

Griffen v Abed

2023 NY Slip Op 33346(U)

September 26, 2023

Supreme Court, New York County

Docket Number: Index No. 805144/2020

Judge: Kathy J. King

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J. KING PART 06

Justice

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VIRGINIA GRIFFEN,

Plaintiff,

- v -

ANTOINE ABED, WESTSIDE PULMONARY, P.C., MOUNT
SINAI HOSPITAL, WEST SIDE RADIOLOGY P.C.

Defendant.

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INDEX NO. 805144/2020

MOTION DATE 03/21/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant West Side Radiology Associates, P.C. d/b/a New York Radiology Partners i/s/h/a West Side Radiology P.C. (hereinafter “West Side Radiology”) seeks an Order pursuant to CPLR § 3211(a)(8), dismissing the Amended Verified Complaint in its entirety as against West Side Radiology, and any and all cross-claims, based on plaintiff’s failure to obtain jurisdiction over the person of this moving defendant by reason of failure to properly serve process upon defendant West Side Radiology.

Plaintiff cross-moves, pursuant to CPLR § 306(b), to extend the time for service of process of the Amended Complaint on West Side Radiology, nunc pro tunc, by an additional 120 days, and compelling defendant to immediately designate the location for service, or alternatively deeming the Amended Summons and Complaint timely served.

This action, sounding in medical malpractice, alleges that there was a delay in diagnosing small cell lung cancer which resulted in a progression of the disease, and a diminished chance of of a cure.

By way of background, on June 2, 2020, the original plaintiff, Virginia Griffen, filed a Summons & Verified Complaint which, according to the affidavit of service, was served upon West Side Radiology on July 17, 2020. Plaintiff passed away on June 29, 2020, and the matter was automatically stayed until an administrator was appointed for Ms. Griffen's Estate. On March 22, 2021, Nicole Parrilla received Limited Letters of Administration

Thereafter, the Amended Summons and Amended Verified Complaint was filed on July 2, 2021. According to the affidavit of service, the Amended Summons and Amended Verified Complaint was allegedly served upon West Side Radiology on July 9, 2021, on "Ashley (Doe)" at 5 Columbus Circle, 9th Floor in New York, New York, an individual who was "authorized to accept" a copy of said papers.

In its Verified Answer of January 6, 2023, West Side Radiology asserted an affirmative defense based on lack of personal jurisdiction for failure to properly serve process upon the answering defendant.

The basis for defendant's request for dismissal is that service of the original Summons and Complaint on July 17, 2020, was a nullity, since the plaintiff passed away on June 29, 2020, the case was stayed, and there was no plaintiff at that time. Plaintiff concedes this point.

West Side Radiology further argues that the Amended Summons and Complaint, which was served on July 9, 2021, was invalid because it was not served in accordance with CPLR § 311(a)(1), which provides that service upon a corporation is only proper when it is made upon "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (CPLR § 311[a][1]).

In support of the motion, defendant submits the affidavit of Mr. Donovan O. Spamer, the current Vice President of Development and Physician Services for Mid-Rockland Imaging

Partners, Inc. (“Rockland”), who attests that while Rockland acquired certain assets from West Side Radiology, only Rockland is responsible for accepting service for West Side Radiology, and no one at West Side Radiology, which provides professional services to patients, is authorized to accept service. He avers that a record search did not reveal receipt of an Amended Complaint in this matter.

In opposition, and in support of the cross-motion, plaintiff argues that Mr. Spamer’s affidavit is conclusory, and that he fails to note that, according to the listing on the webpage of the New York State Secretary of State, that the location where service was effectuated is not only “an office...used to provide professional services to patients,” but is also the “Principal Executive Office Address” of West Side Radiology, and the business address listed for its Chief Executive Officer, Michael Abiri M.D. Plaintiff annexes a copy of the webpage to the moving papers.

Plaintiff also notes that Mr. Spamer’s affidavit is silent about the named individual and description of the person served at that address, as set forth in the affidavit of service. Plaintiff argues that defendant has failed to submit any evidence to rebut plaintiff’s affidavit of service and the presumption that service was proper and valid. Notably, defendant acknowledges that it failed to maintain proper filing information with the New York State Secretary of State with respect to West Side Radiology.

“[I]t is well established that the affidavit of a process server constitutes prima facie evidence of proper service. The mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service” (*Matter of de Sanchez*, 57 AD3d 452, 455 [1st Dept 2008], quoting *De La Barrera v Handler*, 290 AD2d 476 [2d Dept 2002]) [internal quotation marks omitted].

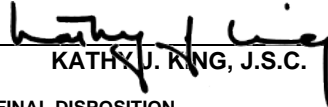
Based on the foregoing, the Court finds that defendant has failed to satisfy its burden rebutting the plaintiff's prima facie showing that proper service of the Amended Summons and Complaint was effectuated, based upon the affidavit of service submitted by the plaintiff. The affidavit of Mr. Spamer lacks probative value, as it is conclusory and contradicts defendant's own public filing information on the public webpage of the New York State Secretary of State, which lists the address of defendant's Principal Executive Office as 5 Columbus Circle, New York, New York, which according to the affidavit of service, is the location where defendant was served.

Accordingly, it is hereby

ORDERED, that defendant's motion is denied; and it is further

ORDERED, that plaintiff's cross-motion is denied as moot.

This constitutes the Decision and Order of the Court.

9/26/2023			
DATE			KATHY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE