

Bentley Meeker Light. & Staging, Inc. v Mason

2018 NY Slip Op 31636(U)

March 5, 2018

Supreme Court, New York County

Docket Number: 160493/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ ROBERT D. KALISH
Justice

PART 29

**BENTLEY MEEKER LIGHTING &
STAGING, INC.,**

INDEX NO. 160493/2017

MOTION DATE 1/26/18

Plaintiff,

MOTION SEQ. NO. 001

- v -

STEPHEN ROBERT MASON,

Defendant.

The following papers, numbered 3-9, were read on this motion to dismiss.

- Notice of Motion – Memorandum of Law in Support – Affirmation in Support – Exhibit A – RJJ **█ Nos. 3-7**
- Affirmation in Opposition **█ No. 8**
- Reply Affirmation in Further Support **█ No. 9**

Motion by Defendant Stephen Robert Mason (“Mason”) pursuant to CPLR 3211 (a) (8) to dismiss the complaint against him for lack of personal jurisdiction is denied.

BACKGROUND

Plaintiff Bentley Meeker Lighting & Staging, Inc. (“Bentley Meeker”) brought this action to recover an amount in excess of \$65,000.00 from Mason for his alleged conversion of five D&B Audiotechnik 4 Channel Amplifiers (the “Amplifiers”) that he allegedly stole from Bentley Meeker. Plaintiff alleges in its verified complaint that it employed Mason as an Audio/Visual Shop Warehouse Employee from on or about October 29, 2015 to August 31, 2016 and as an Audio/Visual Shop Department Manager from on or about September 1, 2016 to October 3, 2017. Plaintiff further alleges that Mason stole the Amplifiers from Plaintiff’s principal place of business, located at 465 10th Avenue, New York, New York 10018, on October 2, 2017. Plaintiff further alleges that it terminated Mason on October 3, 2017.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Bentley Meeker commenced the instant action against Mason on November 27, 2017 by e-filing a summons and verified complaint. Plaintiff alleges that a licensed New York City process server served process upon Defendant by: (1) on December 4, 2017, at 11:35 a.m., affixing a copy of the summons and verified complaint to the door at 150 Chambers Street Apartment 2W, New York, New York 10007 (the “Apartment”), Mason’s “dwelling house/usual place of abode; and (2) on December 4, 2017, mailing a copy of the same to the Apartment, allegedly Mason’s “last known residence.” (Glandian affirmation, exhibit A [Affidavit of Service].) The Affidavit of Service states that the process server previously attempted to serve Mason or a person of suitable age and discretion at the Apartment on: Tuesday, November 28, 2017, at 6:27 p.m.; Thursday, November 30, 2017, at 11:10 a.m.; and Friday, December 1, 2017, at 10:19 a.m. (*Id.*) The Affidavit of Service further states, regarding “military service,” that the “[p]erson spoken to was asked whether the defendant was in the military [] and received a negative reply. . . . [B]ased upon the conversation and observation . . . defendant is not in the military.” (*Id.*)

Mason now appears in the instant action by counsel for the purpose of the instant motion brought pursuant to CPLR 3211 (a) (8) to dismiss Bentley Meeker’s verified complaint against him. Mason argues, in the main, that the process server’s alleged four attempts to serve him do not constitute “diligent efforts” as required by the CPLR. Mason states in support of his argument that four attempts at service made during business hours in a period of less than one week does not constitute diligent efforts. Mason further argues that the process server was required to make an inquiry as to Mason’s whereabouts or place of business.

Bentley Meeker argues in its opposition papers that the process server’s four attempts to serve Mason constitute diligent efforts. Plaintiff states in support of its argument that the first attempt to serve Mason was made outside of business hours. Plaintiff further states that the process server was not required to inquire as to Mason’s whereabouts or place of business. Plaintiff further states that it believed Mason was unemployed at the times of the attempted service. Plaintiff then argues that Mason has not denied receiving the summons and verified complaint.

Mason states in his reply papers that he resides in the Apartment with his girlfriend. Mason then argues that he “immediately secured new employment with two different companies” shortly after October 11, 2017, and “begins work at 8:00 a.m. five days per week and works until 8:00 p.m. on at least three nights per

week.” (Reply affirmation of Glandian at 2.) Mason further argues that whether he has actually received the summons and verified complaint is irrelevant. Mason then reiterates that the four alleged attempts at service do not constitute diligent efforts because, among other things, Plaintiff failed to make a genuine inquiry as to Mason’s whereabouts and place of employment prior to attempting to serve process on him in the manner described in the Affidavit of Service.

DISCUSSION

A party seeking to assert personal jurisdiction bears the ultimate burden of proof as to whether the court has personal jurisdiction over the defendant. (*See Goel v Ramachandran*, 111 AD3d 783, 788 [2d Dept 2013].) On a CPLR 3211 (a) (8) motion to dismiss for lack of personal jurisdiction, “the plaintiff[] need only make a prima facie showing that such jurisdiction exists.” (*Id.*)

“Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308.” (*Washington Mut. Bank v Murphy* (127 AD3d 1167, 1175 [2d Dept 2015] [internal quotation mark and citations omitted].) CPLR 308 provides:

“Personal service upon a natural person shall be made by any of the following methods:

“1. by delivering the summons within the state to the person to be served; or

“2. 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 and by either mailing the summons to the person to be served 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, . . . ; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, . . . ; or . . .

“4. 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; . . .

“6. For purposes of this section, “actual place of business” shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.”

The affidavit of service of process upon Defendant suggests that the process server attempted to serve Mason pursuant to CPLR 308 (4), commonly known as “nail and mail” service.

To reach CPLR 308 (4), a plaintiff must first have attempted service under CPLR 308 (1) and (2) “with due diligence.” “The requirement of due diligence must be strictly observed because there is a reduced likelihood that a defendant will actually receive the summons when it is served pursuant to CPLR 308 (4).” (*Serraro v Staropoli*, 94 AD3d 1083, 1084 [2d Dept 2012].) “What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality.” (*Id.*)

The Appellate Division, First Department held in *Ayala v Bassett* (57 AD3d 387 [1st Dept 2008]) that a process server exercised due diligence where three different attempts were made to serve a defendant at the defendant’s residence on three different days, at times of day that were in the morning, the afternoon, and the evening, over a 22-day period. The Appellate Division, First Department has also held that attempts at service were not diligent where two attempts were made at times when it was likely the defendant was in transit to or from work. (*Wood v Balick*, 197 AD2d 438 [1st Dept 1993]).

The Appellate Division, Second Department has held that “[f]or the purpose of satisfying the due diligence requirement of CPLR 308 (4), it must be shown that

the process server made genuine inquiries about the defendant's whereabouts and place of employment." (*Serraro* at 1085.)

In the instant action, there is no indication that either the process server or Plaintiff tried to determine Mason's whereabouts or place of employment. While the Affidavit of Service appears to state that an inquiry occurred regarding Mason's military service status, it is silent as to who the "person" was to whom the process server may have spoken.

The Court notes that the instant action was commenced on November 27, 2017, and that pursuant to CPLR 306-b Plaintiff would have 120 days, or until March 27, 2018, to complete service of the summons and complaint on Defendant. As such, a finding in the instant motion that the process server's attempts to serve Mason did not constitute diligent efforts could not result in the granting of a motion to dismiss at this time. At most, such a finding could only result in Plaintiff having to serve process upon Mason by March 27, 2018.

Nevertheless, for the purposes of opposing the instant CPLR 3211 (a) (8) motion to dismiss for lack of personal jurisdiction, Bentley Meeker has shown prima facie that such jurisdiction exists. Plaintiff has alleged a sufficiently reasonable belief that either Mason or a person of suitable age and discretion would be present at the Apartment during the times at which the process server attempted service. Further, four attempts at service were made, at varying times of day, on different days, with the first attempt made outside of normal work hours.

CONCLUSION

Accordingly, it is

ORDERED that motion by Defendant Stephen Robert Mason pursuant to CPLR 3211 (a) (8) to dismiss the complaint against him for lack of personal jurisdiction is denied; and it is further

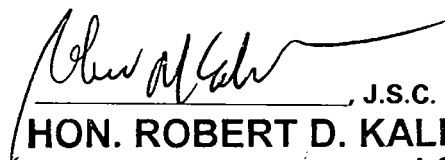
ORDERED that Plaintiff Bentley Meeker Lighting & Staging, Inc. shall serve a copy of this order with notice of entry upon Defendant on or before March 16, 2018; and it is further

ORDERED that Defendant shall file his answer within 40 days of service upon him of a copy of this order with notice of entry; and it is further

ORDERED that counsel for all parties are directed to appear for a preliminary conference at 71 Thomas Street, Room 104, New York, New York 10013-3821 on Tuesday, June 12, 2018, at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: March 5, 2018
New York, New York


_____, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE