

Mori v Riomar Corp.

2022 NY Slip Op 33126(U)

September 19, 2022

Supreme Court, New York County

Docket Number: Index No. 154687/2020

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 154687/2020

HENRY MORI,

MOTION SEQ. NO. 004

Plaintiff,

- v -

RIOMAR CORP., MARTHA SILVA FRANSA, KANA RESTAURANT, D/B/A KANA, D/B/A KANA TAPAS BAR AND RESTAURANT, ARMANDO OROFINA, ALEJANDRO VEGA, ANDRES VEGA, and JOHN DOE

INTERIM ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for DISMISS

In this intentional tort and negligence action, defendants Armando Orofina and Andres Vega move, pursuant to CPLR 3211(a)(8), for an order dismissing the complaint against them for failure to properly serve them in accordance with CPLR 308(2). Plaintiff Henry Mori opposes the motion and cross-moves, pursuant to CPLR 306-b, for an order granting him an extension of time to complete service. Orofina and Vega oppose the cross motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion and cross motion are decided as follows.

Factual and Procedural Background

Plaintiff commenced this action in June 2020 after he was allegedly injured when assaulted by employees of defendant Kana Restaurant, which was then owned by, among others, Orofina and Vega (collectively "movants") (Doc No. 1 at 3-7). Shortly thereafter, plaintiff

allegedly served movants (Doc Nos. 6, 9). Following joinder of issue (Doc No. 11), plaintiff again allegedly served movants (Doc Nos. 26-27). Movants subsequently moved (mot. seq. 001) to dismiss the complaint as against them for failure to properly complete service (Doc No. 13-14), which application plaintiff opposed (Doc No. 34-35).

By order entered April 28, 2021, this Court granted movants' motion and dismissed the complaint as against them (Doc No. 57). Plaintiff then moved (mot. seq. 003) for leave to reargue, contending, among other things, that his time to serve movants was extended because of the COVID-19 pandemic (Doc No. 62-63). Movants opposed the motion for leave to reargue (Doc No. 68). By order entered January 20, 2022, this Court granted plaintiff leave to reargue and, upon reargument, denied movants' initial motion to dismiss (Doc No. 84). Plaintiff was ordered to complete service on movants within 30 days of service of the order with notice of entry (Doc No. 84 at 3). Plaintiff then allegedly served movants for a third time (Doc Nos. 91-92).

Movants now move, pursuant to CPLR 3211(a)(8), for an order dismissing the complaint as against them for failure to properly complete service (Doc Nos. 93-94). In support of their motion, movants argue that they never received a copy of the summons and complaint when they were allegedly served in accordance with this Court's January 2022 order (Doc No. 94 at 5-9). Plaintiff opposes the motion, arguing that his affidavits of service establish that movants were properly served, and cross-moves, pursuant to CPLR 306-b, for an order granting him an extension of time to serve movants should his service be deemed incomplete (Doc No. 110). Movants oppose the cross motion and reiterate their contention that they were never properly served (Doc No. 115).

Legal Conclusions

“[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut [that] presumption” (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; see *Eros Intl. PLC v Mangrove Partners*, 191 AD3d 464, 465 [1st Dept 2021]; *San Lim v MTA Bus Co.*, 190 AD3d 493, 493 [1st Dept 2021], *lv dismissed* 37 NY3d 1041 [2021]). However, “a sworn nonconclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit” (*NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]; see *HMC Assets, LLC v Trick*, 199 AD3d 454, 455 [1st Dept 2021]). When such a factual dispute exists surrounding the validity of service, a traverse hearing is warranted (see *Omansky v Gurland*, 4 AD3d 104, 108 [1st Dept 2004]; *Ananda Capital Partners v Stav Elec. Sys. (1994)*, 301 AD2d 430, 430 [1st Dept 2003]).

Here, there is a genuine factual dispute about whether service of the summons and complaint occurred. Plaintiff filed affidavits of service indicating that movants were served with a copy of the summons and complaint (Doc Nos. 91-92),¹ thereby raising the presumption of proper service (see *Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591, 591 [1st Dept 2020], *lv dismissed* 36 NY3d 1046 [2021]). In support of their motion, movants submit individual affidavits in which they each aver that they never received a copy of the summons and complaint (Doc Nos. 95-96). In their affidavits, movants specifically assert that the process server only provided them with a copy of this Court’s January 2022 order, a notice of entry for such order,

¹ Plaintiff previously filed affidavits of service which did not indicate that movants were each served with a copy of the summons and complaint (Doc Nos. 87, 90). The affidavits only provided that movants were served with copies of this Court’s January 2022 order and the notice of entry for such order (Doc Nos. 87, 90). However, plaintiff subsequently filed corrected affidavits of service which indicated that a copy of the summons and complaint was timely served upon movants (Doc Nos. 91-92).

and an affirmation of service by electronic filing, which are included as exhibits to movants' affidavits (Doc Nos. 95-96).

Movants' individual affidavits denying receipt of the summons and complaint, and copies of the physical documents provided by the process server, are "sworn, nonconclusory statement[s] and documentary evidence" that they were never served with a summons and complaint, as required by this Court's January 2022 order (*U.S. Bank N.A. v Abu*, 193 AD3d 606, 606-607 [1st Dept 2021]). Movants' denial that they were served with a copy of the summons and complaint completely contradicts the information provided in plaintiff's affidavit of service, thereby "posing a clear dispute of facts" (*Ananda Capital Partners*, 301 AD2d at 430). "Since there is a total disagreement as to whether service was accomplished, there should be a traverse hearing" (*Hinds v 2461 Realty Corp.*, 169 AD2d 629, 632 [1st Dept 1991] [citations omitted]; *see Nationstar Mtge. LLC v McCallum*, 167 AD3d 523, 524 [1st Dept 2018]; *342 E. 67 Realty LLC v Jacobs*, 106 AD3d 610, 611 [1st Dept 2013]).

The parties' remaining contentions are either without merit or need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that the motion by defendants Armando Orofina and Andres Vega seeking to dismiss plaintiff Henry Mori's complaint as against them pursuant to CPLR 3211(a)(8), as well as plaintiff Henry Mori's cross motion, pursuant to CPLR 306-b, for an extension of time to complete service, are held in abeyance pending the outcome of a traverse hearing regarding the propriety of service on said defendants; and it is further

ORDERED that the motion by defendants Armando Orofina and Andres Vega, and the cross motion by plaintiff Henry Mori, are decided to the extent that this matter is referred to a

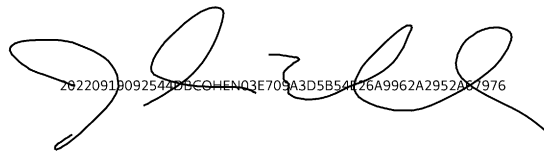
Judicial Hearing Officer of Special Referee for a traverse hearing to hear and determine the issue of service of process with respect to said defendants; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that such granting of a traverse hearing and/or referral is conditioned on defendants Armando Orofina and Andres Vega serving a copy of this order, within 30 days of entry of this order, with notice of entry, upon opposing counsel and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee’s calendar; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that failure to serve the order on the Special Referee Clerk within the time period set forth above shall be deemed an abandonment of defendants Armando Orofina and Andres Vega’s jurisdictional claim, and a denial of said defendants’ motion to dismiss.



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DAVID B. COHEN, J.S.C.

9/19/2022
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE