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Stellar Morrison LLC v. Ramos

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[*1]

Stellar Morrison LLC v Ramos
2023 NY Slip Op 50398(U) [78 Misc 3d 1231(A)]
Decided on April 3, 2023
Civil Court Of The City Of New York, Bronx County
Zellan, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 3, 2023

Civil Court of the City of New York, Bronx County

<p>Stellar Morrison LLC, Plaintiff(s)</p> <p>against</p> <p>Jesse Ramos, Defendant(s)</p>
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Index No. CV-037135-11/BX

For Plaintiff: Gutman, Mintz, Baker & Sonnenfeldt, LLP (Hotan Rohparvar, of counsel),
New Hyde Park, NY

For Defendant: D. Andrew Marshall, New York, NY

Jeffrey S. Zellan, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers/Numbered

Order to show Cause/ Notice of Motion and
Affidavits /Affirmations annexed 1

Answering Affidavits/ Affirmations 2

Reply Affidavits/ Affirmations 3

Memoranda of Law

Other — Motion Papers in Motion Seq. No. 001 4

Upon the foregoing cited papers, the Decision/ Order of the Court is as follows:

The instant motion is granted to the extent forth in this decision and order, and this action is dismissed for lack of jurisdiction due to improper service.

The instant motion was filed pursuant to the decision and order of the Court dated November 18, 2022 denying defendant's initial motion to vacate and dismiss (Motion Seq. No. 001) without prejudice to defendant re-filing with a more definitive sworn statement from defendant establishing personal knowledge that he had not been served with the summons and complaint in this action. Defendant now having done so, the Court finds that defendant has overcome the presumption of valid service based upon the process server's affidavit of service in this action, and established good cause to dismiss this action for lack of jurisdiction pursuant to CPLR 5015(a)(4). [\[FN1\]](#)

As defendant alleges — and plaintiff conceded on the record in arguing Motion Seq. No. 001 — the affidavit of service sworn in May 2011 (the specific day in the jurat being illegible in the copy provided to the Court) states that the process server served an individual that the [*2]process server identified as defendant, and describing the served individual as a brown-skinned female, approximately 5'4" in height and weighing over 125 pounds. (Aff. of Glenn Michael Consor, ¶ 7). In contrast, defendant is, in fact, a white Hispanic male, approximately 5'8" in height, and then weighing approximately 160 pounds. (Aff. of Defendant sworn Nov. 21, 2022, ¶ 8; and Aff. in Reply, ¶ 9). While plaintiff offers a copy of defendant's learner permit in opposition and avers that "a review of the Defendant's Drivers License Permit will reveal how a reasonable person could state that the person served was a female as opposed to a male," the Court does not accept plaintiff's invitation to opine on defendant's appearance other than to note that defendant's complexion in the learner permit image appears quite pale and very much unlike the process server's description of the individual he allegedly served. The Court also notes that the process server would have seen the individual in person, not just a small picture on an identification card. Further, plaintiff's assertion that the process server "knew" the person he served to be defendant is utterly conclusory as the process server's affidavit on that point (upon which counsel relied) does not state any basis for the process server's alleged personal knowledge of defendant's identity and is thus itself utterly conclusory. [\[FN2\]](#) (Aff. in Opp., ¶¶ 31 and 35; and Consor Aff., ¶ 1). Given the stark inconsistency between defendant's description of himself (as corroborated by the new affidavit and the copy of his learner permit provided by plaintiff) and the process server's description of defendant, defendant has not only rebutted the presumption of service pursuant to the affidavit of service, but rendered a traverse hearing unnecessary. *See*, CPLR

2218; and, *U.S. Equities Corp. v. Cavadias*, 163 N.Y.S.3d 921, *10 (Civ. Ct., Bronx Co. 2022) (discussing standard to vacate and dismiss without traverse hearing).

Presumably recognizing the severe contrast between the process server's purported description of defendant and the actual reality of who defendant was, plaintiff pivots to the argument that the process server must have meant to indicate that he completed substitute service. The Court finds that argument unavailing. Even if the Court were to assume that the process server intended to indicate that he had effected substitute service to a person of suitable age and discretion (an alternative also proposed by plaintiff at argument in Motion Seq. No. 001, but abandoned in the instant motion, as reflected in counsel's affirmation in opposition, at ¶ 31), there is no indication that the process server completed the second necessary step of mailing a copy of the summons and complaint as required by statute. *See, J.A.M. Assoc., LLC v. Gomez*, 169 N.Y.S.3d 798, *2-3 (Civ. Ct., Bronx Co. 2022). The supplemental mailing of the complaint pursuant to CPLR 3215(g)(3) is not a substitute for completing proper service in the first instance, and cannot substitute for the mailing required for alternative service upon a person of suitable age and discretion.

Plaintiff's argument that defendant has not established a meritorious defense is equally unavailing. Defendant seeks to vacate the judgment under CPLR 5015(a)(4) for lack of jurisdiction. Accordingly, defendant does not need to establish a reasonable excuse for delay or a meritorious defense to the proceeding as he would be required to do so pursuant to CPLR 5015(a)(1). [See, *Martinez v. Nguyen*, 102 AD3d 555, 556 \(1st Dept. 2013\)](#) (motion to vacate for [*3]lack of jurisdiction from improper service need not establish reasonable excuse for default or meritorious defense). Accordingly, the Court does not reach the issue of whether defendant has established a meritorious defense. Further, as the Court is granting the primary relief defendant seeks, the Court also does not reach defendant's alternative relief of seeking leave to interpose an answer and assert a counterclaim about an alleged illegal lockout that occurred long ago, and for which defendant has had ample time and opportunity to seek relief.

As to defendant's application for sanctions, that branch of the instant motion is denied. While troubling, plaintiff's arguments are not so egregiously frivolous as to warrant the extreme action of awarding sanctions.

Accordingly, it is:

ORDERED that the instant motion is granted in part; and it is further

ORDERED that the default judgment in this action is vacated; and it is further

ORDERED that all liens, garnishments, income executions or other enforcement of the judgment in this action are vacated; and it is further

ORDERED that any funds collected in satisfaction of the judgment in this action be returned to defendant forthwith; and it is further

ORDERED that this action is dismissed without prejudice for lack of personal jurisdiction; and it is further

ORDERED that the branch of the instant motion seeking sanctions against plaintiff is denied.

This constitutes the Decision and Order of the Court.

Date: April 3, 2023
Hon. Jeffrey S. Zellan
Civil Court Judge (NYC)

Footnotes

Footnote 1: *Compare*, Aff. of Defendant sworn Oct. 22, 2022, at 1, *with* Aff. of Defendant sworn Nov. 21, 2022.

Footnote 2: Although plaintiff asserts in opposition that "the process server knew and got confirmation that the recipient of said process was the Defendant," there is nothing in the process server's affidavit or elsewhere in the record in either Motion Seq. No. 001 or the instant motion establishing what acts, if any, the process server allegedly undertook to confirm that the individual he allegedly served was in fact defendant. (Aff. in Opp., ¶ 35).

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