

Jackson v. Truly Green Landscape and Maintenance, Inc., Not Reported in A.3d (2011)

52 Conn. L. Rptr. 732

2011 WL 5925131

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

Kenneth JACKSON et al.

v.

TRULY GREEN LANDSCAPE
AND MAINTENANCE, Inc. et al.

No. FSTCV106006476S. | Nov. 2, 2011.

Opinion

ALFRED J. JENNINGS, JR., Judge Trial Referee.

Procedural/Factual Background

*1 This is an action by condominium unit owners Kenneth Jackson and Jennifer Loporchio brought in eight counts against seven defendants alleged to be responsible in negligence, recklessness, and/or strict liability, directly or vicariously, for causing a fire at the plaintiffs' apartment complex in Greenwich. The motion to dismiss now before the court¹ was filed by counsel on behalf of defendant Salatiel Onofre, alleged to be a resident of White Plains, New York, an employee of the defendant Truly Green Landscape and Maintenance, Inc., challenging the court's exercise of personal jurisdiction over him in that he was not properly served with process under [Conn. Gen.Stat. § 52–59b](#), the Connecticut longarm statute.

The marshal's return indicates that service was made on all defendants on August 10, 2010. Service was effected on defendant Onofre by certified mail to him at his address in White Plains, New York. On August 13, 2010 the marshal received a return receipt of certified mail confirming delivery at the defendant Onofre's address. (Supplemental Return, No. 103.) Defendant claims that the service is defective because the marshal did not first effect service on the Connecticut Secretary of the State as the statutory agent for nonresident individual defendants, as required by [Conn. Gen.Stat. § 59–](#)

52b(c). The plaintiffs object to the motion to dismiss. The motion and the objection thereto have been briefed by the plaintiffs and the moving defendant who filed a reply brief on January 26, 2011. The court heard oral argument at the short calendar of July 5, 2011.

Discussion

[Conn Gen.Stat. § 52–59b\(c\)](#) provides in relevant part:

Any nonresident individual, ... over whom a court may exercise personal jurisdiction, as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual, ... may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual, ... personally. The process shall be served by the officer to whom the same is directed upon the Secretary of the State by leaving with or at the office of the Secretary of the State, at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant at the defendant's last-known address, by registered or certified mail, postage prepaid, return receipt requested, a like true and attested copy with an endorsement thereon of the service upon the Secretary of the State.

It is undisputed that the marshal failed to effect service on the Secretary of the State before mailing a copy of the process in this case to defendant Onofre at his address in New York. Prior Service on the Secretary of the State before mailing process to a nonresident individual defendant is a mandatory requirement in order to effect valid service of process on the nonresident individual. “The Superior Court ... may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court, or has waived any objection to the court's exercise of personal jurisdiction ... [W]hen a particular method of service of process is set forth by statute, that method must be followed ... Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction ... [A]n action commenced by such improper service must be dismissed.” (Citations and internal quotation marks omitted.) [Jiminez v. DeRosa](#), 109 Conn.App. 332, 338 (2008). Specifically, failure to serve the Secretary of the State in connection with longarm service under [§ 52–59b](#) is

Jackson v. Truly Green Landscape and Maintenance, Inc., Not Reported in A.3d (2011)

52 Conn. L. Rptr. 732

a jurisdictional defect mandating dismissal. “[T]he failure to leave process with the Secretary of State’s office is no service at all under § 52–59b(c).” (Citation omitted.) *Pasquariello Electric Corp. v. Nyberg*, Superior Court, Judicial District of New Haven, Docket No. CV08–5024983 S (Zoarski, J., October 7, 2009), 2009 WL 3739445 at *6 (motion to dismiss granted for insufficient service of process). See, also, *Snow v. Overman*, Superior Court, Judicial District of Fairfield, Docket No. CV07–5011602S (Hiller, J., October 1, 2008), 2008 WL 4635946 (motion to dismiss granted for failure to serve the Secretary of State under § 52–59b).

*2 The plaintiffs’ opposition to dismissal is based entirely on their claim that counsel for the defendant Onofre had no authority from his client to file the motion to dismiss challenging personal jurisdiction, because counsel had allegedly violated the [Rules of Professional Conduct, Rule 1.5\(b\)](#) which provides, under the heading “Fees”: “The scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible, shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.” In support of their objection plaintiffs have attached to their Memorandum of Law (No. 118) a copy of an e-mail of January 14, 2011 from Atty. Steigelfest (appearing counsel for defendant Onofre) who had filed this motion to dismiss on November 3, 2010. The e-mail is simply attached to the memorandum without any certification or authentication. Under Connecticut law, “before a document may be considered by the court in support of a motion for summary judgment, there must be a preliminary showing of [the document’s] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be.” (Internal quotation marks omitted.) *New Haven v. Pantani*, 89 Conn.App. 675, 679, 874 A.2d 849 (2005). Despite this rule, a court has discretion to consider unauthenticated documentary evidence when no objection has been raised by the opposing party. *Barlow v. Palmer*, 96 Conn.App. 88, 92, 898 A.2d 835 (2006). In this case, however, Atty. Steigelfest has objected in his reply memorandum (No. 121) by stating, at p. 2, “and the plaintiffs have provided no evidence that a violation has taken place.” The court will therefore disregard the e-mail. Also, each counsel has made unsworn factual representations in their memoranda regarding the claim of counsel’s violation of [Rule 1.5\(b\)](#), which the court will also disregard. Our Supreme Court has said in *Standard Tallow Corp v. Jowdy*, 190 Conn. 48, 54 (1983): “[w]hen a motion to dismiss for

lack of personal jurisdiction raises a factual question which is not determinable from the face of the record, the burden of proof is on the plaintiff to present evidence which will establish jurisdiction.” “Moreover, a court cannot make a critical factual finding based on memoranda and documents submitted by the parties ...” *Coughlin v. Waterbury*, 61 Conn.App. 310, 315 (2001).

Since the plaintiffs have failed to present any evidence of their claim that Atty. Steigelfest violated [Rule 1.5\(b\)](#) they have failed to meet their burden of proof that the court has jurisdiction despite the failure to comply with [Conn. Gen.Stat. § 52–59b](#).

Furthermore, plaintiffs are attempting to use a rule of ethics concerning the requirement of a written fee agreement between Atty. Steigelfest and his client to their tactical advantage in this litigation. This is not proper. The opponent in a civil lawsuit has no standing to intrude into the other party’s attorney-client relationship to overcome a glaring defect in service of process.

*3 The Rules of Professional Conduct caution those who seek to rely on their provisions. They provide a framework for the ethical practice ... Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

(Quoting Preamble to the Rules of Professional Conduct, Scope, p. 3; internal quotation marks omitted.) *Gagne v. Vaccaro*, 255 Conn. 390, 403, 766 A.2d 416 (2001).

Breach of [Rule 1.5\(a\)](#) of the Rules for charging unreasonable legal fees did not give rise to a cause of action for a violation of the Connecticut Unfair Trade Practices Act (CUTPA), [General Statutes § 42–110a et seq.](#) *Noble v. Marshall*, 23

Jackson v. Truly Green Landscape and Maintenance, Inc., Not Reported in A.3d (2011)

52 Conn. L. Rptr. 732

Conn.App. 227, 231 (1990). The court reasoned that “the Rules of Professional Conduct do not of themselves give rise to a cause of action ... The rules that have been adopted by the judges of the Superior Court have the force of law ... but they were not intended to create a private cause of action under CUTPA.” (Citation omitted.) *Id.*; see also *Brown v. Loomis*, Superior Court, judicial district of Middlesex, Docket No. 99 0088096 (July 27, 2000, Gordon, J.) (27 Conn. L. Rptr. 550, 551) (holding that a breach of Rule 1.5(b) of the Rules cannot provide the basis for a public policy violation to establish a CUTPA claim).

Similarly, in *R.S. Silver Enterprises Co. v. Pascarella*, this court held that although the defendant-attorney breached rule 1.8 of the Rules, that violation alone did not give rise to a cause of action for breach of fiduciary duty. *R.S. Silver Enterprises Co. v. Pascarella*, Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV 06 5002499 (July 14, 2010, Jennings, J.T.R.). This court concluded: “The court therefore declines to impose civil liability on [the defendant] based on the finding that he violated Rule 1.8 ... Plaintiff had other remedies. It could have filed a grievance with the Statewide Grievance Committee,

or could have sued [the defendant] for legal malpractice and attempted to establish a violation of the standard of care by violation of the Rule.” *Id.*

The ethical/disciplinary essence of the Rules of Professional Conduct is underscored by the fact that the only case cited by plaintiffs in support of their objection to this motion to dismiss, *Burton v. Mottolese*, 267 Conn. 1 (2003), is an action by a Connecticut attorney for declaratory and injunctive relief from the order of a Superior Court judge before whom she was trying a case, disbarring her pursuant to his inherent authority, for violations of Rules 1.2, 1.5(b), 1.7(b), 1.8(f), 1.16(a)(3), 3.3, 3.5(3), and 8.2 of the Rules of Professional Conduct.

Order

*4 For these reasons, the motion to dismiss for lack of personal jurisdiction over defendant Salatiel Onofre is granted, and Plaintiffs Objection to Motion to Dismiss is overruled.

Parallel Citations

52 Conn. L. Rptr. 732

Footnotes

- 1 Defendant Onofre moved for a thirty-day extension of time to plead in response to the plaintiff's complaint (No. 106) which was granted by the court on September 17, 2010 (No. 106.86). This motion to dismiss was filed on November 3, 2010. The plaintiffs conceded at oral argument that they were not claiming that the motion to dismiss was untimely under the thirty-day filing deadline of Practice Book § 10–30.

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