

Sumter v Lomita

2020 NY Slip Op 35514(U)

January 10, 2020

Supreme Court, Bronx County

Docket Number: Index No. 32434/2018E

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — BRONX COUNTY

PRESENT: Hon. GEORGE J. SILVER

Justice

CATHERINE SUMTER,

INDEX NO. 32434/2018E

Plaintiff,

MOTION DATE _____

v.

MOTION SEQ. NO. 001

CRAIG LOMITA, M.D. and
MONTEFIORE MEDICAL CENTER,

MOTION CAL. NO. _____

Defendants.

The following papers numbered 1 to 3 were read on this motion for (Seq. No. 001)
for DISMISSAL (See CPLR §2219[a]):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>1</u>
Answering Affidavit and Exhibits	No(s). <u>2</u>
Replying Affidavit and Exhibits	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
annexed decision and order of the court.

Dated: January 10, 2020

George J. Silver
HON. GEORGE J. SILVER

HON. GEORGE J. SILVER

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

1. Check one: Case Disposed Non-Final Disposition
2. Check as Appropriate: ... Motion is: Granted Denied Granted in Part Other

SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY

PRESENT: GEORGE J. SILVER*Justice*

CATHERINE SUMTER,

Plaintiff,

Index No. 32434/2018E

- v -

Motion Seq. No. 001CRAIG LOMITA, M.D. and MONTEFIORE
MEDICAL CENTER,

Defendants.

Cross-Motion: Yes No

Defendant CRAIG LOMITA, M.D. (“Dr. Lomita or “defendant”) moves, pursuant to CPLR § 3211(a)(8), for an order dismissing the summons with notice against him, and deleting his name from the caption based upon plaintiff’s failure to obtain personal jurisdiction over him.¹ Plaintiff opposes the motion. For the reasons discussed below, the court grants the motion.

BACKGROUND

This action was commenced with the filing of the summons with notice on October 31, 2018. Dr. Lomita asserts that according to plaintiff’s affidavit of service, the summons with notice was allegedly served via substituted service at 3411 Wayne Avenue, Bronx, New York 10467 (“3411 Wayne Avenue”). However, Dr. Lomita argues that he has never practiced medicine, nor maintained an office at 3411 Wayne Avenue. Dr. Lomita also notes that an internet search of his office lists eight different locations, but none of the addresses is 3411 Wayne Avenue.

Additionally, Dr. Lomita argues that while plaintiff’s affidavit of service states that the summons with notice was left with Michelina Lord (“Ms. Lord”) at 3411 Wayne Avenue, he does not know Ms. Lord, and has never resided at 3411 Wayne Avenue. As such, Dr. Lomita maintains

¹ Defendant MONTEFIORE MEDICAL CENTER (“Montefiore”) does not dispute that it was properly served.

that there was no substituted service on him at his “residence” or “actual place of business” in this matter.

In opposition, plaintiff argues that although her summons with notice identified Dr. Lomita’s address as 1250 Waters Place, Bronx, NY (“1250 Waters Place”), she spoke to Alicea Hart (“Ms. Hart”), the process server, who stated that process could not be served at 1250 Waters Place, and instead, “instructions had been given to serve both defendants at 3411 Wayne Avenue, which houses offices of Montefiore.” Plaintiff explains that she agreed to serve both defendants at 3411 Wayne Avenue, and that Ms. Hart left the summons with notice with Ms. Lord, an employee of Montefiore, on February 11, 2019. Accordingly, plaintiff requests a traverse hearing in order to determine whether the service of process on Dr. Lomita at 3411 Wayne Avenue was proper.

In reply, Dr. Lomita argues that plaintiff’s opposition is based on hearsay and cannot be considered as a matter of law. Dr. Lomita contends that plaintiff’s opposition only consists of plaintiff’s affirmation, which sets forth “purported discussions with the process server and hearsay stemming therefrom.” Specifically, Dr. Lomita posits that plaintiff submits Ms. Hart’s statement regarding her alleged inability to serve him at 1250 Waters Place, but plaintiff does not include any information as to whether Ms. Hart presented to 1250 Waters Place at any time, and/or ever attempted to serve Dr. Lomita at 1250 Waters Place. Similarly, Dr. Lomita highlights plaintiff’s submission of Ms. Hart’s statement regarding “a purported instruction from an unknown or unidentified person or place or thing to serve the defendants at 3411 Wayne Avenue.” As such, Dr. Lomita maintains that the court cannot accept plaintiff’s hearsay assertions as a matter of law.

Additionally, Dr. Lomita argues that Ms. Hart’s affidavit does not state that Ms. Hart attempted service at 1250 Waters Place, or upon Dr. Lomita personally at his actual office. Dr. Lomita also notes that Ms. Hart’s affidavit does not mention that Ms. Hart was “instructed” to go to 3411 Wayne Avenue, and if so, by whom or what. Finally, Dr. Lomita reemphasizes that while the summons with notice correctly lists Dr. Lomita’s office address as 1250 Waters Place, Ms. Hart stated that she served the summons with notice on someone other than Dr. Lomita at 3411 Wayne Avenue.

DISCUSSION

CPLR § 3211(a)(8) allows a defendant to seek dismissal of a complaint on the basis that the court lacks personal jurisdiction over him or her. Under CPLR § 308, personal service shall be

made by: (1) delivering the summons to the person to be served; or (2) delivering the summons 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. CPLR § 308(6) defines “actual place of business” as “any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.”

Here, plaintiff has failed to properly serve Dr. Lomita. While plaintiff purportedly served Ms. Lord on behalf of Dr. Lomita at 3411 Wayne Avenue, this address is not Dr. Lomita’s residence or place of business within the meaning of CPLR §§ 308(1) and (2). Indeed, in his sworn affidavit, Dr. Lomita attests that he never resided at 3411 Wayne Avenue, or maintained an office, or practiced medicine at 3411 Wayne Avenue (*Ben-Amram v. Hershowitz*, 14 A.D.3d 638, 638 [2d Dept. 2005] [dismissing complaint where “any purported service pursuant to CPLR § 308 was ineffective” “since it was undisputed that the defendant did not reside at the address where personal service was attempted, and the address was not alleged to be the defendant’s place of business”]; *Perdomo v. Chau Shing Wong*, 275 A.D.2d 357, 358 [2d Dept. 2000] [“Since it is undisputed that the defendants did not reside at the address where personal service was attempted and the address was not alleged to be the defendants’ place of business, any purported service pursuant to CPLR § 308 was ineffective.”]).

Moreover, there is no allegation or indication that Ms. Lord was an agent authorized to accept service on behalf of Dr. Lomita (*see, Persaud v. New York City Health & Hosps. Corp.*, 183 A.D.2d 705, 706 [2d Dept. 1992] [plaintiff failed to establish that NYCHHC was properly served where plaintiff served the summons and complaint on an administrative assistant employed by NYCHHC to perform general secretarial duties, however, “the administrative assistant was clearly not an officer, director, managing agent, or cashier of the NYCHHC, and there is no evidence that she was an agent authorized by appointment or law to accept service on its behalf”]; *see also, West v. Doctor’s Hosp.*, 198 A.D.2d 92, 92 [1st Dept. 1993] [“Although the invoices of defendant-respondent, an attending physician at defendant hospital, specified two business addresses, including an office at the hospital in room 847, service was improperly made upon a hospital administrator at the administration office on the fourteenth floor.”]; *Glasser v. Kaswol Const. Corp.*, 176 A.D.2d 858, 859 [2d Dept. 1991] [plaintiff failed to obtain personal jurisdiction over defendant where “it is undisputed that the process server employed by the plaintiff effected

service on an individual who was not employed by the corporate defendant, and at a location in the Bronx where the defendant did not maintain an office”).

Furthermore, plaintiff’s assertion that Ms. Hart was instructed to serve both defendants at 3411 Wayne Avenue is insufficient to raise an issue of fact warranting a traverse hearing. Indeed, as defendants correctly highlight, plaintiff has failed to specify why process could not be served at 1250 Waters Place, or identify who advised her to serve defendants at 3411 Wayne Avenue. Moreover, even if someone had instructed plaintiff to serve defendants at 3411 Wayne Avenue, 3411 Wayne Avenue is not Dr. Lomita’s residence or place of business, as explained above, and plaintiff has failed to establish that Ms. Lord is an agent authorized to accept service on behalf of Dr. Lomita (see, *Prochillo v. Acker*, 108 A.D.2d 800, 802 [2d Dept. 1985] [dismissing complaint on ground of lack of personal jurisdiction where “the testimony failed to establish that 10 Wren Drive was either defendant’s actual place of business, dwelling place or usual place of abode so as to satisfy the requirements [CPLR § 308(2).] The weight of the credible evidence clearly established that defendant had not resided at that address since December 31, 1977 . . . and there was absolutely no proof that defendant performed any of his medical practice at that location.”]). Accordingly, due to plaintiff’s failure to properly serve defendants pursuant to CPLR § 308, plaintiff’s complaint must be dismissed on the ground of lack of personal jurisdiction (CPLR § 3211(a)(8)).

Based on the foregoing, it is hereby

ORDERED that Dr. Lomita’s application to dismiss the complaint based on the lack of personal jurisdiction is GRANTED; and it is further

ORDERED that plaintiff’s request for a traverse hearing is DENIED; and it is further

ORDERED that the clerk is directed to enter judgment dismissing the complaint with respect to Dr. Lomita; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on February 26, 2020 at 9:30 a.m. at 851 Grand Concourse (Part 19A, Room 600), Bronx, New York. This constitutes the decision and order of the court.

Dated: January 10, 2020

George J. Silver
HON. GEORGE J. SILVER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

HON. GEORGE J. SILVER