700 N.Y.S.2d 87
1999 N.Y. Slip Op. 10000
(Cite as: 94 N.Y.2d 118, 722 N.E.2d 55, 700 N.Y.S.2d 87)

H

Court of Appeals of New York.

Merryl KIHL, Appellant,
v.
Karl O. PFEFFER et al., Defendants,
and
Honda Motor Co., Inc., Respondent.

Nov. 30, 1999.

Motorist who was injured in single-vehicle accident brought personal injury action against town, county, and manufacturer of vehicle. The Supreme Court, Nassau County, Allan L. Winick, J., granted manufacturer's motion to strike complaint based on motorist's failure to respond to discovery requests within time periods established by court. Motorist appealed, and the Supreme Court, Appellate Division, affirmed, 256 A.D.2d 555, 682 N.Y.S.2d 462. Appeal was taken, and the Court of Appeals, Kaye, C.J., held that dismissal of action was not an abuse of discretion by trial court, as motorist's initial responses to interrogatories were untimely and inadequate, and motorist failed to comply with order which granted manufacturer's motion to dismiss unless plaintiff provided further interrogatory answers within 20 days after service of order.

Affirmed.

West Headnotes

|1| Process ⚿82
313k82 Most Cited Cases

Service of papers on an attorney is complete upon mailing. McKinney's CPLR 2103(b), par. 2.

|2| Process ⚿145
313k145 Most Cited Cases

A properly executed **affidavit** of service raises a **presumption** that a proper **mailing** occurred, and a mere denial of receipt is not enough to rebut this presumption.

|3| Pleading ⚿365(3)
302k365(3) Most Cited Cases

|3| Pretrial Procedure ⚿315
307Ak315 Most Cited Cases

Denials by persons who had reviewed mail for plaintiff's counsel during month in which counsel was on vacation that they had received order conditionally granting defendant's motion to dismiss products liability action unless plaintiff served further answers to interrogatories were insufficient to overcome **presumption** that proper **mailing** occurred which arose from properly executed **affidavit** of service, and thus did not create issue of fact requiring a hearing in connection with defendant's subsequent motion to strike complaint.

|4| Pretrial Procedure ⚿46
307Ak46 Most Cited Cases

When a party fails to comply with a court order and frustrates the disclosure scheme set forth in discovery rules, it is well within trial court's discretion to dismiss the complaint.

|5| Pretrial Procedure ⚿314
307Ak314 Most Cited Cases

|5| Pretrial Procedure ⚿315
307Ak315 Most Cited Cases

Trial court acted within its discretion by striking complaint in dismissing products liability action brought against automobile manufacturer after plaintiff, whose initial responses to manufacturer's interrogatories were untimely and inadequate, failed to comply with order which granted manufacturer's motion to dismiss unless plaintiff provided further interrogatory answers within 20 days after service of order. McKinney's CPLR 3126.

|6| Pretrial Procedure ⚿563
307Ak563 Most Cited Cases

If the credibility of court orders and the integrity of judicial system are to be maintained, a litigant cannot ignore court orders with impunity.

|7| Pretrial Procedure ⚿42
307Ak42 Most Cited Cases

Compliance with a disclosure order requires both a timely response, and one that evinces a good-faith effort to address the requests meaningfully.
***88 **56 *118** Gleason, Dunn, Walsh & O'Shea, Albany (Thomas F. Gleason and James E. Dering of counsel), for appellant.

*119 Lester Schwab Katz & Dwyer, L.L. P., New York City (Eric A. Portuguese and Steven B. Prystowsky of counsel), for respondent.

***120 OPINION OF THE COURT**

Chief Judge KAYE.

At issue is the dismissal of a complaint against defendant Honda Motor Co., Inc. for plaintiff's failure to respond to Honda's interrogatories within court-ordered time frames. We conclude that the trial court did not abuse its discretion in dismissing the complaint, and affirm the Appellate Division order so holding.

On July 26, 1995, plaintiff commenced a damages action for personal injuries arising out of a one-car accident six months earlier. Alleging that she was a passenger in a Honda that skidded off a Nassau County roadway in the Town of Oyster Bay, plaintiff sued the driver, Karl O. Pfeffer, as well as Honda, the County and the Town. As against Honda she claimed negligence, breach of express and implied warranties, strict products liability and failure to warn in connection with the automobile and its component parts, including the seat belts. Honda responded with a general denial, cross-claims and a host of discovery requests, including demands for expert witness disclosure, collateral source information,, **57 ***89 no-fault authorizations, medical information and certain records.

On March 18, 1996, the parties convened before the court for a preliminary conference, resulting in an extensive Preliminary Conference Order fixing specific dates for discovery, to be completed within six months. The order was consented to by each party and signed by the Trial Judge. Most pertinently, the order required plaintiff to respond to Honda's interrogatories "within 30 days following receipt of same." That very day Honda served plaintiff with its "First Set of Interrogatories"--34 pages, 92 questions. Having had no response, on September *121 13, 1996--roughly five months beyond the response date fixed by the Preliminary Conference Order--Honda moved to strike the complaint and dismiss plaintiff's claims against it, or to compel responses within 10 days. Honda alleged that without specificity as to the claimed defect in the automobile it could not adequately prepare its defense. Plaintiff's counsel submitted an affidavit opposing the motion, and that same day--December 10, 1996--served its responses to Honda's interrogatories.

Honda, however, persisted in seeking dismissal of the complaint, portraying plaintiff's responses as "woefully inadequate and totally unresponsive in clear violation of the Court's Order." In particular, Honda claimed that responses 43 through 56 offered no clue as to the claimed defect in the car. Interrogatory 43, for example, seeking specificity as to the purported design defect, was answered "Defective design: Plaintiff alleges a defective design in the automobile, seatbelt and the seatbelt mechanisms and reserve their right to supplement this response prior to trial." Nearly identical responses followed with respect to the request for specificity as to failure to warn (Interrogatory 44), failure to inspect (Interrogatory 45), improper marketing and advertising (Interrogatory 46) and the defect that exacerbated plaintiff's injuries (Interrogatory 47).

By order dated March 31, 1997, the Trial Judge granted Honda's motion to dismiss the complaint for failure to comply with the Preliminary Conference Order unless plaintiff served further answers to interrogatories 43 through 56 within 20 days after service of a copy of the order on plaintiff's counsel. The court held that plaintiff's answers were "not responsive, lack any reasonable detail and improperly reserve the right to provide answers at a later time."

Honda's Order with Notice of Entry, indicating service by mail on all other parties at their correct addresses, is dated June 6, 1997, and stamped "Filed" by the Nassau County Clerk on June 16, 1997. The Jurat on Honda's Affidavit of Service, however, reads "Sworn to before me this 6th day of April, 1997." During the month of June 1997, counsel for Honda twice wrote to plaintiff's counsel

referencing the Trial Judge's order, the first letter beginning: "As you are now undoubtedly aware, Judge Kutner has ordered that plaintiff supplement [her] discovery responses." Nevertheless, plaintiff's counsel claimed the March 31, 1997 order was not actually served, as represented, ***122** on June 6, 1997. Plaintiff made no further responses to Honda's interrogatories within 20 days after June 6, 1997. [FN*]

> FN* On July 23, 1997, plaintiff belatedly served additional responses to Honda's interrogatories, Honda asserts that plaintiff's responses are still inadequate.

On October 20, 1997, the Trial Judge issued an order reserving decision on Honda's motion to strike the complaint until it received an explanation of when Honda served the court's March 31, 1997 order. Plaintiff's counsel, who was on vacation during the entire month of June, then submitted twoaffidavits--one from his partner who reviewed his mail during June, the second from his secretary who opened his mail--asserting that they did not see the March 31, 1997 order in the June mail. Honda responded with two ***90** ****58** affidavits of its own, the first from the secretary who mailed the Order with Notice of Entry and prepared the Affidavit of Service, attesting that "April" was her typographical error; the second affidavit--to the same effect--was from the Notary Public who signed the Jurat.

On February 9, 1998, the Trial Judge granted Honda's motion to strike the complaint, noting that the court found Honda's explanation for the discrepancy in dates on the Affidavit of Service reasonable. The Appellate Division affirmed, with two Justices dissenting on the ground that a hearing was required to resolve the question of fact regarding service of the March 31, 1997 order. The double dissent on an issue of law brought the case to this Court (CPLR 5601[a]).

[1][2][3][4][5] Three familiar propositions of law resolve this appeal in Honda's favor. *First,* service of papers on an attorney is complete upon mailing (CPLR 2103[b][2]). *Second,* a properly executed **affidavit** of service raises a **presumption** that a proper **mailing** occurred, and a mere denial of receipt is not enough to rebut this presumption (*Engel v. Lichterman,* 62 N.Y.2d 943, 944-945, 479 N.Y.S.2d 188, 468 N.E.2d 26). Here, the denials of receipt by persons who reviewed plaintiff's lawyer's June mail were insufficient to create an issue of fact requiring a hearing. *Third,* when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint (*Zletz v. Wetanson,* 67 N.Y.2d 711, 713, 499 N.Y.S.2d 933, 490 N.E.2d 852).

[6][7] Regrettably, it is not only the law but also the scenario that is all too familiar (*see, e.g., Tewari v. Tsoutsouras,* 75 N.Y.2d 1, 10- 11, 550 N.Y.S.2d 572, 549 N.E.2d 1143; *Reynolds Sec. v. Underwriters Bank & Trust Co.,* 44 N.Y.2d 568, 571-572, 406 N.Y.S.2d 743, 378 N.E.2d 106; ***123** *Laverne v. Incorporated Vil. of Laurel Hol*low, 18 N.Y.2d 635, 637, 272 N.Y.S.2d 780, 219 N.E.2d 294, *appeal dismissed* 386 U.S. 682, 87 S.Ct. 1324, 18 L.Ed.2d 403). If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders * * * as are just," including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges BELLACOSA, SMITH, LEVINE, CIPARICK, WESLEY and ROSENBLATT concur.

Order affirmed, with costs.

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697 N.Y.S.2d 319
1999 N.Y. Slip Op. 09073
(Cite as: 266 A.D.2d 203, 697 N.Y.S.2d 319)

C

Supreme Court, Appellate Division, Second Department, New York.

STROBER KING BUILDING SUPPLY CENTERS, INC., respondent,
v.
Terry R. MERKLEY, appellant, et al., defendants.

Nov. 1, 1999.

Defendant appealed from judgment entered by the Supreme Court, Rockland County, Bergerman, J., in action to enforce personal guaranty. The Supreme Court, Appellate Division, held that defendant had failed to defeat presumption created by affidavit of service that plaintiff had properly mailed copy of judgment with notice to entry, so that period for filing appeal began with mailing.

Appeal dismissed.

West Headnotes

[1] Appeal and Error ⚿348(1)
30k348(1) Most Cited Cases

Appeal must be taken within 30 days after the appellant is served with a copy of the judgment appealed from and written notice of its entry. McKinney's CPLR 5513(a).

[2] Process ⚿145
313k145 Most Cited Cases

Properly executed **affidavit** of service raises a **presumption** that a proper **mailing** occurred.

[3] Appeal and Error ⚿348(1)
30k348(1) Most Cited Cases

[3] Appeal and Error ⚿914(1)
30k914(1) Most Cited Cases

Conclusory statement in reply brief as to date on which appellant's counsel received judgment with notice of entry was insufficient to defeat **presumption** that proper **mailing** occurred which was created by properly executed **affidavit** of service, and thus, 30-day period for taking appeal began to run upon mailing. McKinney's CPLR 2103(b), par. 2.

****319** Hedinger & Lawless, New York, N.Y. (Anthony J. Belkowski of counsel), for appellant.

Stein & Stein, Haverstraw, N.Y. (Alisa Stein of counsel), for respondent.

LAWRENCE J. BRACKEN, J.P., WILLIAM D. FRIEDMANN, GLORIA GOLDSTEIN and NANCY E. SMITH, JJ.

MEMORANDUM BY THE COURT.

***203** In an action, *inter alia,* to recover upon a personal guaranty, the defendant Terry Merkley appeals from a judgment of the Supreme Court, Rockland County (Bergerman, J.), entered July 2, 1998, which is in favor of the plaintiff and against him in the principal sum of $118,735.79.

ORDERED that the appeal is dismissed, with costs to the respondent.

[1][2][3] An appeal must be taken within 30 days after the appellant is served with a copy of the judgment appealed from and written notice of its entry (*see,* CPLR 5513[a]). The plaintiff mailed a copy of the judgment with notice of entry to the appellant's counsel on July 30, 1998. The notice of appeal was dated September 28, 1998. "A properly executed **affidavit** of service raises a **presumption** that a proper **mailing** occurred" (*Engel v. Lichterman,* 62 N.Y.2d 943, 944, 479 N.Y.S.2d 188, 468 N.E.2d 26). Under CPLR 2103(b)(2), service is complete upon mailing. The appellant failed to raise any issue regarding the validity of the affidavit of service. The conclusory statement contained in the appellant's reply brief, that his counsel did not receive the judgment with notice of entry until September 25, 1998, is insufficient to defeat the presumption that a proper mailing occurred (*cf., Heffernan v. Village of Munsey Park,* 133 A.D.2d 139, 518 N.Y.S.2d 813; *see, Deygoo v. Eastern Abstract Corp.*, 204 A.D.2d 596, 612 N.Y.S.2d 415).

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676 N.Y.S.2d 265
1998 N.Y. Slip Op. 07062
(Cite as: 252 A.D.2d 780, 676 N.Y.S.2d 265)

C

Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the ESTATE OF Alphonse L. JACQUET, Deceased.
Marianne J. Dawson, Appellant;
Cooper Union for the Advancement of Science and Art, Respondent.

July 16, 1998.

Three years after will was admitted to probate without objection, decedent's daughter, who was only surviving child of decedent, brought action to reopen probate and contest will. The Surrogate's Court, Broome County, Thomas, S., granted motion by executor of estate to dismiss application. Daughter appealed, and the Supreme Court, Appellate Division, Yesawich, J., held that: (1) evidence supported determination that daughter had received citation notifying her that will was being probated, and (2) ruling on motion to dismiss counsel for executor based on conflict of interest was properly deferred until after ruling on motion to dismiss.

Affirmed.

West Headnotes

|1| Wills ⚿355
409k355 Most Cited Cases

Evidence was sufficient to establish that daughter of decedent had received citation notifying her that decedent's will was being probated, warranting dismissal of proceeding to reopen probate and contest will brought by daughter three years after will was admitted to probate; affidavit of service by secretary who had mailed citation to daughter, and testimony of secretary regarding her regular procedure, created presumption of receipt, and daughter had produced no convincing proof that secretary had not followed normal procedure, or that daughter had not received citation.

|2| Process ⚿145
313k145 Most Cited Cases

Properly executed **affidavit** of service raises **presumption** that proper **mailing** occurred, and mere denial of receipt does not rebut that presumption.

|3| Attorney and Client ⚿21.20
45k21.20 Most Cited Cases

Surrogate's Court could properly defer its decision on motion to disqualify counsel for executor of decedent's estate, on basis of conflict of interest, until after resolving executor's motion to dismiss proceeding in which decedent's daughter sought to reopen probate and contest will.
****266** M. Suzanne McMahon, Johnson City, for appellant.

Thomas, Collison & Meagher (Robert F. Whalen, of counsel), Endicott, for respondent.

Before CARDONA, P.J., and CREW, YESAWICH , SPAIN and GRAFFEO, JJ.

***780** YESAWICH, Justice.

Appeal from an order of the Surrogate's Court of Broome County (Thomas, S.), entered July 18, 1997, which dismissed petitioner's application to reopen the probate of decedent's last will and testament.

Alphonse L. Jacquet (hereinafter decedent) died on June 6, 1993, leaving his entire estate to respondent, his college alma mater. On June 21, 1994, decedent's last will and testament, dated April 15, 1983, was admitted to probate without objection and respondent, also named as executor therein, was issued letters testamentary. Some three years later, petitioner, decedent's only surviving child, commenced the instant proceeding to reopen probate and contest the will. In her petition, she alleges, *inter alia,* that she never received a citation notifying her that the will was being probated and that she would have appeared to contest its validity had she been made aware of when the hearing was to be held.

Respondent thereafter moved to dismiss the petition, claiming that the citation was mailed to petitioner, as ordered by ***781** Surrogate's Court, on May 20, 1994; in opposition, petitioner again attested that she had not received it. A traverse hearing was conducted at which Christine Smith, the secretary who had purportedly mailed the citation to petitioner, testified that she had indeed done so, as evidenced by the affidavit of service she had completed. To substantiate this assertion, Smith explained her regular procedures for mailing such documents and averred that she never deviated from these procedures, which were designed to insure proper mailing. In addition to testifying that she did not receive any citation, petitioner attempted to elicit proof, from one of the partners of the law firm representing respondent, as to the multiple thefts from a trust account established by decedent for the benefit of petitioner's daughter that were committed by a former member of the firm and the events surrounding the firm's discovery of those thefts and handling of the estate in general. This evidence, petitioner maintained, was relevant in determining whether the firm had followed its regular practices with respect to this estate and, more particularly, whether the guilty attorney may have had a motive to prevent petitioner from learning of the probate hearing. Finding the questions posed on these matters too speculative and remote from the issue of whether petitioner was actually served, Surrogate's Court in large part sustained respondent's objections to them.

Surrogate's Court, though taking judicial notice "of the fact [that the attorney] has pleaded guilty to taking funds from the estate, has been sentenced, and disbarred", ****267** nonetheless found that respondent had met its burden of proving a "regular course of conduct relative to mailing citations *** thus giving rise to the presumption of receipt", which petitioner had not adequately rebutted. Concluding that petitioner was indeed properly served, the court went on to dismiss the petition and also dismissed, as academic, petitioner's motion to disqualify respondent's counsel. Petitioner appeals.

[1][2] We affirm. "A properly executed **affidavit** of service raises a **presumption** that a proper **mailing** occurred"; a mere denial of receipt does not rebut that presumption (*Engel v. Lichterman,* 62 N.Y.2d 943, 944, 479 N.Y.S.2d 188, 468 N.E.2d 26; *cf., Matter of Shaune TT.,* 251 A.D.2d 758, 758-759, 674 N.Y.S.2d 457.. Here, the affidavit of service, coupled with Smith's testimony as to her regular procedure for mailing citations, and petitioner's admission that she had never had any difficulty receiving her mail were more than sufficient to raise a presumption that she received the citation (*see, Engel v Lichterman, supra; Nassau Ins. Co. v. Murray,* 46 N.Y.2d 828, 829-830, 414 N.Y.S.2d 117, 386 N.E.2d 1085; *Best v. City of Rochester,* 195 A.D.2d 1073, 1074, 600 N.Y.S.2d 405).

***782** In response, petitioner produced no convincing proof that Smith did not follow her regular office procedures in this instance (*see, Nassau Ins. Co. v. Murray, supra*). The fact that the relevant practices were those of a single individual in the firm, rather than of the firm as a whole, does not render those practices evidentially valueless. And, as Surrogate's Court correctly found, petitioner's supposition that the citation may have been intercepted by someone else in the firm is too remote and speculative to justify the "fishing expedition" that her counsel sought to undertake in this record. In short, given the totality of the hearing evidence, it cannot be said that the court erred in rejecting petitioner's averment that she did not receive the citation (*see, Dean v. Sarner,* 201 A.D.2d 770, 771, 607 N.Y.S.2d 485; *Law v. Benedict,* 197 A.D.2d 808, 810, 603 N.Y.S.2d 75).

[3] As for petitioner's motion to disqualify respondent's counsel on conflict of interest grounds, it was not improper, given the entirety of the circumstances, for Surrogate's Court to defer its decision as to that matter until after resolving respondent's motion to dismiss (*see, Renault Inc. v. Auto Imports,* 19 A.D.2d 814, 243 N.Y.S.2d 480).

ORDERED that the order is affirmed, without costs.

CARDONA, P.J., and CREW, SPAIN and GRAFFEO, JJ., concur.

676 N.Y.S.2d 265, 252 A.D.2d 780, 1998 N.Y. Slip Op. 07062

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