

Stein v Schlesinger

2016 NY Slip Op 31255(U)

June 30, 2016

Supreme Court, New York County

Docket Number: 651514/16

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----- X
ADAM STEIN,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 651514/16

Seq. No.: 001

STUART SCHLESINGER,

Defendant.

----- X
HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motions:

PAPERS	NUMBERED
SUMMONS	1
NOTICE OF MOTION AND FREILICH AFF. IN SUPP.	2-3 (Ex. A)
STEIN AFF. IN SUPPORT	4 (Exs. A-B)
PLAINTIFF'S MEMO. OF LAW IN SUPPORT	5
AFFIDAVIT OF SERVICE	6

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff Adam Stein moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint in the amount of \$100,000, the amount of an unpaid retainer fee allegedly owed by defendant Stuart Schlesinger. Defendant does not oppose the motion. After a review of the papers, and after a review of the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about June 7, 2011, plaintiff Adam Stein executed a retainer agreement with nonparty Albin Luczak to prosecute the latter's claims for medical malpractice and personal injury and filed the same with the Supreme Court, Kings County, where the claims were pending. Ex. A. to Stein Aff. Pursuant to the agreement, Luczak retained Stein pursuant to a contingency fee arrangement. Id. After the retainer agreement was executed, Stein referred Luczak's case to defendant Stuart Schlesinger, an attorney who has since been disbarred. Stein Aff., at par. 6. Stein represented that, pursuant to an agreement between he and Schlesinger, Schlesinger agreed to pay him 1/3 of any fee which he (Schlesinger) earned on the Luczak matter. Stein Aff., at par. 7. After Schlesinger received payment of his fee on the Luczak matter, he wrote a check to Stein on November 21, 2014 in the amount of \$100,000, representing Stein's alleged share of the fee in the Luczak matter. Stein Aff., at par. 8; Ex. B to Stein Aff. Stein claims that when tried to cash the check, it bounced. Stein Aff., at par. 9. Stein has made several attempts to have Schlesinger pay him the \$100,000, but such attempts have been in vain, leaving the money still owed to him. Stein Aff., at par. 10.

Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, seeking to recover the amount of the unpaid retainer fee allegedly owed to him by Schlesinger. In support of the motion, plaintiff submits a "summons upon motion for summary judgment in lieu of complaint" dated March 21, 2016, which designates venue in New York County based on defendant's place of residence; a notice of motion for summary judgment in lieu of complaint; his own affirmation; the affirmation of his attorney, Robert A. Freilich, Esq.; a memorandum of law; and an affidavit of service.

In his affirmation in support, Freilich states that he was advised by Murray Richman, Esq., counsel for Schlesinger in a criminal matter pending in the United States District Court for the

Southern District of New York, that Mr. Richman “confirmed that it was his belief that Mr. Schlesinger lives at 186 Dune Road, Quogue, New York 11959, the address [Stein’s] process server used to effectuate service on [d]efendant.” Freilich Aff., at par. 6. In his affidavit of service, the process server stated:

That on the 8th day of APRIL 2016 at 5:08 pm at 186 DUNE RD, QUOGUE, NY 11959, the dwelling place/usual place of abode, [d]eponent served the within SUMMONS UPON MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT and REQUEST FOR JUDICIAL INTERVENTION upon STUART SCHLESINGER by affixing true copies to the front door of said premises. Deponent was unable, with due diligence to find witness or a person of suitable age and discretion thereat. Deponent also attempted to serve the defendant at his last known business address on March 30, 2016 at 12:44 pm at 207 EAST 94TH STREET, SUITE 303, NEW YORK, NY but found the suite to be vacant.

Within 20 days of such delivery deponent caused to be enclosed a copy of the SUMMONS UPON MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT and REQUEST FOR JUDICIAL INTERVENTION in a first class postpaid envelope properly addressed to STUART SCHLESINGER at 186 DUNE RD, QUOGUE, NY 11959 and deposited said envelope in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State. The envelope bore the legend “Personal and Confidential” and did not indicate on the outside thereof, by return address or otherwise, that the communication was from an attorney or concerned an action against the defendant.

(emphasis provided).

PLAINTIFF’S CONTENTIONS:

Stein argues that he is entitled to summary judgment in lieu of complaint in the amount of \$100,000 due to Schlesinger’s failure to pay the retainer fee. He contends that the check sent to him by defendant is “an instrument for the payment of money only” and thus falls within the purview of CPLR 3213.

CONCLUSIONS OF LAW:

Procedural Infirmities:

Plaintiff's motion is denied on several grounds. A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). As movant, plaintiff has the burden of establishing that it properly served defendant with process. *See CPLR 3213; Cadle Co. v Ayala*, 47 AD2d 919, 920 (2d Dept 2008). If service cannot be made with due diligence pursuant to the personal delivery method set forth in CPLR 308(1) or by the "deliver and mail" method set forth in CPLR 308(2), plaintiff may use the "affix and mail" method set forth in CPLR 308(4).

Section 308(4) allows plaintiff to affix 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" "The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received." *McSorley v Spear*, 50 AD3d 652, 653 (2d Dept 2008), quoting *Gurevitch v Goodman*, 269 AD2d 355 (2d Dept 2000). A failed attempt to serve a defendant at his or her dwelling place or usual place of abode may not qualify as due diligence unless the process server has also attempted to ascertain defendant's place of employment for service at that location. *See O'Connell v Post*, 27 AD3d 630 (2d Dept 2006).

This Court finds not only that Stein failed to properly serve Schlesinger, but that he egregiously flouted, if not ignored, the laws governing service of process.

Here, the process server showed absolutely no due diligence in attempting to serve

Schlesinger personally pursuant to CPLR 308(1) or 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. . . .” pursuant to CPLR 308(2). The affidavit of service reflects that Schlesinger was served by affix and mail at his “dwelling place/usual place of abode” on April 8, 2016. However, there is no basis for the process server’s conclusion that Schlesinger was served at his dwelling place or usual place of abode. The only indication that Schlesinger was even associated with the Quogue premises was Richman’s “belief that Mr. Schlesinger lives at 186 Dune Road, Quogue, New York.” Freilich Aff., at par. 6. This by no means rendered the premises his dwelling place or usual place of abode and, even if it did, the process server’s lack of due diligence in attempting to effectuate service pursuant to CPLR 308(1) or 308(2) rendered the purported service void. Moreover, the process server’s attempt to serve Schlesinger at his last known business address was clearly violative of CPLR 308(2).

There is no indication that the process server made any attempt to learn Schlesinger’s address, including, but not limited to checking with the Department of Motor Vehicles to determine where he could be properly served. *See Spath v Zack*, 36 AD3d 410 (1st Dept 2007). Additionally, since the process server clearly failed to perform an investigation into Schlesinger’s actual place of employment, it was improper for him to have resorted to affix and mail service. *See Riverwalk Holding, Ltd. v Fiallo*, 40 Misc3d 1211(A) (Sup Ct Queens County 2013).

Moreover, the process server’s follow up mailing pursuant to CPLR 308(4), which was required to be sent to his actual place of business or last known residence, was sent to Schlesinger at his Quogue address in Suffolk County. This address, as noted above, was referred to by the process server as Schlesinger’s “dwelling place/usual place of abode.” Since the terms “dwelling place” and “usual place of abode” cannot be equated with the term “last known residence” (*Feinstein*

v Bergner, 48 NY2d 234, 239 [1979]), the affidavit of service is defective in this regard as well.

In sum, the process server utterly failed to make any showing of the due diligence required in order to effectuate service pursuant to CPLR 308(4).¹

In addition, the motion must be denied since the process server only purported to serve Schlesinger with a copy of the “summons upon motion for summary judgment in lieu of complaint and request for judicial intervention.” Thus, even assuming that service of process been proper, Schlesinger was not served with a complete set of the supporting motion papers and the motion would have to be denied.

Moreover, the affidavit of service bears an incorrect index number and is therefore defective in that regard as well.

Finally, Stein’s affirmation is in improper form since he is a party to the action. See CPLR 2106(a).

Given these numerous procedural violations, the motion is denied.

Substantive Infirmities

Even assuming, arguendo, that the motion were not denied on procedural grounds, it would be denied on the merits.

CPLR 3213 provides [for summary judgment in lieu of complaint] where the contract allegedly breached was “an instrument for the payment of money only.” But the remedy is not available where there are other issues and considerations presented by the writing. For example, this procedural avenue is foreclosed if the liabilities and obligations can only be ascertained by resort to evidence outside the instrument, or if more than simple proof of nonpayment or a de minimus deviation from the face of

¹This Court notes further that the process server’s affidavit is also defective insofar as it fails to specify how the papers were affixed to Schlesinger’s door.

the document is involved (*Weissman v Sinorm Deli*, 88 NY2d 437 [1996]).

Kerin v Kaufman, 296 AD2d 336, 337 (1st Dept 2002).

Here, Stein represents that, pursuant to an agreement he had with Schlesinger, Schlesinger agreed to pay him 1/3 of any fee which he (Schlesinger) earned on the Luczak matter. Stein Aff., at par. 7. After Schlesinger received payment of his fee on the Luczak matter, he purportedly wrote a check to Stein on November 21, 2014 in the amount of \$100,000, representing Stein's alleged share of the fee in the Luczak matter, and, when Stein tried to cash the check, it bounced. Stein Aff., at pars. 8-9.

This is clearly not a situation where all of the foregoing facts are discernible from the check submitted by Stein. The motion papers are devoid of the terms of the alleged agreement between Stein and Schlesinger. Nor does the check included as Ex. B to Stein's affirmation² reflect that it was for payment of Stein's fee. It simply says "New Acct." on the memo line. Stein Aff., at Ex. B. The transmittal cover sheet from Chase Bank does not even reflect that the check was refused for insufficient funds. *Id.* Moreover, Stein submits no proof "that he performed some work which contributed towards the earning of the fee" to which he is allegedly entitled. *A. Stanly Proner, P.C. v Julien & Schlesinger, P.C.*, 134 AD2d 182, 185 (1st Dept 1987), citing *Oberman v Reilly*, 66 AD2d 686 (1978), *lv dismissed* 48 NY2d 654 (1979). Thus, Stein has failed to establish his entitlement to summary judgment in lieu of complaint.

In arguing that the check signed by Schlesinger is an "instrument for the payment of money only", Stein relies on *First Inter-Cty. Bank of New York v DeFilippis*, 160 AD2d 288 (1st Dept 1990). In that case, the court indeed found that "[a] check is an 'instrument for the payment of money only',

²Assuming, arguendo, that this Court were to consider the affirmation.

and due execution of the check and the circumstances under which it was given were sufficiently set forth in the moving papers (*citation omitted*).” 160 AD2d at 289. That case is distinguishable, however, since, as noted above, Stein’s motion papers do not sufficiently set forth the circumstances giving rise to the alleged debt.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Adam Stein for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied, and the action is dismissed; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: June 30, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**