

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

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JOSEPH RAKOFSKY and RAKOFSKY LAW FIRM, P.C.,

Plaintiffs,
-against-

Turkewitz Affidavit in
Support of Motion to Dismiss

THE WASHINGTON POST COMPANY, et al.,

Index # 105573/11

Defendants.

-----X
Eric Turkewitz, being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in New York and a defendant in this action along with 80 other lawyers, law firms, media companies, and John Doe /pseudonymous defendants. I am also local counsel to 16 lawyer-defendants, representing 35 entities, along with Marc Randazza as *pro hac vice* counsel. A client list is on the Rider.

2. This Affidavit is based on personal knowledge. The three subjects are:

- Plaintiff's failure to obtain personal jurisdiction over me (and my law firm) due to his repeated failure to properly serve the pleadings;
- Plaintiff's claim in open court on September 15th that *all* parties had been served with the pleadings, when they had not; and
- Plaintiff's claim that he is an attorney in good standing in New Jersey, when in fact, he's been suspended from practice.

3. Regarding the attempts to serve process: Two copies of the Summons and Complaint¹ were handed to my receptionist on May 12, 2011. I was not served personally. But there was no follow-up service by regular mail as required by CPLR 308(2), rendering it defective as a matter of law.

4. Before responding to the initial pleading, I received an Amended Complaint² (but not the Amended Summons) that was dated and postmarked May 16, 2011. An Amended Complaint supercedes the original, rendering the original moot, such that it's the only complaint to be considered in the action.³ If the original pleading is moot (as here), then a plaintiff must serve the amended pleading in the same fashion as the original as per CPLR 304. This action must proceed as though the original pleading had never been served.⁴

5. But in trying to serve the Amended Complaint, the plaintiff again failed to use a method of service approved by the Legislature under CPLR 308: The plaintiff simply served the Amended Complaint by certified mail on May 16th, and certified mail is not a CPLR-approved method of service. Since the court is without authority to cure jurisdictional defects, this second attempted service also fails as a matter of law. A copy of the envelope it was served in is attached as Exhibit U, showing the May 16th postmark and certified mail sticker. I have possession of the original and will make it available to the court if it's needed.

6. The Court of Appeals has been abundantly clear that “[s]ervice is only effective when it is made pursuant to the appropriate method authorized by the CPLR.”⁵ The fact that I have a copy of the pleadings and am well aware of the filing is not relevant, for the Court has also written that “Notice received by means other than those authorized by statute does not bring a

¹ DeVoy Affidavit, Exhibits A, B

² DeVoy Affidavit, Ex. C

³ *Hummingbird Assoc. v Dix Auto Serv.*, 273 AD2d 58, 58 (1st Dept. 2000); *Nimkoff Rosenfeld & Schechter v. O'Flaherty*, 71 AD3d 533, 895 NYS.2d 824 (1st Dept. 2010); *Metropolitan Transp. Auth. v. Keyspan Corp.*, 2010 NY Slip Op 31096 (J. Goodman, May 26, 2010)

⁴ *Halmar Distribs., Inc. v. Approved Mfg. Corp.*, 49 AD 2d 841 (1st Dept. 1995)

⁵ *Markoff v. South Nassau Community Hosp.*, 61 NY2d 283, 288 (1984)

defendant within the jurisdiction of the court.”⁶

7. While CPLR 308 details simple and straightforward methods of serving a person with process, the plaintiff failed to follow it. Twice. He has, therefore, failed to properly obtain jurisdiction over either me or my firm.

8. And plaintiff’s Affidavit of Service confirms that I was not properly served, as it states that substituted service was made on my office on May 12th, but it fails to indicate the follow-up mailing required by CPLR 308(2) (as I noted above). Thus, by the plaintiff’s own admission, I was not served in accordance with the law. Dismissal is required because the plaintiff failed to comply with the prescribed condition of the follow-up mailing.⁷

9. The Affidavit of Service also contains erroneous information, in that it errantly claims the Amended Summons and Amended Complaint -- which are dated May 16th -- were served on me on May 12, 2011. Thus, the Affidavit of Service claims I was served with the Amended Complaint four days before that pleading was even created.

8. Moreover, the Affidavit of Service⁸ was belatedly filed, well beyond the 20 days authorized by CPLR 308(2), and only when it was demanded at the September 15, 2011 conference of this case immediately following the *pro hac vice* hearing for Marc Randazza.

11. Turning to the jurisdictional allegations within the Complaint,⁹ it states in paragraphs 46-47 that my principal place of business is the District of Columbia. I don’t know

⁶ *Macchia v. Russo*, 67 NY2d 592, 594 (1986)

⁷ *Einheber v. Bodenheimer*, 12 Misc3d 1177(A), 820 NYS.2d 842 (Bransten, J., 2006), citing *Pesner v. Fried*, 166 AD2d 512, 512-13 (2d Dept.1990)

⁸ DeVoy Affidavit, Ex. T

⁹ DeVoy Affidavit, Ex. A

why as I've never lived in, been admitted in, or practiced law in, the District of Columbia. My only association with D.C is as a tourist. Similar factually incorrect allegations are made in the Amended Complaint in paragraphs 47-48.¹⁰

12. While amending the Amended Complaint to properly allege jurisdiction could potentially cure that error, it presumes some type of merit to the underlying action. The First Department is clear that while it is “well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay, [this Court] has consistently held that in order to conserve judicial resources, an examination of the proposed causes of action is warranted and *leave to amend will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law.*”¹¹ For the reasons set forth in Mr. Randazza’s Memo of Law, Mr. Rakofsky is unable to state a cause of action against me (or my firm) as no legitimate basis exists to state one from my posting.¹²

13. Turning now to the mis-representations Mr. Rakofsky made at the September 15th conference. He appeared *pro se* because his prior counsel quit. He was asked whether all defendants had been served with the pleadings -- and Mr. Randazza pressed him on this point in the presence of the Court and numerous other defense counsel. Mr. Randazza knew that several of our clients had never received the pleadings, and he wanted to see how service had allegedly been made. Mr. Rakofsky stated that *all* parties had been served, and said he would file all the

¹⁰ DeVoy Affidavit, Ex. C

¹¹ *Davis & Davis, P.C. v. Morson*, 286 AD2d 584, 730 NYS2d 293 (1st Dept. 2001); citations omitted, emphasis added; CPLR 3025

¹² see, Lawyers and Advertising (The New Frontier); *New York Personal Injury Law Blog*, <http://www.newyorkpersonalinjuryattorneyblog.com/2011/04/lawyers-and-advertising-the-new-frontier.html> (last viewed December 14, 2011)

Affidavits of Service. Both Andrea Field and Justice Goodman were present. He then filed many affidavits of service, but none were filed for these five defendants that Mr. Randazza and I represent: John Doe # 1, Crime and Federalism, "Tarrant 84", Banned Ventures LLC, and Bannination.com. It's unclear why Mr. Rakofsky told the court that all parties were served when this was clearly not the case. Mr. Rakofsky, despite being asked about this multiple times in the court's presence in order to give him a chance to correct himself, never made such correction.

15. Finally, when Mr. Rakofsky moved to amend the Amended Complaint (which was subsequently withdrawn as being in violation of the stay), he claimed he was an attorney in good standing in New Jersey and signed his name "Esq."¹³ The Notice of Motion dated October 24, 2011 and the Affidavit in Support he swore to on October 13, 2011, have those representations. Given that he was actually suspended from practicing law in New Jersey at the time, this was false. He wrote in his Affidavit:

1. I, JOSEPH RAKOFSKY, ESQ., am an attorney-at-law, duly admitted to practice law in New Jersey.

25. I am a member of the New Jersey Bar in good standing. An official certificate of good standing issued by the Supreme Court of New Jersey on February 16, 2011 is submitted as Plaintiffs' Exhibit "8."

16. When the motion to amend the Amended Complaint were signed on October 13th and the Affidavit in Support was signed on October 24th, however, Mr. Rakofsky was already ineligible from practicing law in New Jersey for about a month. On September 26, 2011, the

¹³ Exhibit V, Mr. Rakofsky's Notice of Motion and his supporting Affidavit (see ¶¶ 1, 25), both dated October 24, 2011.

New Jersey Supreme Court published its attorney ineligibility list for 2011.¹⁴ On page 8 of 212, Joseph Rakofsky - the only "Rakofsky" in the document - is identified as *ineligible to practice law*. On September 28, 2011, the New Jersey Lawyers' Fund for Client Protection issued a list of attorneys to be deleted from that September 26 Ineligibility. List¹⁵ Joseph Rakofsky's name was *not* found on this list of deletions. Since then, the Lawyers' Fund for Client Protection has issued more notices reinstating attorneys from the Supreme Court's ineligibility list. Mr. Rakofsky has never been reinstated: The reinstatement notices are dated October 14,¹⁶ October 25,¹⁷ November 9,¹⁸ November 22,¹⁹ and December 7.²⁰ I then double-checked the information that was online by calling the Lawyers Fund for Client Protection in New Jersey on December 14, 2011, and spoke to Ms. Castro, a Judiciary Clerk. She told me the plaintiff is still ineligible. It appears, therefore, that Mr. Rakofsky was suspended from the practice law when he submitted his Affidavit attesting to his good standing, and remains suspended today, as he has been since September 26, 2011.

17. In sum, the plaintiff seems to have made every conceivable mistake in trying to start and maintain a lawsuit. The plaintiff:

- Failed to properly serve me with the original pleadings as required by CPLR 308(2);
- Failed to properly serve me with the amended pleadings as required by CPLR 308(2);
- Filed affidavits of service proving that no mailing was done pursuant to CPLR 308(2);

¹⁴ <http://www.judiciary.state.nj.us/notices/2011/n110927e.pdf> (last accessed Dec. 14, 2011)

¹⁵ <http://www.judiciary.state.nj.us/notices/2011/n110929e.pdf> (last accessed Dec. 14, 2011)

¹⁶ <http://www.judiciary.state.nj.us/notices/2011/n111031c.pdf> (last accessed Dec. 14, 2011)

¹⁷ <http://www.judiciary.state.nj.us/notices/2011/n111101b.pdf> (last accessed Dec. 14, 2011)

¹⁸ <http://www.judiciary.state.nj.us/notices/2011/n111110d.pdf> (last accessed Dec. 14, 2011)

¹⁹ <http://www.judiciary.state.nj.us/notices/2011/n111202c.pdf> (last accessed Dec. 14, 2011)

- Filed an Affidavit of Service stating that the Amended Complaint dated May 16th had been served four days earlier, on May 12th;
- Failed to timely file the affidavits of service;
- Mis-stated my jurisdiction as Washington D.C.;
- Mislaid the Court in stating that all parties were served when this was clearly not so;
- Failed to properly state a claim, as set forth in the Memo of Law of Marc Randazza; and
- Falsely swore in an Affidavit that he was an attorney in good standing in New Jersey at the time he was actually suspended from practice.

18. The plaintiff's failure to follow even the most elemental procedural aspects for commencing and maintaining an action, and disregard for the significance of swearing to a document, mirrors the comments of Judge Jackson from the underlying murder trial. At that time Judge Jackson stated on the record that he was "astonished" at Mr. Rakofsky's performance and at his "not [having] a good grasp of legal principles and legal procedure."²¹ He also recognized Mr. Rakofsky's ethical problems regarding an email he sent to an investigator about trying to "trick" a witness.²² This has caused a needless waste of resources in dealing with, and constantly responding to, the errors.

²⁰ <http://www.judiciary.state.nj.us/notices/2011/n111208b.pdf> (last accessed Dec. 14, 2011)

²¹ DeVoy Affidavit, Ex. A, p. 4

²² Transcript Ex. E of DeVoy Affidavit; and "trick" email Ex. R of DeVoy Affidavit

Dated: New York, New York
December 15, 2011

Eric Turkewitz, *pro se* and as counsel
to the defendants listed on the Rider

Sworn to before me on the 15th day of December, 2011:

NOTARY PUBLIC

Rider:

Parties represented by Marc Randazza (*pro hac vice*) and Eric Turkewitz (local counsel)

Writer/Defendant	Associated Entities	Amended Complaint ¶¶	Jurisdiction, per Amended Complaint	Total Defendants
Eric Turkewitz	The Turkewitz Law Firm	47-48; 172	Washington, DC	2
Scott Greenfield	Simple Justice NY, LLC blog.simplejustice.us Kravet & Vogel, LLP	19-21; 148-152; 212	New York	4
Carolyn Elefant	MyShingle.com	16-17; 146-147; 201	Washington, DC	2
Mark Bennett	Bennett And Bennett	32-33; 160; 206	Texas	2
Eric L. Mayer	Eric L. Mayer, Attorney-at-Law	22-23; 153; 203	Kansas	2
Nathaniel Burney	The Burney Law Firm, LLC	82-83; 193-194; 198	New York	2
Josh King	Avvo, Inc.	78-79; 202	Washington State	2
Jeff Gamso		24-25; 154	Ohio	1
George M. Wallace	Wallace, Brown & Schwartz	57-58; 180-181	Florida	2
“Tarrant84”	Banned Ventures Banni	65-67; 185	Colorado	3
Brian L. Tannebaum	Tannebaum Weiss	55-56; 179	Florida	2
Colin Samuels	Accela, Inc.	80-81; 192; 199	California	2
John Doe #1	Crime and Federalism	26-27; 155-157	Unknown	2
Antonin I. Pribetic	Steinberg Morton	51-52; 175; 205	Canada	2
Elie Mystel	AboveTheLaw.com; Breaking Media, LLC	9-11; 143; 200	New York	3
David C. Wells	David C. Wells, P.C.	12-13; 182;	Florida	2
16 individuals				35 entities