

<b>Colon v City of New York</b>
2022 NY Slip Op 33238(U)
September 26, 2022
Supreme Court, New York County
Docket Number: Index No. 158400/2020
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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SEFERINO COLON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NYPD DETECTIVE STEVEN K. BYRNE, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PORT AUTHORITY POLICE OFFICER, and PORT AUTHORITY POLICE OFFICER STEVEN O'SHEA

Defendants.

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INDEX NO. 158400/2020

MOTION DATE 05/03/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to DISMISS.

Plaintiff commenced this action—based upon plaintiff’s October 14, 2016 arrest and subsequent prosecution resulting in an acquittal on July 19, 2019—asserting claims for, inter alia, malicious prosecution. Plaintiff filed affidavits of service documenting service of the summons and complaint on defendants the Port Authority of New York and New Jersey (the “Port Authority”) and on Steven O’Shea on October 14, 2020 at 4 World Trade Center, 150 Greenwich Street, 24th floor, New York, NY 10007, pursuant to CPLR §308(2) through service upon Ms. Sandra S., a person of suitable age and discretion, with a subsequent mailing to that address (NYSCEF Doc. Nos. 3 and 4). Plaintiff submits an additional affidavit of service documenting service on O’Shea, pursuant to CPLR §308(4), at 21 Arizona Avenue Unit 207 Long Beach, NY 11561 on September 14, 2021, (NYSEC Doc. No. 16). O’Shea has not interposed an Answer.

The Port Authority now moves to dismiss this action as to Steven O’Shea, arguing that the service of process on O’Shea was invalid and dismissal is therefore warranted under CPLR §306-b. In support of its motion, the Port Authority submits an affidavit from O’Shea attesting that he has never resided at 21 Arizona Avenue Unit 207 Long Beach, NY 11561 and has no connection to that address [NYSCEF Doc. No. 17 [O’Shea Aff. at ¶9)].

Plaintiff opposes this motion, arguing that service was properly effected on O’Shea on October 14, 2020 at 4 World Trade Center, and also cross-moves for a default judgment against O’Shea. In its reply and opposition to plaintiff’s cross-motion, the Port Authority submits the affidavit of Karl Andre, Manager of Technical Services in the Port Authority’s Law Department. Andre attest that while the Port Authority accepts service on behalf of the Port Authority at its corporate headquarters, at 4 World Trade Center, 23rd (rather than 24th) floor it does not accept service on behalf of Port Authority Police Officers at that address (NYSCEF Doc. No. 29 [Andre Aff. at ¶¶1-6]). He further adds that the Port Authority did not accept service of process on behalf of Police Officer Steven O’Shea on October 14, 2020 or any date thereafter (NYSCEF Doc. No. 29 [Andre Aff. at ¶¶7-8]).

### DISCUSSION

CPLR §306-b provides, as relevant here, that service of the summons and complaint must be made within one hundred and twenty days after the commencement of a proceeding and that “[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service” (CPLR §306-b).

The Port Authority’s motion is denied. The affidavits of service filed by plaintiff constitute prima facie evidence of proper service upon O’Shea pursuant to CPLR §308(2) (See Rivera v

Banks, 135 AD3d 621, 622 [1st Dept 2016]). While the Court recognizes that, as a rule, a police officers' "actual place of business" is their precinct (See Williams v The City of New York, 2010 NY Slip Op 30022[U] [Sup Ct, New York County 2010]; see also Jiminez v City of New York, 5 AD3d 182, 183 [1st Dept 2004] [substituted service at Department of Correction headquarters in Manhattan did not establish jurisdiction over correction officers working at Rikers Island]), the Port Authority's submissions fail to either establish that this principle applies or otherwise rebut plaintiff's prima facie showing.

Specifically, Officer O'Shea's affidavit only disputes plaintiff's service of process at 21 Arizona Avenue, Unit 207 Long Beach, NY 11561 and does not address the service at 4 World Trade Center or attest that this address is not his actual place of business. The affidavit of Karl Andre—submitted for the first time on reply—is also insufficient, as it amounts to a conclusory denial of proper service (San Lim v MTA Bus Co., 190 AD3d 493, 493 [1st Dept 2021], lv to appeal dismissed sub nom. Lim v MTA Bus Co., 37 NY3d 1041 [2021]) and a general description of Port Authority policy concerning service of process (See Rivera v Banks, 135 AD3d 621, 622 [1st Dept 2016] ["Defendants' submission of a warden's affidavit concerning the general procedures for service of process at Rikers Island was insufficient to raise an issue of fact concerning the propriety of service on defendants"]). The Court further notes that Andre's assertion that service of process is only accepted on the 24th floor is belied by the fact that plaintiff's service of process on the Port Authority on that floor has not been contested by the Port Authority. Accordingly, the Port Authority's motion is denied.

Plaintiff's cross-motion for a default judgment as to O'Shea is also denied, however. Even assuming, arguendo, that plaintiff's submissions have satisfied the requirements of CPLR §3215(f), defendants have set forth both a reasonable excuse for delay and potentially meritorious

defense, mandating denial of the motion (See Lopez v City of New York, 179 AD2d 388, 389 [1st Dept 1992]). Finally, in light of this reasonable excuse and potentially meritorious defense and “the strong public policy of this state to dispose of cases on their merits,” (HSBC USA v Lugo, 127 AD3d 502, 503 [1st Dept 2015] [internal citations omitted]), the Court exercises its authority pursuant to CPLR §3012(d) and compels plaintiff to accept service of O’Shea’s late answer.

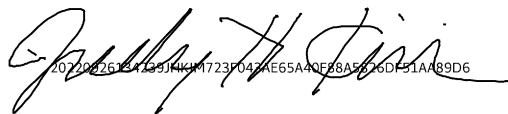
Accordingly, it is

**ORDERED** that the motion to dismiss the complaint as to Steven O’Shea is denied; and it is further

**ORDERED** that plaintiff’s motion for a default judgment as to Steven O’Shea is denied; and it is further

**ORDERED** that Steven O’Shea is directed to serve an answer to the complaint within twenty days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.



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9/26/2022

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE