

<b>Cascardo v Macklowitz</b>
2018 NY Slip Op 31231(U)
June 8, 2018
Supreme Court, New York County
Docket Number: 101528/2017
Judge: Frank P. Nervo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 4

-----X  
DEBRA CASCARDO,

Plaintiff,

DECISION AND ORDER

Index No. 101528/2017

- against -

MICHAEL MACKLOWITZ, ESQ., individually and  
professionally, SETH GINSBERG, ESQ., individually  
and professionally, and ALLAN FRANKEL, ESQ.,  
individually and professionally,

Defendants.  
-----X

**FRANK P. NERVO, J.:**

In this legal malpractice action, defendants move, pursuant to CPLR 3211 (a) (8), for pre-answer dismissal of plaintiff's complaint for lack of personal jurisdiction based on improper service. Plaintiff, appearing pro se, opposes the application.

The affidavit of service filed with the New York County Clerk on December 7, 2017 reveals that nonparty Dusty Burke (Burke) served defendants on October 27, 2017 by leaving the summons and complaint with their receptionist at their business located at 299 Broadway, Suite 1405, in New York County.

Defendants do not dispute that 299 Broadway, Suite 1405, is their actual place of business nor do they dispute that copies of the summons and complaint were delivered to their receptionist. Nevertheless, they argue that service is incomplete because plaintiff failed to timely file proof of service with the clerk. The affidavit of service also fails to state that additional mailings of the summons and complaint were made.

Plaintiff in opposition avers that defendants lack standing to move for dismissal because they are in default by failing to timely answer the complaint. Plaintiff, though, assumes that

personal jurisdiction was acquired over defendants, and the failure to obtain personal jurisdiction over a party renders all subsequent proceedings against that party null and void (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 522 [1st Dept 2016] [citation omitted]). In any event, plaintiff did not seek a default judgment against defendants. Furthermore, given defendants' interest in the outcome of this action, standing is not an issue that is implicated here (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 (2007)).

Plaintiff next argues that defendants were properly served. She avers that she personally accompanied Burke to defendants' office where Burke delivered the papers to the receptionist identified as "Dee/Dale" (plaintiff aff, ¶ 3). Plaintiff also tenders an affidavit from Burke in which Burke avers that he delivered the "legal malpractice summons and complaint to the above defendants' legal office" (Burke aff at 1). Burke "then dropped a package in the US Mail with 3 [copies of] the summons and complaints enclosed to their business address" (*id.*).

In reply, each defendant avers that he never received the summons and complaint in this action by mail.

CPLR 308 describes the manner by which personal service upon a natural person is acquired. The methods of service prescribed in CPLR 308 must be strictly complied with in order to obtain personal jurisdiction (*see Persaud v Teaneck Nursing Ctr.*, 290 AD2d 350, 351 [1st Dept 2002]), as "[n]otice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Williams v DRBX Holdings, LLC*, 80 AD3d 534, 534 [1st Dept 2011], *lv denied* 17 NY3d 710 [2011] [internal quotation marks and citation omitted]). On a motion brought under CPLR 3211(a)(8), plaintiff bears the "burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017] [citations omitted]).

As is relevant here, CPLR 308 (2) states, in part, that personal service can be made:

“[B]y delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . of the person to be served and . . . by mailing the summons by first class mail to the person to be served at his or her actual place of business . . . such delivery 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 delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service . . .”

To the extent defendants move for dismissal based on plaintiff’s failure to timely file the affidavit of service, the motion is denied. The “failure to file proof of service within the 20-day time period . . . is not a jurisdictional defect, but a ‘mere irregularity’” (*Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014] [internal citations omitted]; *Flannery v General Motors Corp.*, 214 AD2d 497, 503 [1st Dept 1995] [Rubin, J., concurring], *affd* 86 NY2d 771 [1995]). Here, 20 days from October 27, 2017 fell on November 16, but plaintiff did not file Burke’s affidavit until December 7. An extension of time to file proof of service may be granted in the absence of prejudice (*see Paracha v County of Nassau*, 228 AD2d 422, 423 [2d Dept 1996]), and defendants have not shown that they suffered any prejudice from the three-week delay.

Defendants also contend that dismissal is appropriate because the affidavit of service does not show that the requisite mailings under CPLR 308(2) were made. An “affidavit of a process server constitutes prima facie evidence of proper service” (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]), but Burke’s affidavit fails to state the date on which the summons and complaint were mailed, the addresses to which they were mailed, and whether the envelopes contained the external markings required by statute. Such defects rebut the presumption of proper service and, ordinarily, defects on an affidavit of service warrant dismissal of the action (*see*

*Deutsche Bank Natl. Trust Co. v Ferguson*, 156 AD3d 460, 461 [1st Dept 2017] [granting dismissal where the “affidavit of service says that the summons and complaint were mailed to defendant’s ‘last known address,’ without identifying that address”]; *Olsen v Haddad*, 187 AD2d 375, 375-376 [1st Dept 1992], *lv denied* 81 NY2d 707 [1993] [granting dismissal where the envelope containing the summons and complaint was not marked “personal and confidential”]).

Nevertheless, the submissions are sufficient to warrant a traverse hearing (*see Gray-Joseph v Shuhai Liu*, 90 AD3d 988, 989-990 [2d Dept 2011]). Burke averred that he mailed the summons and complaint to defendants thereby creating a conflict as to whether service was properly made.

Accordingly, it is

ORDERED that defendants’ motion is granted to the extent of setting this matter down for a traverse hearing to determine the issue of whether plaintiff acquired in personam jurisdiction over defendants; and it is further

ORDERED that the issue of whether plaintiff acquired in personam jurisdiction over defendants is 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 this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further


ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in

the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

This constitutes the decision and order of the court.

Dated: *June 8*, 2018

*ENTER:*



Frank E. Nervo, J.S.C.