

Largie v TCBA Watson Rice, LLP

2014 NY Slip Op 33212(U)

December 12, 2014

Supreme Court, New York County

Docket Number: 150170/2014

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

_____ x
PATRICK L. LARGIE,
Plaintiff,

- against -

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TCBA WATSON RICE, LLP, TONDAH
CONSULTING GROUP, INC., BENNIE
HADNOTT & CPA P.C., BENNIE HADNOTT &
CO., P.C., and BENNIE HADNOTT (individually),
Defendants.

DECISION/ORDER

Motion Seq. 001

_____ x

In this partnership dispute, defendants TCBA Watson Rice, LLP (“Watson Rice”), Tondah Consulting Group, Inc. (“Tondah”), Bennie Hadnott & CPA P.C. (“Hadnott CPA”), and Bennie Hadnott (“Hadnott”) move to dismiss the first amended complaint¹ (“FAC”) pursuant to CPLR 3211 (a) (3), (7), and (8).

Defendants admit that Watson Rice was properly served, and withdrew that branch of their motion to dismiss claiming lack of personal jurisdiction over Watson Rice. (Ds.’ Memo. Of Law In Supp. at 4.) Defendants contest the sufficiency of service on the remaining defendants, Tondah, Hadnott CPA, and Hadnott. With respect to Tondah and Hadnott, defendants contend that CPLR 306-b requires plaintiff “to file proof of service . . . within 120 days of service.” (Ds.’ Sur-Reply Aff. in Further Supp., ¶¶ 35-37, 49-51.) Although the prior version of CPLR 306-b

¹ After defendants brought their motion to dismiss, the parties stipulated to the filing of the FAC. In addition, plaintiff withdrew any causes of action against defendant Bennie Hadnott & Co., P.C. (P.’s Sur-Reply Aff. in Further Opp., ¶ 3.)

required that proof of service be filed within 120 days of commencement, the statute was amended in 1997 to delete that requirement. (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 306-b:2.) As Tondah raises no other objection to service upon it, service is deemed sufficient.

With respect to Hadnott individually, plaintiff contends that Hadnott was served on February 19, 2014 by personal delivery pursuant to CPLR 308 (1) and 313. Plaintiff offers the affidavit of a process server who avers that he served Hadnott at Hadnott's residence. (Aff. of James Reap [Ex. H to P.'s Sur-Reply Aff. In Further Opp.].) Defendants contend that the affidavit of service is insufficient to show personal service on Hadnott because it states on its face that it is for service on TCBA Watson Rice, LLP. (Ds.' Sur-Reply Aff. in Further Supp., ¶ 48.) Defendants, however, focus on only one line of the affidavit. The body of the affidavit states that the process server "attempted to serve Bennie Hadnott and TCBA Watson Rice, LLP," and left "documents for Bennie Hadnott and TCBA Watson Rice, LLP." (Reap Aff.) The court rejects defendants' contention that the affidavit did not identify Hadnott as the object of the intended service. (See CPLR 306 [a], 306 [b].)

The process server also avers that when he asked the individual whom he served if he was Bennie Hadnott, the individual "stated that he was his brother and that Bennie would be home later in the evening." (Reap Aff.) A short time later, the process server returned, and the individual, who had previously identified himself as Hadnott's brother, "turned" when the process server called out "Bennie." (Id.) The individual, however, never stated that he was Bennie Hadnott. An affidavit of service is ordinarily prima facie evidence of service. (See Scarano v Scarano, 63 AD3d 716, 716-717 [2d Dept 2009].) Here, however, the affidavit purports to make service only by personal delivery and not by nail and mail or substitute service.

Yet, the process server acknowledges that the person who was served, when asked, denied that he was Bennie Hadnott. This affidavit of service therefore does not on its face conclusively demonstrate that service was effected by personal delivery on Hadnott. A traverse hearing will be ordered to address the service upon him.²

With respect to Hadnott CPA, plaintiff submits an affidavit of service that is regular on its face. (Aff. of Eric Averbach [Ex. G to P.'s Sur-Reply Aff. in Further Opp.]) The affiant avers that he served "Bennie Hadnott CPA, P.C." on February 6, 2014 by serving Malik Tyson at the place of business of "Bennie Hadnott CPA, P.C." (Id.) The affiant further avers that he asked Tyson if he was authorized "to accept the legal papers" for this entity, and Tyson responded in the affirmative. (Id.) Tyson, however, submits a detailed affidavit on personal knowledge disputing these assertions. Among other things, Tyson, an intern at Watson Rice, denied that he was asked whether he was authorized to accept service, and stated that he was not authorized to accept service for any entity.³ (Aff. of Malik Tyson, ¶¶ 3, 5.) These conflicting affidavits raise questions of fact regarding service of process that must be resolved at a hearing. (See Edwards, Angell, Palmer & Dodge, LLP v Gerschman, 116 AD3d 824, 825 [2d Dept 2014]; Dunn v Pallett, 42 AD3d 807, 808-809 [3d Dept 2007].)

Finally, defendants raise the issue of a misnomer with respect to one of the defendants, Bennie Hadnott & CPA P.C. Defendants contend that because no such entity exists, it could not have been served. (Ds.' Sur-Reply Aff. in Further Supp., ¶¶ 7-9.) Defendants do not, however,

² As the affidavit of service is insufficient to demonstrate service, the traverse hearing will be ordered notwithstanding the absence of an affidavit by Hadnott attesting that he was not the person to whom the process server spoke at the time of the alleged service.

³ Again notable in its absence is any representation by Hadnott that neither Bennie Hadnott CPA, P.C. nor Bennie Hadnott & CPA P.C. had offices at the same location as Watson Rice.

dispute that an entity called “Bennie Hadnott CPA, P.C.” does exist. (Id., ¶ 12; P.’s Sur-Reply Aff. in Further Opp., ¶ 9.) Pursuant to CPLR 305 (c), “the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.” Without waiving service, Hadnott CPA has taken part in this motion to dismiss and its arguments are preserved. The court will address an application to correct the misnomer, if the plaintiff prevails on the traverse hearing.

Accordingly, it is hereby ORDERED that the issues of sufficiency of service upon defendants Bennie Hadnott and Bennie Hadnott CPA, P.C., named herein as Bennie Hadnott & CPA P.C., are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served by plaintiff Patrick L. Largie forthwith on the Clerk of the Special Referee’s Office (Room 119) to arrange a date for the reference to a Special Referee; and is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report; and it is further

ORDERED that any causes of action against defendant Bennie Hadnott & Co., P.C. are deemed withdrawn; and it is further

ORDERED that, in the interests of judicial economy, the branches of defendants’ motion

to dismiss pursuant to CPLR 3211 (a) (3) and (7) will held abeyance pending the traverse hearing.

This constitutes the decision and order of the court.

Dated: New York, New York
December 12, 2014



MARCY FRIEDMAN, J.S.C.