

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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ROY DEN HOLLANDER,	:	
	:	
	:	New York County
Plaintiff-Appellant,	:	Ind. No. 152656/2014
	:	Hon. Jennifer Schecter
-against-	:	
	:	
TORY SHEPHERD, ADVERTISER NEWSPAPERS	:	
PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA	:	
PUBLICATIONS PTY LIMITED,	:	
	:	
Defendants-Appellees.	:	
	:	
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**MEMORANDUM OF DEFENDANTS TORY SHEPHERD,
ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE,
FAIRFAX MEDIA PUBLICATIONS PTY LIMITED IN OPPOSITION
TO PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' REPLY**

LEVINE SULLIVAN KOCH & SCHULZ, LLP

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Counsel for Defendants

Defendant-Appellees Tory Shepherd, Advertiser Newspapers Pty Ltd., Amy McNeilage, and Fairfax Media Publications Pty Limited (together, “Defendants”), by and through their undersigned attorneys, submit this memorandum of law in opposition to Plaintiff-Appellant Roy Den Hollander’s (“Plaintiff” or “Hollander”) motion to dismiss or strike Defendants’ reply memorandum in support of their motion to dismiss Plaintiff’s appeal.

PRELIMINARY STATEMENT

In the face of Defendants’ motion to dismiss this appeal, Plaintiff, a lawyer, freely admits he certified falsely that his appendix contains true and accurate copies of the records in the court below. It does not. Unable to show why Defendants’ motion should not therefore be granted, Plaintiff has set off on a frolic and detour, asking this Court to strike for lack of proper service Defendants’ reply on that motion. Nevertheless, Plaintiff admits he was served both by email (as agreed to by the parties) and Federal Express, and Plaintiff’s own exhibit (this Court’s order) demonstrates that the service was timely. Clearly, as Plaintiff’s moving papers demonstrate, service was more than adequate. For all these reasons, Plaintiff’s motion to strike Defendants’ reply is frivolous, and should be denied and fees and costs should be awarded to Defendants for having to oppose it.

PROCEDURAL BACKGROUND¹

On April 1, 2016, Defendants made a motion to dismiss Plaintiff’s appeal from the lower court’s opinion finding that it did not have personal jurisdiction over any of the four Australian Defendants in this matter. *See* Defendants’ Motion to Dismiss Appeal (“Apr. 1 Motion”). Defendants argue that Plaintiff’s appeal should be dismissed because the appendix, certified as

¹ Additional background can be found in Defendants’ Memorandum in Support of Motion to Dismiss the Appeal (“Apr. 1 Mem.”) at 2-5.

accurate by Plaintiff, (1) includes documents never filed below, (2) includes documents filed below but altered by Plaintiff on appeal, (3) omits relevant documents in the record below, and (4) mischaracterizes documents in the appendix's index. *See* Apr. 1 Mem. at 8-10. To prevent prejudice, Defendants also requested emergency relief staying the appeal pending disposition of the April 1 Motion. *See* Hollander Aff., Ex. B. In response, the Court adjourned the appeal to the September Term. *Id.* The same day, the Court set a briefing schedule on Defendants' motion to dismiss requiring Plaintiff's opposition be served on April 8 and Defendants' reply be served on April 13. *Id.* Thereafter, the parties agreed to service by email, *id.*, Ex. C, and on April 7, Plaintiff served his opposition.

On the morning of April 13, Defendants served their reply via email. *Id.*, Ex. D. Out of an abundance of caution and as a courtesy to Hollander, Defendants served a hard copy of the opposition by Federal Express. *Id.*, Exs. E & I.

The same day Plaintiff was served with Defendants' reply, he filed a letter with the Court alleging that Defendants' affidavit of service was false because he believed that they first filed and then served the reply. *Id.*, Ex. F. Further, Plaintiff complained that it was improper for Defendants to serve him both by email and by Federal Express because Federal Express "was not the means of service agreed to." *Id.* Hollander also contended that despite the reply date of April 13 set by the Court, Defendants should have served their reply papers on April 12. *Id.*

The following day, Defendants filed a short letter along with another affidavit confirming that the original affidavit of service was not false and that Defendants did serve and then file the reply on the date indicated by the Court in its April 1 order. *Id.*, Ex. G.

Thereafter, Hollander tried to file yet *another* letter, which was rejected by the Court. *Id.*
¶ 14. He then filed a formal motion on April 16.

ARGUMENT

PLAINTIFF'S MOTION SHOWS HE WAS SERVED ON THE DAY ORDERED BY THE COURT

This motion is a red herring to distract the Court from Plaintiff's fatally flawed appendix—one he concedes is based on a false certification and which requires the dismissal of this appeal.

Plaintiff makes just two arguments as to why Defendants' reply should be stricken. *First*, he argues that, even though he received the reply by both email and Federal Express, he believes the Defendants filed their reply prior to serving it on Plaintiff. This argument has no merit. As sworn to by Brian Earl, a paralegal in this office, the reply was served by email on Hollander as agreed and then filed with this Court. Hollander Aff., Ex. G. Given that the parties agreed to serve by email, that ends the inquiry. Defendants also served Hollander by Federal Express the same day as a courtesy. (Indeed, Plaintiff's own exhibits show that Defendants generated the Federal Express label before filing the reply. *See id.*, Ex. I.) Despite Plaintiff's claims to the contrary, Defendants have gone above and beyond what they agreed to and the motion should be denied.

Second, Hollander argues that Defendants failed to timely serve the reply because they failed to file it "at least one day before the return date" or by "4 o'clock in the afternoon" of the day before the return date as required by the CPLR. *Id.* ¶ 12. But this ignores that unlike an ordinary motion made on notice, *the Court* set the briefing schedule on Defendants' motion, which was filed concurrently with an application for interim relief in the form of a stay. *Id.*, Ex. B; *cf.* CPLR 2214(d) (noting that a court may set a briefing schedule on orders to show cause). The order, attached to Plaintiff's own papers, explicitly states that the reply was due on April 13.


Ex. B, the same day it was served and filed. Thus, Hollander's claim that the reply is untimely is frivolous too.

CONCLUSION

This is an entirely frivolous motion designed to harass the Defendants. For each and all the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's motion to dismiss or strike Defendants' reply and award Defendants costs and attorneys' fees pursuant to 22 NYCRR 130-1.1, and grant such other relief as this Court deems appropriate.

Dated: April 28, 2016

LEVINE SULLIVAN KOCH & SCHULZ, LLP

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Counsel for Defendants

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----- X

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: Index No. 152656/2014
:

: **AFFIDAVIT OF SERVICE**
:

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Brian Earl, being duly sworn, deposes and says as follows:

1. I am a paralegal with the law firm of Levine Sullivan Koch & Schulz, LLP. I am not a party to this action, am over 18 years of age, and reside in Hudson County, New Jersey.

2. On April 28, 2016, I served a true copy of the Memorandum of Law in opposition to Plaintiff's motion to strike Defendants' reply by priority overnight courier and email upon:

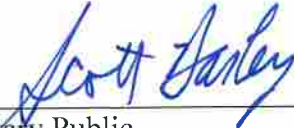
ROY DEN HOLLANDER
545 East 14th Street, 10 D
New York, NY 10009
rdenhollander97@gsb.columbia.edu

Plaintiff-Appellant *pro se*



Brian Earl

Subscribed and sworn to before me
this 28th day of April, 2016



Notary Public

SCOTT BAILEY
Notary Public, State of New York
Notary No. 01BA6201502
Qualified in New York County
Commission Expires March 2, 2017