

**Kal Tire v Vitale**

2020 NY Slip Op 32355(U)

July 17, 2020

Supreme Court, New York County

Docket Number: 657644/2019

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

KAL TIRE,

Plaintiff,

- v -

ALESSANDRO VITALE, MATTEO DENINNO

Defendant.

-----X

INDEX NO. 657644/2019
MOTION DATE 02/05/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 70

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Matteo Deninno's motion to dismiss for lack of jurisdiction pursuant to CPLR § 3211 (a)(8) is denied and Kal Tire's cross-motion for alternate service and an extension of time to complete service is denied as moot.

The Relevant Facts and Circumstances

This action arises from an alleged fraudulent scheme to defraud Kal Tire where Alessandro Vitale, a former Kal Tire employee, allegedly hired Mr. Deninno's companies to perform services for Kal Tire at inflated prices in return for which Mr. Deninno paid kickbacks to Mr. Vitale. Kal Tire filed its complaint on December 23, 2019 (the Complaint; NYSCEF Doc. No. 1)

On January 8, 2020, Kal Tire's process server obtained Mr. Deninno's address from the New York Department of Motor Vehicles (the DMV), which address was listed as 4142 24th St, Apt

826, Long Island City, New York (the **LIC Address**) (NYSCEF Doc. No. 24). Pursuant to an affidavit of service (NYSCEF Doc. No. 2; the **Affidavit of Service**), dated January 15, 2020, the Complaint was served at the LIC Address by leaving a copy of the papers with the concierge, Manuel Fajardo, “a person of suitable age and discretion, who refused access to [Mr. Deninno’s] actual apartment, and accepted in accordance with his/her everyday duties.” A copy of the Complaint was also sent to the LIC Address by first class mail. Mr. Deninno filed the instant motion to dismiss in response.

### **Discussion**

Mr. Deninno argues that the Complaint should be dismissed pursuant to CPLR § 3211 (a)(8) for lack of jurisdiction as personal service was improper because Kal Tire did not deliver the service papers to Mr. Deninno at his actual place of business, dwelling place or usual place of abode. In its opposition papers, Kal Tire argues that Mr. Deninno’s motion to dismiss should be denied because (i) the presumption of proper service under the Affidavit of Service is un rebutted, (ii) Mr. Deninno should be estopped from denying that he lived at the LIC Address, or (iii) in the alternative, Kal Tire should be granted its cross-motion for alternate service and an extension of time to complete service.

Pursuant to CPLR § 3211 (a)(8), dismissal is warranted where the court lacks jurisdiction over a defendant. CPLR § 308 (2) provides for personal service by (i) delivering the summons to a person of suitable age and discretion at the dwelling place or usual place of abode of the person to be served, (ii) mailing the summons by first class mail to the last known residence, and (iii) filing proof of service.

Although an affidavit of service in accordance with CPLR § 308 is prima facie evidence that process was properly served (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]), a fact-based, sworn denial of service is sufficient to rebut the presumptive validity of service (*Ananda Capital Partners v Stav Elec. Sys. (1994)*, 301 AD2d 430, 430 [1st Dept 2003]). Where the presumption of valid service is overcome by a nonconclusory, sworn denial, a traverse hearing is required to determine whether service was proper (*id.*).

Here, the Affidavit of Service indicates that service was effected on Mr. Deninno through the concierge at the LIC Address on January 15, 2020. To the extent that Mr. Deninno argues that the concierge did not constitute a person of suitable age and discretion, this is incorrect because service left with a doorman, followed by a mailing, has been held to be valid where building access is prohibited, as was the case here (*see Rosenberg v Haddad*, 208 AD2d 468, 469 [1st Dept 1994]).

Mr. Deninno also denies that the LIC Address was his dwelling place or usual place of abode. Instead, Mr. Deninno attests that he never resided at the LIC Address and that his friend who lived there, Rebecca Querci, let him use the address for his driver's license (NYSCEF Doc. No. 7, ¶ 10). Mr. Deninno explains that the LIC Address was used to renew his driver's license on September 6, 2019 before he moved to Italy on September 15, 2019 with the intent to stay there permanently (*id.*, ¶¶ 2-9). Ms. Querci also attests that she permitted Mr. Deninno to list her LIC Address with the DMV, but states that he had never stayed with her at this address (NYSCEF Doc. No. 8, ¶¶ 4-7).

In further support of his motion, Mr. Deninno adduces a Consular Certificate, dated September 5, 2019, from the Consulate General of Italy in New York that certified Mr. Deninno's intent to permanently return to Italy on September 15, 2019, which certificate was issued for the "introduction of the Customs Tariff of the Italian Republic" (NYSCEF Doc. No. 9). He also attaches cellphone records that indicate cellphone service from Italy for the period of September 16, 2019 to January 23, 2020, other than a few odd weeks. Under these circumstances, Mr. Deninno has provided a fact-based, sworn denial that would typically be sufficient to rebut the presumption that service was valid such that a traverse hearing would be necessary to resolve whether service was proper (*see Ananda Capital Partners, supra*).

Notwithstanding the foregoing, Vehicle and Traffic Law § 505 (5) requires that every motor vehicle licensee notify the Commissioner of Motor Vehicles of a change in residence within 10 days of the change and failure to comply with this provision estops a defendant from challenging the propriety of service made at a former address (*Ortiz v Santiago*, 303 AD2d 1, 4-5 [1st Dept 2003]).

Mr. Deninno relies on *Matter of RBC Capital Mkts. Corp. v Bittner*, 24 Misc 3d 728 [Sup Ct, NY County 2009] to argue that his failure to update his address with the DMV cannot estop him from contesting service. However, his reliance is misplaced. In *RBC Capital Markets*, the defendant was served in New York based on the address listed on his driver's license and the court concluded that his failure to report a change of address did not estop him from relying on defective service where the defendant moved to New Jersey. Significantly, the court compared

the motor vehicle statutes in both states and concluded that Vehicle and Traffic Law § 505 (5) was inapplicable because it would effectively deprive the defendant of benefitting from a longer period to update his change of address as provided by the sister state of New Jersey (*id.* at 734). In contrast to *RBC Capital Markets*, Mr. Deninno did not move to a neighboring state of New York or seek the benefit of any statute for which application would be denied if Vehicle and Traffic Law § 505 (5) were to be upheld in this case.

In addition, whereas the defendant in *RBC Capital Markets* neglected to timely update his address with the DMV, Mr. Deninno affirmatively misrepresented his address to the DMV. Here, significantly, the record indicates that Mr. Deninno ***affirmatively misrepresented*** his address by recording the LIC Address at the DMV, an address that he now attests was never his residence (NYSCEF Doc. No. 7). Under these circumstances, Mr. Deninno is estopped from relying on any alleged defective service because he failed to report his change of address in accordance with Vehicle and Traffic Law § 505 (5) (*see Burke v Zorba Diner*, 213 AD2d 577, 578-579 [2d Dept 1995] [denying motion to dismiss for lack of jurisdiction where defendant's failure to report address change to DMV was an affirmative misrepresentation that plaintiff had every right to rely on when effecting service of process]; *McCleaver v VanFossen*, 276 AD2d 603, 604 [2d Dept 2000] [defendants estopped from contesting validity of service when they moved from New York to the State of Washington without providing notice of their change of address]).

Moreover, the renewal of Mr. Deninno's New York driver's license on September 6, 2019, just 9 days before he purportedly made a permanent move to Italy, reveals that Mr. Deninno attempted

to obscure his new address, especially when Mr. Deninno was, or should have been, aware of this impending action as Kal Tire filed a petition for pre-action discovery in January 2019 concerning his alleged fraud (*see Kal Tire v J.P. Morgan Chase Bank, N.A. and Bank of Montreal*, Index No. 150472/2019). Thus, Mr. Deninno is also estopped from raising defective service as a defense because the record indicates that he engaged in conduct to prevent Kal Tire from learning of his new address, i.e., by providing an address to the DMV at which he now claims he does not reside (*see Feinstein v Bergner*, 48 NY2d 234, 241 [1979]).

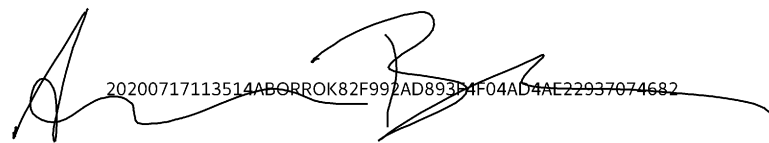
Inasmuch as Mr. Deninno claims that his failure to notify the DMV does not estop him from asserting lack of personal jurisdiction by a state in which he is not a resident (*see Avis Rent A Car Sys., LLC v Scaramellino*, 161 AD3d 572, 573 [1st Dept 2018]), this proposition cannot be the basis of dismissal because Mr. Deninno only moved to dismiss based on the service component of personal jurisdiction under CPLR § 308 (2), and not under any jurisdictional basis pursuant to either CPLR § 301 or CPLR § 302 (Notice of Motion, NYSCEF Doc. No. 4). For the avoidance of doubt, none of Mr. Deninno's motion papers address personal jurisdiction over him, generally.

As Mr. Deninno is estopped from contesting the validity of service to his LIC Address, his motion to dismiss must be denied and Kal Tire's cross-motion is, therefore, denied as moot.

Accordingly, it is

ORDERED that Mr. Deninno’s motion to dismiss based improper service and Kal Tire’s cross-motion for alternate service are both denied; and it is further

ORDERED that Mr. Deninno is directed to file an answer to the complaint within 20 days of this decision and order.

  
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7/17/2020  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: