

West 79 LLC v Toledo
2015 NY Slip Op 31496(U)
August 7, 2015
Supreme Court, New York County
Docket Number: 151325/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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WEST 79 LLC, ALAN NAGEL, STEVEN
NAGEL, EVELYN NAGEL, CLAIR NAGEL,
LISA W. NAGEL,

Plaintiff,

Index No.
151325/2015

DECISION and
ORDER

- against -

Mot. Seq. #001

MOSHE TOLEDO A/K/A MOISHE TOLEDO,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

The instant action seeks money damages for an outstanding balance in the amount of \$144,455.00 against defendant, Moshe Toledo a/k/a Moishe Toledo ("Toledo").

Toledo moves to dismiss West 79 LLC's ("Plaintiff") action, pursuant to CPLR § 3211(a)(8), on the ground that the Court lacks jurisdiction based on Plaintiff's failure to effect service of the summons and complaint on him. In support, Toledo submits an affidavit. Annexed to Toledo's affidavit is: a copy of a Time Warner bill addressed to Moshe Toledo at "27 W 69th Apt A New York, NY 10023" for services provided April 24, 2014-May 23, 2015.

Plaintiff opposes. In opposition, Plaintiff submits: a copy of the summons and complaint that was filed with the court on February 6, 2015, an affidavit prepared by Toledo dated July 17, 2014 in a prior action brought by Plaintiff where Toledo stated his address was 2AB at 27 West 69th Street New York, New York 10023; and a copy of the Affidavit of Service.

In the Affidavit of Service prepared by Plaintiff's server of process, Avatar Neal, stated that on March 6, 2015, at 7:43 a.m., he went to apartment 2AB at 27 West 69th Street, New York, New York 10023, and served Toledo by affixing a copy of the summons, complaint and notice of mandatory electric filing to the door of 2AB at 27 West 69th Street, New York, New York 10023. Mr. Neal states that he had previously attempted service at this location on the following dates and times: February 18, 2015, at 7:47 PM, and February 26, 2015, at 1:09 PM. The third attempt was on March 6, 2015 at 7:43 AM. In addition to affixing the copies to the door, Mr. Neal stated he also mailed a copy of the summons, complaint and notice of mandatory electric filing to apartment 2AB, 27 West 69th Street, New York, New York 10023.

In his affidavit, Toledo avers that he "moved out of Apartment 2AB at 27 West 69th Street New York, New York 10023, in the beginning of October of 2014." Toledo states that on October 6, 2014, Toledo moved into Apartment A at 27 West 69th Street New York, New York 10023 ("Apartment A").

CPLR §3211(a)(8) states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant.

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]). By contrast, a defendant's "sworn non-conclusory denial" of service is sufficient to dispute the veracity or content of a process server's affidavit. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]; *Hinds v. 2461 Realty Corp.*, 169 AD2d 629 [1st Dep't 1991]).

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D. 3d 459 [1st Dept. 2004]).

CPLR 308(4) provides:

where service under paragraphs one and two cannot be made with due diligence, *by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state* of the person to be served and by either mailing the summons to such person 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 affixing 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 affixing or mailing, whichever is effected later; service shall be complete ten days after such filing...

(emphasis added).

"The 'nail and mail method' provision of the CPLR permits a plaintiff to mail duplicate process to the defendant at his last known residence, but clearly requires that the 'nailing' be done at the defendant's actual place of business, dwelling place, or usual place of abode." *David v. Moyer*, 133 A.D. 2d 737, 737 [2nd Dept 1987].

Here, as there is an issue as to whether Toledo resides at the location where service was purportedly rendered, a traverse hearing is directed.

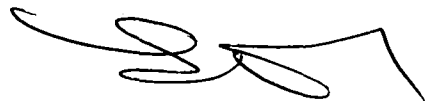
Wherefore, it is hereby

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing with respect to service upon defendant, Moshe Toledo, and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: AUGUST 7, 2015



Eileen A. Rakower, J.S.C.