

Thomas v Halvey

2019 NY Slip Op 33733(U)

December 20, 2019

Supreme Court, Kings County

Docket Number: 515554/2018

Judge: Lara J. Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 20th day of December 2019.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X

JOHN THOMAS,

Index No.: 515554/2018

Plaintiff,

DECISION & ORDER

-against-

CHRISTOPHER HALVEY and JOHN DOE,

Defendants.

-----X

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

	Papers Numbered:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	1 _____
Opposing Affidavits (Affirmations) _____	2 _____
Reply Affidavits (Affirmations) _____	3 _____
Other Papers: <u>Supplemental Affirmation</u> _____	4 _____

Introduction

Defendant, Christopher Halvey’s moves by motion sequence number 1, pursuant to CPLR § 3211(a)(8) for dismissal of the action for lack of personal jurisdiction.

Plaintiff opposes this application.

Background and Procedural History

This action is for personal injuries allegedly sustained in a motor vehicle accident that occurred on July 31, 2015. The summons and complaint were served on July 31, 2018. Issue was joined on December 7, 2018 wherein the defendant plead the affirmative defense of lack of personal jurisdiction.

At oral argument on December 4, 2019, the issue of whether the mailed copy of the summons and complaint contained the words “personal and confidential” was raised. Further, plaintiff’s e-filed opposition contained an unsigned and unnotarized affidavit of the process server. This Court provided the parties the opportunity to address these issues. The matter was adjourned to December 18, 2019. Defendant was given the limited opportunity to provide supplemental papers to include a clear copy of the front and back of the envelope and relevant case law. Plaintiff was permitted to provide supplemental papers to include a signed and notarized affidavit by his process server and relevant case law. On December 18, 2019, the rescheduled oral argument date, plaintiff failed to appear.¹ Plaintiff’s counsel did e-filed a signed and notarized affidavit from the process server. The defendant e-filed a supplemental affirmation.

¹ The Court requested that the defendant contact plaintiff when he did not answer either calendar call. In response, plaintiff spoke with the Part Clerk and stated that he is not appearing for the oral argument, contrary to the part rules.

Discussion

Motion to Dismiss

At issue is whether plaintiff obtained personal jurisdiction of defendant Christopher Halvey. Plaintiff contends that service of process was made pursuant to CPLR § 308(4) which states, in part, as follows:

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; ...

(CPLR § 308[4]).

“Although the ultimate burden of proof regarding personal jurisdiction rests with the plaintiff, to defeat a CPLR § 3211(a)(8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court” (*see Weitz v Weitz*, 85 AD3d 1153, 1154 [2011]; *Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 986 [2007])” (*Whitcraft v Runyon*, 123 AD3d 811, 812; [2 Dept., 2014]).

“Ordinarily, the affidavit of a process server constitutes a prima facie showing of proper service”, but “when a defendant submits a sworn denial of receipt of service containing specific facts to refute the statements in the

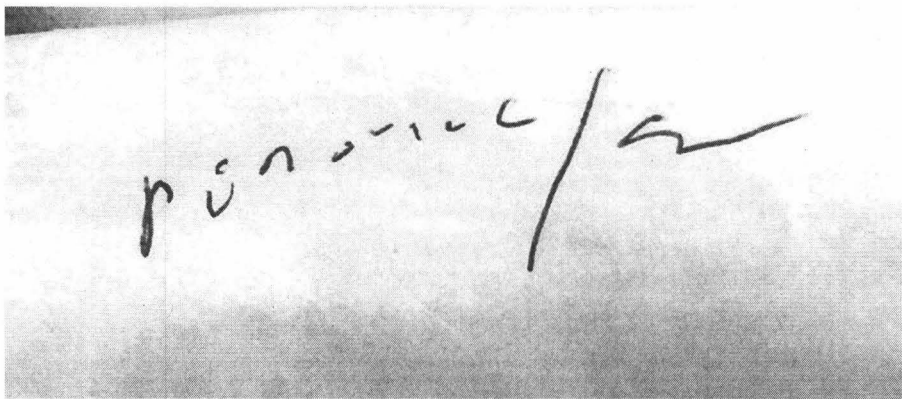
affidavit of the process server, the prima facie showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of the evidence at a hearing”.

(*Wells Fargo Bank, NA v Spaulding*, 111 N.Y.S.3d 118 [2 Dept., 2019] [internal citations omitted]).

The process server, John Foster states by affidavit that service was completed in accordance with the requirements of CPLR § 308(4) for affix and mail service (*see* Opposition, Exhibit 1). This gives rise to the presumption that service was properly made on the defendant.

To rebut this presumption, the defendant must submit “a sworn denial of receipt of service containing specific facts to refute the statements in the affidavit of the process server” (*Wells Fargo Bank, NA v Spaulding*, 111 N.Y.S.3d 118 [2 Dept., 2019]; *quoting Bank of N.Y. Mellon v. Ortiz*, 174 A.D.3d 489, 490, 103 N.Y.S.3d 562 [2 Dept., 2019]). “A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit” (*JPMorgan Chase Bank, N.A. v Grinkorn*, 172 A.D.3d 1183 [2 Dept., 2019]; *quoting Washington Mut. Bank v. Huggins*, 140 A.D.3d 858 [2 Dept., 2016]). “Service of process upon a natural person must be made in strict compliance with the statutory methods of service set forth in CPLR 308” (*Wells Fargo Bank, NA v Spaulding*, 111 N.Y.S.3d 118 [2 Dept., 2019]; *quoting FV-1, Inc. v. Reid*, 138 A.D.3d 922 [2 Dept., 2016]).

In the case at bar, defendant sufficiently rebutted the presumption that service was properly made. The mailing to the defendant did not bear the legend “personal and confidential” on the front of the envelope. The following was written on the back of the envelope:



(see Defendant Supplemental Affirmation, Exhibit A).

“[T]he requisite mailing did not bear the legend “personal and confidential” on the envelope as required by the statute (see, CPLR 308 [4]; *Pesner v Fried*, 166 AD2d 512; *Broomes-Simon v Klebanow*, 160 AD2d 973). Since the plaintiff failed to comply with the prescribed conditions, personal jurisdiction over the defendant was not acquired, and the complaint should have been dismissed.” (*Mastropierro v. Bennett*, 233 A.D.2d 483, 484, 650 N.Y.S.2d 287 [2 Dept., 1996]; see *Broomes-Simon v. Klebanow*, 160 A.D.2d 973, 554 N.Y.S.2d 695 [2 Dept., 1990] see generally *Hulse v Wirth*, 175 A.D.3d 1276, 108 N.Y.S.3d 148 [2 Dept., 2019]).

Conclusion

Accordingly, defendant’s motion to dismiss is granted, in its entirety. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

Lara J. Genovesi
J.S.C.

2019 DEC 24 AM 8:21

KINGS COUNTY CLERK
FILED

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