

Pierre v Soto
2016 NY Slip Op 32471(U)
March 28, 2016
Supreme Court, Rockland County
Docket Number: 030972/2015
Judge: Margaret Garvey
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
-----X
CLAIRE PIERRE,

Plaintiff,

-against-

DECISION AND ORDER
(Motions # 1 and 2)

MARGIE A. SOTO,

Index No. 030972/2015

Defendants.
-----X

Margaret Garvey, J.S.C.

The following papers, numbered 1 to 2, were considered in connection with the Notice of Motion filed by Defendant (Motion #1) seeking an Order, pursuant to Civil Practice Law and Rules § 3211(a)(8), dismissing the action for lack of personal and subject matter jurisdiction because of the Plaintiff's failure to comply with Civil Practice Law and Rules § 308(2) (requiring proof of service be filed with the clerk of the court within twenty days of either service on a person of suitable age and discretion or mailing, whichever is effected later), and an Order, pursuant to Civil Practice Law and Rules § 3211(a)(5) barring re-filing of plaintiff's complaint on the ground that the Statute of Limitations has now expired, and for such other, further and different relief as to this Court seems just, proper and equitable; and also Notice of Cross-Motion of Plaintiff (Motion #2) pursuant to Civil Practice Law and Rules § 2011 granting Leave to file her Affidavit of Service *nunc pro tunc*, along with any other and further relief the Court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF JULIO DEBELLIS, ESQ. DATED DECEMBER 4, 2015/EXHIBITS (A-B)	1
NOTICE OF CROSS-MOTION/AFFIRMATION IN OPPOSITION OF RICHARD ADAM, ESQ. DATED JANUARY 29, 2016/EXHIBIT A	2

Upon the foregoing papers, the Court now rules as follows:

This personal injury negligence action was commenced by Plaintiff on March 6, 2015 with the filing of the Summons, Complaint through the NYSCEF system. Issue was joined as to Defendant with the filing of an Answer on her behalf through the NYSCEF system on October 8, 2015.

Defendant filed the instant motion seeking dismissal of the action for lack of personal jurisdiction pursuant to Civil Practice Law and Rules § 3211(a)(8) based on the Plaintiff's failure to file an Affidavit of Service of process with the Rockland County Clerk, and an Order pursuant to Civil Practice Law and Rules § 3211(a)(5) barring re-filing of this action upon the ground that the Statute of Limitations has now expired. Plaintiff filed a Cross-Motion pursuant to Civil Practice Law and Rules § 2001 seeking leave to file the Affidavit of Service nunc pro tunc.

Civil Practice Law and Rules § 308(2) states:

Personal service upon a natural person shall be made by any of the following methods:

(2) by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served 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 delivery 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 delivery or mailing, whichever is effected later;

It is not disputed by the parties that the Defendant was served in the instant matter by way of service to a person of suitable age and discretion pursuant to Civil Practice Law and Rules § 308(2). However, Defendant alleges that Plaintiff's failure to file the affidavit of service with the Rockland County Clerk within twenty (20) days of the service renders the service on the Defendant improper, defective and does not afford this Court personal

jurisdiction over the defendant. Plaintiff concedes that the process server they employed in this matter, Majestic Process Service, Inc., served the Defendant on July 2, 2015 pursuant to the statutory requirements, but thereafter failed to file the affidavit of service with the Rockland County Clerk. Additionally Plaintiff avers that they only recently became aware of Majestic's mistake and therefore via Cross- Motion are seeking an Order granting leave to file the affidavit of service *nunc pro tunc*.

Turning to Defendant's argument that Plaintiff's failure to file the affidavit of service with the Rockland County Clerk after service of the Defendant results in defective service, and lack of jurisdiction of this Court over the Defendant. Defendant correctly states that the Second Department has held that Civil Practice Law and Rules § 308(2) requires strict compliance and the Plaintiff has the burden of proving by the preponderance of credible evidence that service was properly effected. However, that strict interpretation addresses how service occurs, i.e. the manner, the location. That is seen in the cases cited by Defendant. They deal directly with how the service of the Defendant was effectuate; on whom the service was made, where the service was made, and how the service was made. The cases Defendant cites are devoid of any discussion in which failure to file an affidavit of service alone resulted in defective service. For example, one of the cases Defendant cites, Nassau v. Gallagher, in support of his argument, is distinguishable from the instant matter. [35 AD3d 786 (2d Dept 2006)]. The Court in Nassau granted Defendant's motion to dismiss due to the failure to file the affidavit of service, but the decision was based on the specific circumstances of that case. See Id. Specifically, Plaintiff was aware of the original affidavit's incorrect recital dates for delivery and mailing, never filed the affidavit of service due to the errors, never requested the Court amend the original affidavit of service and merely filed an Amended Affidavit of Service in response to the Defendant's motion to Dismiss never requesting leave to file the amended service at that time. See Id. The court has discretion to allow amendment of an original affidavit of service pursuant to Civil Practice Law and Rules § 305(c) and to allow a late filing

of that proof of service pursuant to Civil Practice Law and Rules § 2004, but the court in Nassau chose not to exercise that discretion *sua sponte*, since the Plaintiff failed to request the amendment or late filing from the court. See Id.

Plaintiff in the instant matter has not ignored the missing affidavit of service and merely attached a copy to their opposition papers. In the instant matter Plaintiff has moved for leave to amend the filing date of the affidavit of service *nunc pro tunc* and has attached a copy of it for the Court's review. Unlike in Nassau, this Court is not relegated to exercising discretion without an application by the Plaintiff. Additionally, there is no allegation by either party that there are factual errors with the affidavit of service Plaintiff has filed with their cross-motion. Plaintiff merely avers that the process server failed to file the affidavit of service due to mistake.

A delay in filing a proof of service is considered a procedural irregularity which does not effect jurisdiction and can be fixed *nunc pro tunc* by the court. [Haegeland v. Massa, 75 AD2d 864, (2d Dept 1980)]. Additionally, the failure to file proof of service can be cured by motion if based on the facts provided for the failure the court in an exercise of discretion believes the amendment is best and in the absence of prejudice. [Koslowski v. Koslowski, 251 AD2d 294 (2d Dept 1998); Weininger v. Sassower, 204 AD2d 715, 716 (2d Dept 1994); The purpose of requiring a proof of service relates to the time in which the Defendant has to answer and does not relate to jurisdiction acquired by the court upon service of the summons. [Helfand v. Cohen, 110 AD751 (2d Dept 1985); Conde v. Zaganjor, 66 AD3d 947 (2d Dept 2009); Reporter Co. V. Tomicki, 60 AD2d 94 7 (3d Dept 1978)].

Defendant clearly was not prejudiced in that she received the summons and complaint allowing her to have knowledge of the facts of the case in which she is named, and interpose an Answer. However, contrary to Defendant's argument the Plaintiff would be prejudiced if the Defendant's Motion to Dismiss was granted, as the statute of limitation would run on her action and she would not be able to re-file. Nonetheless, the failure to file the

affidavit of service in this matter was a procedural mistake, which this Court has the discretion to allow Plaintiff to file late. Therefore, Defendant's Motion to Dismiss for lack of personal jurisdiction for failure to file the affidavit of service with the clerk after the Defendant was served, is not supported by the service statute's intent or the case law and is denied.

Now briefly addressing Plaintiff's cross-motion for leave to file the affidavit of service of the Defendant late pursuant to Civil Practice Law and Rules § 2001. Plaintiff avers that she only recently became aware of the mistake of the process server and once made aware of the mistake made this application to file the affidavit of service. A copy of the affidavit of service is attached as Exhibit A to Plaintiff's moving papers. A review of the affidavit of service demonstrates that Defendant was served pursuant to Civil Practice Law and Rules § 308(2), when Jane Doe (she refused her name), who identified herself as a co-tenant of the Defendant accepted service of the Summons and Complaint in this matter on July 2, 2015 at 6:12 p.m. at 14 Smith Hill Road Airmont, New York. Based on the facts provided in the cross-motion along with a copy of the original affidavit of service and noting that the Defendant has appeared in this matter subsequent to the alleged service, Plaintiff's cross-motion for leave to file her affidavit of service *nunc pro tunc* is granted.

Accordingly, it is hereby

ORDERED that Notice of Motion to Dismiss (Motion #1) filed by Defendant is denied in its entirety; and it is further

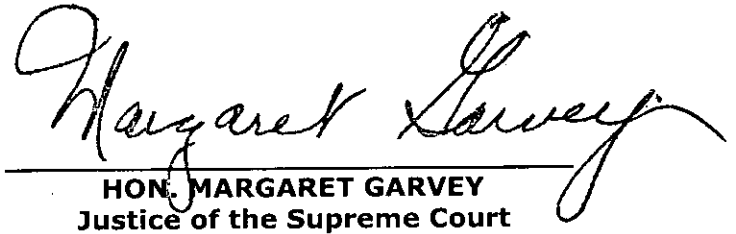
ORDERED that Cross-Motion for Leave to file the Affidavit of Service (Motion #2) by Plaintiff is granted; and it is further

Ordered that the Affidavit of Service e-filed through the NYSCEF system as Exhibit A of Document #9 (Motion #2) is deemed timely filed with this Court and timely served on the Defendant, *nunc pro tunc*.

The foregoing constitutes the Decision and Order of this Court on Motion # 1 and

#2.

Dated: New City, New York
March 28, 2016



HON. MARGARET GARVEY
Justice of the Supreme Court

TO:

RICHARD ADAM, ESQ.
The Adam Law Office, P.C.
Attorney for Plaintiff
(e-filed)

JULIO DEBELLIS, ESQ.
Law Office of Bryan M. Kulak
Attorney for Defendant
(e-filed)