

Belnord Partners LLC v Cornyetz
2018 NY Slip Op 32518(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 158083/17
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X

BELNORD PARTNERS LLC,
Plaintiff,

INDEX NO. 158083/17

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

DANIEL CORNYETZ and NINA CORNYETZ,
Defendants.

DECISION AND ORDER

-----X

By notice of motion, defendants move pursuant to CPLR 3211(a)(8) for an order dismissing this action. Plaintiff opposes and, by notice of cross motion, moves pursuant to CPLR 306-b for an order permitting it to amend its affidavit of service filed on October 3, 2017 and directing the clerk to accept the amended affidavit of service, and extending its time to serve the summons and complaint on defendants. Defendants oppose the cross motion.

I. SERVICE OF THE PLEADINGS

Defendants allege entitlement to succession rights in premises inhabited by their mother at 225 West 86th Street, apartment 808, in Manhattan. (NYSCEF 1). According to plaintiff's process server, he attempted to serve defendant Daniel Cornyetz at 332 East 15th Street, apartment 1B, in Manhattan on September 18, 2017 at 6:05 pm, on September 19, 2017 at 1:20 pm, and on September 20, 2017 at 9:12 am, and that on each occasion he was unable to find someone of suitable age and discretion willing to receive the pleadings. Therefore, on September

20, the server affixed the pleadings to the entrance door of the dwelling place and one day later mailed them to Daniel. (NYSCEF 5). The process server's notes accompanying the affidavit of service reflect that "the door was answered by a female . . . I asked for [Daniel and Nina Cornyetz] and I was told that they do not live there." (NYSCEF 16).

By separate affidavit, the same process server attests that on the same dates and times he attempted to serve Daniel at the premises located at 332 East 15th Street, he attempted to serve Daniel and co-defendant Nina Cornyetz at their mother's residence at 86th Street, and that he affixed and mailed the pleadings to them at that address. (NYSCEF 3).

In the proposed amended affidavit of service, plaintiff's process server states that he attempted to serve both defendants at the 86th Street address on September 13, 2017 at 6 pm, September 14 at 2:50 pm, and September 15 at 9:02 am. (NYSCEF 26). He offers in support copies of logs showing his whereabouts on these dates and times as reflected by Global Positioning System (GPS) information (NYSCEF 31-42) as evidence that a mistake was made in the original affidavit of service.

A different process server attests that she served another copy of the pleadings on Nina at 1884 County Route 22, Valatie, New York 12184 on September 20, 2017 at 6:34 pm by delivering them to "John Doe," identified as Nina's co-resident, and by mailing them the day after. (NYSCEF 4).

By affidavit dated January 8, 2018, Daniel states that he has resided and continues to reside in his late mother's residence, and that the process server's three attempts at service at that residence are insufficient as they were all made on a weekday and during or immediately after regular business hours. Daniel denies residing at the East 15th Street address and observes that an

uncorrected affidavit of service that was originally served as to this address reflects that a person who opened the door there denied that he or Nina lived there. (NYSCEF 10, 16).

According to Nina, the residence in Valatie, New York, is her weekend residence, and she denies that the pleadings were delivered to anyone of suitable age and discretion, but rather left in the perimeter fence, and not posted on the front door or front gate. She observes that the server does not allege having acted with due diligence before resorting to substitute service. (NSYCEF 11).

By affidavit dated January 19, 2018, the process server who served Nina at the Valatie residence, states that the residence has a private driveway leading to it which is enclosed by a fence and a locked gate. On September 20, 2017, the server was unable to enter the gate but saw a man getting out of the pickup truck nearby; the man confirmed that Nina lived at the residence, as did he, and in response to the server's question as to his relationship to Nina, he stated that she was his wife. He refused to take the papers from the process server, who placed them near him on top of the mailbox and thereafter mailed them. (NYSCEF 25).

In response, Nina denies being married, and alleges that the mailbox referenced by the server is a slanted lockbox which would cause any papers placed on it to fall to the ground. (NYSCEF 44).

II. AMENDMENT OF AFFIDAVIT OF SERVICE

As plaintiff submits proof that the process server's original affidavit contains the wrong dates, plaintiff is entitled to amend it.

III. MOTION TO DISMISS

Pursuant to CPLR 308(4), service may be affixed and mailed to the actual dwelling house or usual place of abode of a person if personal or substitute service cannot be effected on the person with due diligence.

A. Service on Daniel

It is undisputed that the process server's first two attempts at serving Daniel at both residences were made on a weekday during normal business hours, and the third and final attempts at 6 pm and a few minutes past 6 pm, all of which are times when it could be reasonably expected that Daniel was at work or in transit to and from work. (*See Faruk v Dawn*, 162 AD3d 744 [2d Dept 2018] [plaintiff did not show due diligence based on three service attempts made during weekday work hours or hours when reasonable that defendant in transit to work]; *Greene Major Holdings, LLC v Trailside at Hunter, LLC*, 148 AD3d 1317 [3d Dept 2017] [no due diligence where three service attempts made during weekdays and two of which during hours when party reasonably expected to be either at or in transit from work; third attempt made at 8:59 pm]; *O'Connell v Post*, 27 AD3d 630 [2d Dept 2006] [same; attempts at 7:45 am, 6:16 pm, and 7:17 pm]; *Gantman v Cohen*, 209 AD2d 377 [2d Dept 1994] [attempts made at 10:50 am, 4:30 pm, and 6:36 pm]).

Moreover, there is no evidence that the server attempted to locate Daniel's actual place of business or employment before affixing and mailing the pleadings. (*See Faruk*, 162 AD3d at 746 [process server did not attempt to locate defendant's place of employment in order to effect service there]; *Wood v Balick*, 160 AD2d 773 [1st Dept 1993] [no due diligence shown as service was made within minutes of normal business hours at times when defendant likely to be transit to and from work, and no attempt made to serve defendant at last known place of business];

Lowinger v State Univ. of New York Health Science Ctr. of Brooklyn, 180 AD2d 606 [1st Dept 1992], *lv denied* 80 NY2d 926 [plaintiff's proof of attempted service did not reflect that server asked neighbors about defendants' habits and employment and no attempt made to serve at place of business]).

Moreover, Daniel's denial of any connection to the 15th Street residence is corroborated by the process server who states that the woman who answered the door told him that Daniel does not reside there. Plaintiff thus does not establish that the 15th Street premises was Daniel's actual dwelling place or usual place of abode.

Defendant Daniel thus establishes that plaintiff did not act with due diligence in serving him with the pleadings as required by CPLR 308(4).

B. Service on Nina in Valatie

While Nina denies being married and alleges that the process server's affidavit thus contains false representations, she does not deny knowing or living with a man who fits the description of the person served. Whether the man identified himself falsely to the process server or the process server misunderstood him is irrelevant, as the man's title or legal relationship to Nina is not in issue, but rather whether the process server reasonably believed that he was a person of suitable age and discretion to receive process for her. (*See e.g., DeMeo v City of Albany*, 63 AD3d 1272 [3d Dept 2009] [even though respondent claimed person served was not authorized to accept service, it was not unreasonable for process server to rely on identification of person as proper person to accept service]). As an adult who identified himself as living in the same premises as Nina, he was of suitable age and discretion. (*See Roldan v Thorpe*, 117 AD2d 790 [2d Dept 1986], *app dismissed* 68 NY2d 663 [person served with pleadings must be of

sufficient maturity, understanding, and responsibility so as to make it likely that he or she will deliver pleadings to defendant]).

Similarly, whether the pleadings fell off the mailbox after they were placed there by the server is also irrelevant, as the server fulfilled her duty of placing the pleadings near the person who refused to take them from her. (*See City of New York v VJHC Dev. Corp.*, 125 AD3d 425 [1st Dept 2015] [proper for process server to leave pleading in defendant daughter's general vicinity after she refused to accept service]).

Nina therefore fails to controvert the allegations in the process server's affidavit, which establish, *prima facie*, proper service of the pleadings on her. (*See e.g., Wright v Denard*, 111 AD3d 1330 [4th Dept 2013] [defendant failed to rebut presumption of proper service by providing specific facts to rebut statements in affidavit of process server; while defendant denied service, he failed to identify person who allegedly accepted service at residence]).

III. CROSS MOTION

The only issue remaining in plaintiff's cross motion is whether to grant leave to extend its time to serve Daniel. Plaintiff contends that as they made diligent attempts to serve Daniel, they should be granted a reasonable extension of time to serve him.

Absent due diligence (*supra*, II.), plaintiff does not show good cause or that the interest of justice warrants the relief, especially as the statute of limitations has not yet expired and as it did not move for an extension until after defendants filed their motion to dismiss. (*See Shea v Bloomberg, L.P.*, 65 AD3d 579 [2d Dept 2009] [motion to extend time to serve should have been denied as plaintiff failed to use due diligence in serving pleadings and did not request extension until after motion to dismiss made]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted only as to dismissing the complaint as against defendant Daniel Cornyetz, and the complaint is severed and dismissed as against him, and the clerk is directed to enter judgment accordingly; it is further

ORDERED, that defendants' motion to dismiss is denied as to defendant Nina Cornyetz, and she is directed to file and serve an answer to the complaint within 30 days of the date of this order; it is further

ORDERED, that plaintiffs' cross motion for an extension of time to serve the complaint on defendants is denied; it is further

ORDERED, that plaintiffs' cross motion for an order permitting the amendment of the affidavit of service is granted, and the New York County Clerk is directed to accept the amended affidavit for filing, *nunc pro tunc*, effective as of October 3, 2017.

10/3/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE