

Goldberg v Kapua Suite, LLC

2023 NY Slip Op 33795(U)

October 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 529231/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of October 2023

HONORABLE FRANCOIS A. RIVERA

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Joan Goldberg,

Plaintiff,

- against -

Kapua Suite, LLC, Ravi Kantha, and Kathryn Kantha,

Defendants.

-----X
KAPUA SUITE, LLC, RAVI KANTHA and
KATHRYN KANTHA,

Third-Party Plaintiffs,

-against-

INTOWN CONSULTANTS, INC., SMR CRAFTWORKS INC., 2D CONSTRUCTION CORP., PERFECT STATE INC., RELIABLE ENTERPRISES INC., RUGGIERO & ASSOCIATES LTD., GEOTECHNICAL ENGINEERING OPTIONS, P.C., NEW YORK DISTRIBUTORS HEARTH AND HOME INC., CALIBER CONTROL INSPECTION INC., ENVIRO SOLUTIONS INC., BAXT INGUI ARCHITECTS, P.C., GAMILL ENGINEERING P.C., D'HUY ENGINEERING, INC. and ENTHINK ENGINEERING LLC,

Third-Party Defendants

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Recitation in accordance with CPLR 2219(a) of the papers considered on the motion of defendants Kapua Suite, LLC, Ravi Kantha, and Kathryn Kantha, filed on February 3, 2023, under motion sequence number one, for an order: pursuant to: (A) CPLR 3211(8) for dismissal for improper service of the Summons with Notice and subsequent Summons and verified

Complaint; (B) An order pursuant to C.P.L.R. § 3211(a) to dismiss the Plaintiff's Complaint on the basis that the claims are barred by the statute of limitations and the Complaint fails to state a claim; (B)(sic) An order requiring a more detailed complaint as to the Property damage claim pursuant to CPLR 3024; (C) Striking paragraphs 17 as prejudicial under CPLR 3024(b). The following papers:

Defendants' notice of motion (NYSCEF Doc #11)

Defendants' affirmation in support (NYSCEF Doc #12)

Exhibits A–D

- A. Summons with Notice (NYSCEF Doc #13)
- B. Summons and Complaint (NYSCEF Doc #14)
- C. Affidavits of Service (NYSCEF Doc #15)
- D. Affidavit of Kathryn Kantha (NYSCEF Doc #16)

Affirmation in opposition (NYSCEF Doc #19)

Affidavit in opposition by Joan Goldberg (NYSCEF Doc #20)

Affidavit in opposition by David Roffe (NYSCEF Doc #21)

Exhibit A – Photograph (NYSCEF Doc #22)

Defendants' affirmation in reply (NYSCEF Doc #25)

Exhibit A – Plaintiff's Bill of Particulars (NYSCEF Doc #26)

Order dated May 11, 2023 directing a traverse hearing on June 5, 2023 and staying all other branches of the motion. (NYSCEF Doc #39).

Exhibits numbered 1-10 admitted into evidence at traverse hearing held September 19, 2023, and September 20, 2023.

BACKGROUND

On October 7, 2022, plaintiff Goldberg commenced the instant action for damages for negligent and intentional damage to plaintiff's real property at 42 Joralemon Street, Brooklyn, New York (hereinafter "Plaintiff's Premises"), as well as for trespass and nuisance, by filing a Summons with Notice with the Kings County Clerk's office.

On January 5, 2023, Goldberg filed a summons and verified complaint. The verified complaint alleges thirty-seven allegations of fact in support of five denominated causes of action. The first cause of action alleges property damage claims against all defendants. The second cause of action alleges a claim for nuisance against all defendants. The third cause of action alleges a claim for assault against defendants Ravi Kantha and Kathryn Kantha. The fourth cause of action alleges a claim for battery against defendants Ravi Kantha and Kathryn Kantha. The fifth cause

of action alleges a claim for intentional infliction of emotional distress against Defendants Ravi Kantha and Kathryn Kantha

On January 11, 2023, Goldberg filed with the Kings County Clerk's office, two affidavits of service of the summons, verified complaint, NYSCEF confirmation notice, and notice of electronic filing, on defendants Ravi Kantha and Kathryn Kantha. On January 23, 2023, Goldberg filed one affidavit of service of the summons and verified complaint on defendant Kapua Suite, LLC.

On January 24, 2023, the defendants filed a joint verified answer containing seventeen denominated affirmative defenses with the Kings County Clerk's office. The second affirmative defense claims that the court lacked personal jurisdiction over the answering defendants due to lack of service.

MOTION PAPERS

The defendants, by notice of motion filed on February 3, 2023, sought an order pursuant to: (A) CPLR 3211(8) for dismissal for improper service of the summons with notice and subsequent summons and verified complaint; (B) pursuant to C.P.L.R. § 3211(a) to dismiss the plaintiff's complaint on the basis that the claims are barred by the statute of limitations and the Complaint fails to state a claim; (B)(sic) requiring a more detailed complaint as to the property damage claim pursuant to CPLR 3024; (C) Striking paragraphs 17 as prejudicial under CPLR 3024(b); and (D) Such other and further relief as this Court deems just and proper.

Defense counsel concedes that service of commencement papers on defendant Kapua Suites, LLC was proper and that the Court does have personal jurisdiction over defendant Kapua Suites, LLC. However, defendant's counsel maintains that service upon the individual defendants Ravi Kantha and Kathryn Kantha was not done in strict conformity with CPLR 308(1) and (2). By their motion filed on February 3, 2023, the defendants sought dismissal of all claims asserted against the individual defendants or, in the alternative, sought a traverse hearing on the issue of service on the individual defendants. After hearing argument, this Court ordered the parties to appear for a traverse hearing on June 5, 2023, by order dated May 11, 2023 and entered with the Kings County Clerk's office on May 15, 2023. On June 5, 2023, the traverse hearing was adjourned to September 19, 2023.

TRAVERSE HEARING

On September 19, 2023 and September 20, 2023, the traverse hearing was conducted in Part 52 of this Court.

David Roffe, plaintiff's licensed process server, testified for the plaintiff. David Roffe's testimony on September 19, 2023 is summarized as follows. Mr. Roffe is a licensed New York City process server. On January 6, 2023, he received documents from his employer, Undisclosed Legal, to be served on Ravi Kantha and Kathryn Kantha at 44 Joralemon Street, Brooklyn, New York. Mr. Roffe arrived at 44 Joralemon Street on January 6, 2023 at approximately 2:10 p.m. and saw a woman whose hair was blonde. Mr. Roffe asked the woman, in English, if she was

Kathryn Kantha, and she responded in the affirmative. Mr. Roffe then handed documents to the woman.

On cross examination, Mr. Roffe admitted that he did not read the document that he served on January 6, 2023. He did not recall receiving a photograph of the party or parties to be served with the assignment received from Undisclosed Legal. Mr. Roffe keeps only an electronic logbook, which is permitted by law.

Plaintiff Goldberg testified on September 19, 2023 and her testimony is summarized as follows. She owns the premises at 42 Joralemon Street and resided there since 1974. Kathryn Kantha and her husband purchased the adjacent home at 44 Joralemon Street in 2019 and continued to reside there in 2023. Ms. Goldberg testified to Kathryn Kantha's hair color as depicted in photographs marked as plaintiff's Exhibits "4", "6", "7", "8" and "9".

On cross-examination, Ms. Goldberg testified that she took the photograph marked Exhibit "4" in October 2022. With regard to Exhibits "6", "7", "8" and "9", Ms. Goldberg did not take the photographs, did not know when the photographs were taken, and did not know the lighting conditions in which the photographs were taken.

On redirect, Ms. Goldberg testified that Ms. Kantha's hair had been "much blonder" than when Ms. Kantha appeared in Court on two occasions.

Plaintiff's counsel rested. This Court heard argument on defense counsel's motion for dismissal. While reserving decision on other arguments, this Court held that all claims against Ravi Kantha were dismissed because plaintiff had not satisfied her burden to establish that service of process was properly performed upon Ravi Kantha.

On September 19, 2023, the defense called non-party witness, Natalia Senkiv, who testified with the aid of a Russian interpreter. Ms. Senkiv's testimony on September 19, 2023 is summarized as follows. Ms. Senkiv was employed by Made Clean Home Solution in January 2023 and was assigned to clean for the Kantha's at 44 Joralemon Street. Her work hours on Fridays in January 2023 began at 2:00 p.m. Ms. Senkiv recalled approaching the entrance to 44 Joralemon Street on Friday, January 26, 2023. A man asked her if the address was 44 Joralemon Street and if Ravi and Kathryn lived there. She responded "yes" to both questions, at which point the man handed Ms. Senkiv a paper with a request to, "give this paper to those people". Ms. Senk testified that her hair color in January 2023 was blonde.

On cross-examination, Ms. Senkiv testified that she speaks English "a little bit". Ms. Senkiv testified that the man who handed her papers spoke to her in English. Ms. Senkiv testified that the man handed her a plain, white envelope of unknown size. Ms. Senkiv gave the envelope to "Katie".

On September 20, 2023, Kathryn Kantha testified for the defense. Ms. Kantha's testimony on September 19, 2023 is summarized as follows. Ms. Kantha testified that her address as of January 6, 2023 was 44 Joralemon Street, Brooklyn, New York 11201. Ms. Kantha testified that she is a retired attorney and presently a stay-at-home mom. Ms. Kantha testified that her hair

color on January 6, 2023 was brown. Ms. Kantha testified Ms. Senkiv's native language is Ukrainian and the two communicate via text text messages using Google translator. Ms. Kantha was inside when Ms. Senkiv reported for work on January 6, 2023. Ms. Senkiv was carrying an envelope, said that someone gave it to her, and set it down in the Kantha children's play room. Ms. Kantha testified that her hair color on January 6, 2023 was brown.

On cross-examination, Ms. Kantha testified that she was not handed papers by a process server. She reiterated that her hair color was brown. Ms. Kantha testified that she later opened the envelope brought by Ms. Senkiv and it contained a summons and complaint reflecting the Goldberg versus Kapua Suite action.

Defense counsel rested. After hearing further argument on whether the process server's logbook had been proffered by plaintiff, this Court declined to dismiss the claims against the individual defendants based on the alleged failure to proffer a logbook.

DECISION

The credible testimony of David Roffe established that he believed that he was serving the defendant in this action. However, this Court finds that Mr. Roffe mistakenly served Natalia Senkiv. Further, Mr. Roffe did not identify the summons and complaint as the document that he served. The credible testimony of Natalia Senkiv established that she was handed papers by Mr. Roffe. Neither defense witnesses was shown the summons and complaint, nor asked if those were the documents received.

The Court finds that plaintiff failed to demonstrate service of the summons and complaint pursuant to CPLR § 308(1) upon defendant Kathryn Kantha and failed to demonstrate service pursuant to CPLR § 308(2) upon defendant Ravi Kantha.

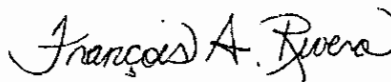
CONCLUSION

The motion of defendants Kapua Suite, LLC, Ravi Kantha, and Kathryn Kantha for an order dismissing the complaint pursuant to CPLR 3211(8) for lack of personal jurisdiction is granted.

The other branches of the defendants' motion are therefore rendered academic.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.

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