

Edan v Johnson

2013 NY Slip Op 31050(U)

March 25, 2013

Sup Ct, New York County

Docket Number: 805223/12

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 805223/2012
EDAN - AS EXECUTRIX OF THE
vs.
JOHNSON, M.D., RUTH C.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 2/11/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) eFiled 12-19
Answering Affidavits — Exhibits _____ No(s) 23
Replying Affidavits _____ No(s) 25

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/25/13

JBL, J.S.C.
JOAN B. LOBIS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
BONNIE EDAN, as Executrix of the Estate of
LAWRENCE SAUL, Deceased,

Plaintiff,

Index No. 805223/12

-against-

Decision and Order

RUTH C. JOHNSON, M.D., MONIQUE GIRARD,
M.D., HERCULES MEDICAL, P.C., KIRK GARRATT,
M.D., DENNIS K. MILLER, M.D., AUDREY
ROSINBERG, M.D., and LENOX HILL HOSPITAL,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

This medical malpractice case arises out of treatment of the decedent, Lawrence Saul. Defendant, Monique Girard, D.O., s/h/a Monique Girard, M.D., moves to dismiss the complaint against her for lack of personal jurisdiction pursuant to Rule 3211(a)(8) of the Civil Practice Law and Rules. For the following reasons, her motion is denied.

Plaintiff, Bonnie Edan, sues as executrix on behalf of the estate of Lawrence Saul. Mr. Saul was scheduled for a prostate procedure on April 5, 2010. Approximately one week before the procedure, he was advised to discontinue aspirin and Plavix, which he had been prescribed since a prior myocardial infarction. Two days before the scheduled procedure, he suffered another myocardial infarction. Following complications, he died on October 22, 2010. Plaintiff filed a summons and complaint on August 16, 2012, alleging medical malpractice relating to Mr. Saul's treatment.

On September 13, 2012, at 1:25 p.m., Ramon Torres, a process server for Plaintiff, delivered a copy of the summons and complaint to Defendant Girard in care of Defendant Girard's employer, Hercules Medical, P.C. (Hercules), which is a medical practice located at 177 East 87th Street, Suite 406, here in New York City. At the time of service, Girard had been on maternity leave since July 11, 2012. The affidavit of service, which was executed on September 18, 2012, indicates that the copy was delivered to a person of suitable age and discretion at the recipient's actual place of business. The affidavit further affirms that in addition to physical delivery at Girard's place of business, the deponent completed service on September 14, 2012, by mailing a copy of the papers to the same address. The record also includes an affidavit of service by the same process server for Defendant Hercules Medical, P.C., indicating physical delivery at the same time as the Girard service as well as completed mailing the next day.

The following month, on October 15, 2012, Defendant Girard filed an answer to the complaint. In her affirmative defenses, Dr. Girard alleges, among others, that this Court lacks personal jurisdiction over her. On November 13, 2012, she returned from maternity leave.

Two months after filing her answer, in December, Girard moved to dismiss the complaint. In her motion, she alleges that this Court lacks personal jurisdiction because Plaintiff purportedly failed to serve her properly. Girard alleges that service is deficient for three reasons: 1) Plaintiff did not complete the service of process because Hercules's receptionist affirms that she does "not recall" receiving any mailed copy; 2) the Hercules address was not Girard's "actual place of business" because at the time of service Girard was on the third month of her four-month maternity

leave from her employment at Hercules; and 3) the process server did not tell Hercules's receptionist that he was leaving a summons and complaint in connection with a lawsuit in which Girard had been named. Defendant Girard further contends that Plaintiff's case should be dismissed against her since service was not perfected within the statutory time, and the statute of limitations has run on filing any new cause of action against her.

Plaintiff opposes the motion and contends that the record shows that Dr. Girard was properly served pursuant to Section 308(2) of the Civil Practice Law and Rules. She cross-moves for an enlargement of time in which to effect service should this Court find that prior service was deficient.

Section 308 of the Civil Practice Law and Rules governs personal service upon natural persons. That section provides, in pertinent part, that service may be made by delivering the summons to a "person of suitable age and discretion at the actual place of business . . . and by . . . mailing the summons by first class mail to the person to be served at his or her actual place of business" Id. § 308(2).

This Court addresses Defendant's contentions in turn. I first consider whether service was not completed based on proof that Hercules's receptionist affirms that she does "not recall" receiving any mailed copy. The statute governing personal service defines service as completed following delivery by "mailing," however, not receipt of mailing. See C.P.L.R. § 308(2); Melton v. Brotman Foot Care Group, 198 A.D.2d 481, 482 (2d Dep't 1993). In this case the record includes

the affidavit of service, which includes the sworn statement that the Girard papers were mailed the day after they were delivered to Hercules's office. The Court notes that the affidavits of service were not timely filed under Section 308(2) since they were filed in January 2013, rather than within "twenty days of either such delivery or mailing, whichever is effected later" Id. But the record shows that failure to file was due to law office failure, and that irregularity may be properly cured by this Court by deeming them filed nunc pro tunc. E.g., Bell v. Bell, Kalnick, Klee & Green, 246 A.D.2d 442 (1st Dep't 1998).

This Court next considers whether the papers were served at Girard's "actual place of business" under Section 308(2). The term, "actual place of business," is defined under the statute as "any location that the defendant, through regular solicitation or advertisement, has held out as its place of business." Id. § 308(6). In this case, Girard affirms that she has been employed by Hercules since December 2008, as an hourly, contractual employee. She has business cards from Hercules that contain her name, and she shares an office there with other doctors who work for Hercules at alternate times. She further affirms that she has received medication samples sent by mail to her at that location. Hercules's receptionist, who greets clients and opens the mail, affirms that Dr. Girard works "as a family practice physician of the practice." Based on this record, I find that the address to where the papers were delivered constituted her "actual place of business" as defined under Section 308(6).

Lastly, this Court considers Defendant Girard's third contention: the process server did not tell Hercules's receptionist that he was leaving a summons and complaint in connection with

a lawsuit in which Girard had been named. The only basis that Defendant relies on to assert that requirement was not met flows from cases where service has been refused. E.g., Bossuk v. Steinberg, 58 N.Y.2d 916, 918 (1983) (upon refusal delivery may be made by leaving copy outside door of person to be served upon provided process server informs person to whom delivery is being made that this is being done). In this case, however, no such disclosure was triggered since the receptionist does not affirm that she refused service. Rather the record reflects that she claims that she told the process server "that Dr. Girard was on maternity leave at that time and not currently working at Hercules." She told the server her name, and the server "left these papers on the front desk" Indeed, the process server swears in his affidavit that he was not told that the doctor was on leave. He does recall that he was told that Defendant, Ruth C. Johnson, M.D., had not worked there for approximately a year, and he did not leave the papers for her, only those for Girard and Hercules.

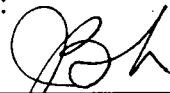
Because this Court finds that Defendant Girard was properly served, it need not consider any request for enlargement of time. Accordingly, it is

ORDERED that Defendant's motion to dismiss is denied, and it is further

ORDERED that the parties appear for a preliminary conference on May 7, 2013, at 2:15 p.m.

Dated: *Mar. 25*, 2013

ENTER:



JOAN B. LOBIS, J.S.C.