

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JOAN B. LOBIS

PRESENT: _____

PART _____

Index Number : 805410/2014
 TEMAN, ARI
 vs
 BRAVERMAN, MD, ERIC
 Sequence Number : 003
 DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s) 62-64

Answering Affidavits — Exhibits X-motion + reply

No(s) 66-73, 79-81

Replying Affidavits _____

No(s) 75-78

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH:
ACCOMPANYING DECISION AND ORDER *and*
Judgement

Dated: 5/19/16

JBL, J.S.C.

JOAN B. LOBIS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ARI TEMAN,

Plaintiff,

-against-

Index No. 805410/2014

Decision and Order

ERIC BRAVERMAN, M.D.; RICHARD SMAYDA, D.O.,
SANDIP BUCH, M.D.; ANUPAMA REDDY, M.D.; PATH
MEDICAL, P.C., DARYA BRAVERMAN, and TOTAL
HEALTH NUTRIENTS,

Defendants.
-----X

JOAN B. LOBIS, J.S.C.:

Currently, plaintiff Ari Teman moves for default judgment against co-defendant Dr. Anupama Reddy, M.D. Dr. Reddy opposes the motion and cross-moves for dismissal based on improper service. For the reasons below, the Court denies the motion for default judgment and grants the cross-motion to sever and dismiss all claims against Dr. Reddy.

In this action, plaintiff alleges he sustained damages due to the fact that Dr. Reddy and others at PATH Medical, P.C. (PATH) misdiagnosed him and treated him for borderline personality syndrome and other disorders when in fact he had obstructive sleep apnea. Plaintiff's application for default judgment relies on the facts that on November 24, 2014 he served Dr. Reddy at PATH, which was listed as her place of business in the national health care registry service and which was the location where plaintiff received treatment from her, and that the individual who accepted service, Vanessa Perez, was a person of suitable age and discretion. Although he brings this motion three months after the statutory one-year deadline, he alleges as good cause for the delay the change in plaintiff's counsel and difficulty in locating Dr. Reddy. Plaintiff says the

process server's affidavit and his performance of a skip trace search which confirmed the doctor's work address serve as prima facie evidence that the doctor was properly served.

The cross-motion asserts that plaintiff did not effectuate proper service on Dr. Reddy because on the date of service she no longer worked at PATH. She submits her own affidavit, which states that starting July 2012 she worked at Manhattan Psychiatric Center and not at PATH, and with the confirming affidavit of a human resources person at PATH. She additionally submits a copy of the email of December 11, 2014 letter from Total Health Nutrients'¹ general counsel to plaintiff's former counsel advising counsel that Dr. Reddy no longer worked at that company. Dr. Reddy claims that plaintiff has not shown good cause for the delay of over one year in bringing this motion. CPLR § 3215. She contends that Vanessa Perez, who purportedly accepted service, was not a person of suitable age and discretion because the affidavit of service does not state her job title or employer, Total Health Nutrients has sworn that it employs no one by that name, and she is not an agent authorized to accept service.

In reply, plaintiff argues that Dr. Reddy held out her former address as her current place of business because it was listed on a national health care registry service, PATH kept her name on its website until January 31, 2016, and physician locator websites and West's National Physicians Directory listed PATH's offices at 304 Park Avenue, the place of service, as her business address. He contends that Vanessa Perez, a person of suitable age and discretion, need not be an authorized agent for the purpose of accepting service, and that the process server served her on behalf of other defendants who did not object. He states he has shown good cause based on

¹ Total Health Nutrients is PATH's trade name

the change of counsel and the inability to locate Dr. Reddy.² Plaintiff contends that he was never provided with the doctor's current place of employment, and he could not locate the address "by means of an exhaustive search." He states that the Court should deem the service to be proper, deny the cross-motion, and hold Dr. Reddy in default.

Dr. Reddy replies that plaintiff, who has the burden of proof, has not shown by a preponderance of the evidence that service was proper. She again points out the deficiencies in the affidavit of service and the fact that that Dr. Reddy left PATH in March 2013, notes that Dr. Reddy did not receive any pleadings in the mail or at her residence, and reaffirms that Dr. Reddy did not consent to service upon Vanessa Perez as her agent. She reiterates her argument that dismissal is proper but requests alternatively that this Court order a traverse hearing or allow her more time to answer the complaint.

The Court concludes that plaintiff did not effectuate service on Dr. Reddy. Section 308 of the CPLR requires strict compliance. Kearney v. Neurosurgeons of New York, 31 A.D.3d 390, 391 (2nd Dep't 2006). Further, it is the plaintiff's burden to show that service was proper. Id. Here, despite plaintiff's alleged diligent efforts, he served Dr. Reddy at an office where she no longer worked. Regardless of any representations made by Ms. Perez or whoever accepted service, the doctor did not authorize anyone at her former workplace to accept service on her behalf. See Continental Hosts Ltd. v. Levine, 170 A.D.2d 430, 430 (2nd Dep't 1991). Plaintiff's argument that a person need not be an authorized agent to accept service, while correct, misconstrues Dr. Reddy's

² Plaintiff alleges he served this motion on Dr. Reddy at 304 Park Avenue, and as she responded she obviously received it. The affidavit of service, however, states that he mailed the motion to Dr. Reddy's counsel at a different address.

position. Ms. Perez was not a person of suitable age and discretion in this instance because she has no connection to Dr. Reddy and does not work at the doctor's actual office. Dr. Reddy argues that the only alternative justification for service would be that Ms. Perez, or whoever accepted service, was Dr. Reddy's authorized agent. The doctor is correct. Plaintiff's contention that service was proper at the wrong office because the office listed Dr. Reddy as an employee until late January 2016, after he had served her and because he was entitled to rely on the website and other information he retrieved on the internet. This ignores the facts that PATH wrote to plaintiff's former counsel on December 4, 2014 and informed him that Dr. Reddy no longer worked there, and additionally it e-filed the letter at that time and that Dr. Reddy was not responsible for the fact that old listings contained her former work address or the fact that Total Health Nutrients did not update its website.

Because service was improper, the Court does not reach the question of whether plaintiff showed good cause for bringing this motion over one year after the date of the alleged service. The Court has considered all other arguments and found them unpersuasive. Therefore, it is

ORDERED that the motion for default judgment is denied and the cross-motion for dismissal as to Dr. Reddy is granted, and all claims against Dr. Anupama Reddy are severed and dismissed; and it is further

ORDERED that the caption is amended to read:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
ARI TEMAN,

Plaintiff,

-against-

Index No. 805410/2014

Decision and Order

ERIC BRAVERMAN, M.D.; RICHARD SMAYDA, D.O.,
SANDIP BUCH, M.D.; PATH MEDICAL, P.C., DARYA
BRAVERMAN, and TOTAL HEALTH NUTRIENTS,

Defendants.
-----X

The Clerks shall note the change in their records, and the parties shall use the amended caption in all future papers. The Clerk is directed to enter judgment accordingly.

Dated: *May 19*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.