondents in habeas corpus proceedings and CPLR Article 78 proceeding are not exposed to any personal liability.

The plaintiff in an action, such as this one, may effect personal service of a summons and complaint upon a named defendant, without first obtaining a court order, pursuant to the methods described in CPLR §308(1), (2) or (4).² CPLR §308(5) permits service upon a named defendant “. . .in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.” Absent of showing of impracticability, a court is without power to direct an alternative means of service pursuant to CPLR §308(5). *See Alvarez v. Klein*, 55 AD3d 643, *Tyler v. Selsky*, 267 AD2d 522 and *Cooper-Fry v. Kolket*, 245 AD2d 846. In cases such as this one, moreover, where a plaintiff seeks compensatory damages in the amount \$250,000.00, jointly and severally against all defendants, in their individual capacities, along with punitive damages in the amount of \$10,000.00 against each defendant, in his/her individual capacity, this Court is particularly concerned with the quality of notice afforded to each of the defendants. In this regard it is noted that “[p]ersonal delivery under CPLR 308(1) is a time-honored method of personal service. It is the method best calculated to give actual notice to the defendant.” Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C308:2. To this end, plaintiff’s application for expedient service pursuant to CPLR §308(5) will be closely scrutinized.

In connection with his applications for poor person status and for an order pursuant to CPLR §308(5) petitioner has filed an Affidavit in Support of Application Pursuant to CPLR 1101, sworn to on January 24, 2011 (hereinafter the Poor Person Affidavit) and an Affidavit in Support of Motion for an Order to Show Cause, also sworn

² CPLR §308(3) authorizes personal service on an natural person through a designated agent. *See* CPLR §318. CPLR §308(3) is not relevant to this action.

to on January 24, 2011 (hereinafter the Expedient Service Affidavit). In paragraph four of the Expedient Service Affidavit petitioner asserts, in conclusory fashion, as follows: “Because personal service pursuant to subdivisions 1, 2 and 4 of CPLR 308 has been, and is impracticable, I ask to proceed by Order to Show Cause so as to authorize me to effect service by regular mail.” He then goes on to assert in paragraph five of the Expedient Service Affidavit as follows: “I have asked all my friends and relatives to assist me in executing personal service in this matter. Each as refused to assist me, due largely to their unwillingness to take time off from work to travel the long distance necessary for them to provide me with such assistance.” No details, however, were provided as to the identities of the friends and relatives contacted by plaintiff, when such contact took place and the specific responses received by petitioner. Other than the above-quoted paragraphs four and five, the plaintiff, in his Expedient Service Affidavit, simply references his Poor Person Affidavit as indicative of his inability to afford a process server. He then asserts, in paragraph seven of the Expedient Service Affidavit as follows: “By virtue of my incarceration at the Upstate Corr. Fac., and my poverty, it will be impossible for me to serve process in this action unless the Court fashions a method of service that my situation will permit me to complete.” The poor person affidavit, which is the standard affidavit utilized by inmates in habeas corpus proceedings and CPLR Article 78 proceedings, broadly states, in relevant part, that plaintiff has “no savings, property, assets or income,” and that he is “unable to pay the costs, fees, and expenses necessary to prosecute this case.” It is further noted that the DOCS printout detailing the activity/status of plaintiff’s inmate account shows no deposits therein over the past six months, no spendable balance and encumbrances totaling more than eight thousand dollars.

The Court finds that additional information is needed in order for it to make an informed determination as to whether or not service of process on the 13 named defendants, under the provisions of CPLR §308(1),(2) or (4), is “impracticable” so as to support an expedient service order pursuant to CPLR §308(5). In this regard the Court finds that plaintiff must submit a supplemental affidavit addressing the following matters:

(1) The identities of the friends and family members plaintiff contacted to solicit assistance in effecting personal service on the defendants must be disclosed along with the approximate date(s) of such contacts and the specific details of each response. If any of such contacts or responses were in writing, copies of same, if available, must be annexed to plaintiff’s supplemental affidavit; and

(2) Plaintiff must state why he would find it impracticable to avail himself of the personal service by mail methodology set forth in CPLR §312-a; and

(3) Plaintiff must state whether or not he has sought the assistance of any private or legal aid attorney in prosecuting this action, on a contingency fee or similar basis, and, if so, the results of such efforts. If plaintiff has not sought any such outside legal representation he must set forth his reason(s) of not doing so; and

(4) Plaintiff must specifically state whether or not he has any funds available, in any form, outside of his inmate account. In this regard the Court notes that plaintiff, over the years, has apparently brought a significant number of 1983 proceedings seeking monetary damages against various DOCS employees in federal court. He must specifically disclose whether or not he has ever received any monetary award in connection with such actions and, if so, the dispositions of funds received.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that petitioner's application for poor person status, as well as his application for an Order pursuant to CPLR §308(5) are denied at this time without prejudice for the plaintiff to re-request such relief upon the submission of a supplemental affidavit as described in this Decision and Order; and it is further

ORDERED, that if plaintiff does not file a supplemental affidavit on or before August 12, 2011 his applications for poor person status and for an Order pursuant to CPLR §308(5) will be denied.

Dated: June 30, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice