Kowlessar v Darkwah
2017 NY Slip Op 32348(U)
June 19, 2017
Supreme Court, Queens County
Docket Number: 701282/2016
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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CRANSTON KOWLESSAR,
Plaintiff,

- against -

KWAME DARKWAH and D'KOTI DARKWAH,
Defendants.

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Index No.: 701282/2016

Motion Date: 6/19/17

Motion No.: 89

Motion Seq.: 2

The following electronically filed documents read on this motion by plaintiff for an Order pursuant to CPLR 2221(d) for leave to reargue this Court's Decision and Order dated March 29, 2017 and entered April 13, 2017, and reversing that order and denying defendants' motion to dismiss and for summary judgment based on lack of personal jurisdiction and prior action pending, and granting plaintiff's cross-motion for an extension of time to serve if it is found service was defective:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.................	EF 54 - 65
Affirmation in Opposition............................	EF 67
Reply Affirmation....................................	EF 68 - 69

This is an action for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on March 25, 2013.

Plaintiff commenced this action by filing a summons and complaint on February 3, 2016. A prior identical action was commenced by plaintiff on July 15, 2015 in Supreme Court, Queens County under index number 707434/2015. By Short Form Order entered on March 28, 2017, the prior action was dismissed with prejudice (Livote, J.). By Short Form Order dated March 29, 2017 and entered on April 13, 2017, this Court dismissed this action on the grounds that the prior action arising out of the same accident was dismissed with prejudice. Plaintiff now seeks to reargue the prior Order.

Pursuant to CPLR 2221(d), a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." It is well established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its determination (see Everhart v County of Nassau, 65 AD3d 1277 [2d Dept. 2009]; McDonald v Strah, 44 AD3d 720 [2d Dept. 2007]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (see Giovanniello v Carolina Wholesale Off. Mach. Co., Inc., 29 AD3d 737 [2d Dept. 2006]; Gellert & Rodner v. Gem Community Mgt., Inc., 20 AD3d 388 [2d Dept. 2005]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1st Dept. 1992]).

As grounds for reargument, plaintiff contends that the Court overlooked the fact that there was not a prior action pending at the time of the Court's decision dismissing this action. Plaintiff further contends that the prior action was improperly dismissed "with prejudice". Based on such, and as the prior action was now dismissed without prejudice on the grounds of lack of personal jurisdiction, reargument is granted and the motion to dismiss based on lack of personal jurisdiction and the cross-motion seeking an extension of the time to serve shall be decided herein.

A process server's affidavit stating proper service in accordance with CPLR 308 constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Wells Fargo Bank, NA v. Chaplin, 65 AD3d 588 2d Dept. 2009]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). However, a defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process server's affidavit, "generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing" (City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; see Wells Fargo Bank, N.A. v Christie, 83 AD3d 824 [2d Dept. 2011]; Associates First Capital Corp. v Wiggins, 75 AD3d 614 [2d Dept. 2010]; Washington Mut. Bank v Holt, 71 AD3d 670[2d Dept. 2010]).

The process server's affidavit states that Kwame Darkwah was served on May 21, 2016 at 2:29 PM by delivering the summons and verified complaint to Co-Tenant, a person of suitable age and

discretion, who refused his name at Kwame Darkwah's dwelling house located at 6634 108th Street, Apt 1A, Forest Hills, NY 11375. The mailing component was completed on May 24, 2016.

In support of the motion to dismiss, defendant Kwame Darkwah submits an affidavit dated June 29, 2016, affirming that he resides at 6634 108th St. Apt. 1A, Forest Hills, NY 11375. He has lived at that address since November 18, 2014. He does not have roommates or co-tenants. He is the only occupant of Apartment 1A. His building does not have a doorman. He further affirms that on May 21, 2016, he was not home between the hours of 9:45 AM and 4:22 PM. He was attending a ceremony in the Bronx. When he left his apartment, he locked the apartment and left it empty. He did not have any guests or workers in his apartment while he was away. He came home and found a copy of a summons and complaint affixed to his door. Annexed to his affidavit are receipts from Uber detailing the trip he took to and from the Bronx on the date of the alleged service.

Based on Kwame Darkwah's affidavit and documentary evidence that he was not home at the time of the alleged service, service was improper.

The process server's affidavit states that D'Koti Darkwah was served pursuant to the Vehicle and Traffic Law by delivering a copy of the summons and complaint to the Secretary of State on May 27, 2016. The process server affirms that on May 27, 2016, the process server mailed to D'Koti Darkwah's actual place of residence a copy of the summons and complaint by registered mail return receipt requested to 120 Village Lane, Daytona, Florida 3211.

Pursuant to Vehicle and Traffic Law 253(1), plaintiff must serve the summons and complaint on the Secretary of State and provide the defendant with notice of such service and a copy of the summons and complaint by certified mail or registered mail with return receipt requested. Where, as here, the registered letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail shall be filed with the Clerk. Here, plaintiff failed to file a certificate of mailing as required within 120 days. Thus, service was improper upon D'Koti Darkwah (see Wing Dong v Chen Mao Kao, 115 AD3d 839 [2d Dept. 2014]; Furey v Milgrom, 44 AD2d 91 [2d Dept. 1974][finding that mailing the summons and complaint one day after the statute of limitations had expired was fatal to jurisdiction even where the documents had been affixed to defendant's door before the limitations period expired]).

Turning to plaintiff's cross-motion to extend the time for service, CPLR 306-b permits an extension of time for service "upon good cause shown or in the interest of justice". "To establish the requisite good cause, reasonable diligence in attempting service must be shown, but the interest of justice is a broader standard, which does not require a showing of good cause, and permits the court to consider many factors" (Spath v Zack, 36 AD3d 410, 413 [1st Dept. 2007]). The factors to be considered include the diligence in attempting to serve process, expiration of the statute of limitations, meritorious nature of the cause of action, length of delay in service, promptness of the plaintiff's request for the extension of time, and prejudice to defendant (see Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105 [2001]).

Upon a review of the motion, cross-motion, oppositions, and replies thereto, this Court finds that plaintiff failed to demonstrate reasonable diligence in attempting service. Here, plaintiff commenced this action on February 3, 2016 because it was "apparent" to plaintiff's counsel that defendants would raise a lack of personal jurisdiction in the first action. Yet, plaintiff waited until May 21, 2016 to serve Kwame Darkwah, 108 days following the purchase of the second index number and 29 days after the motion to dismiss the first action was filed. Plaintiff waited until May 27, 2016, 114 days after purchasing the second index number and 35 days after the motion to dismiss in the first action was filed, to serve D'Koti Darkwah. Although plaintiff contends that service upon D'Koti Darkwah could not have been completed within 120 days because the original envelope was not received until after the 120 days had expired, such contention ignores the fact that plaintiff waited until the 114th day following the purchase of the summons and complaint to attempt service and never attempted personal service at D'Koti Darkwah's residence. Based on such, plaintiff's delay in attempting to serve the summons and complaint fails to demonstrate diligence.

Moreover, although the statute of limitations has expired, plaintiff himself has failed to submit any affidavit demonstrating a meritorious claim or substantiating his alleged injuries. The complaint is merely verified by plaintiff's counsel. Additionally, plaintiff offers no excuse for the delay in attempting to serve defendants after this action was commenced or the delay in making this cross-motion to extend the time for service. Thus, this Court finds that plaintiff failed to meet the interest of justice standard.

[* 5]

Accordingly, plaintiff CRANSTON KOWLESSAR's motion to reargue is granted, and upon reargument, defendants' motion to dismiss for lack of personal jurisdiction is granted, the Complaint is dismissed, and plaintiff's cross-motion to extend the time for service is denied.

Dated: October ________, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.