

Hyun v Salvus Sec. Servs., Inc.
2014 NY Slip Op 30680(U)
March 19, 2014
Supreme Court, New York County
Docket Number: 116352/2010
Judge: Lucy Billings
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

STEPHAN HYUN

INDEX NO. 116352/2010

-v-

MOTION DATE _____

SANTOS PARTY HOUSE, et al.

MOTION SEQ. NO. 005

The following papers, numbered 1 to 3, were read on this motion ~~for~~ additional time to serve a defendant

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2-3

Replying Affidavits _____ | No(s). _____

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

Plaintiff withdraws his motion insofar as it seeks to compel disclosure in Hyun v. Santos Party House, Index No. 116352/2010, and insofar as it seeks to consolidate Hyun v. Salvus Security Services, Inc., Index No. 159044/2012, with that action, both in this court. Therefore the only relief he seeks is in the latter action: (1) for additional time to serve defendant Salvus Security Services, Inc., and to serve it by alternative means or (2) for a default judgment against this defendant. C.P.L.R. §§ 306-b, 311(b), 3215. The court grants the relief sought to the extent set forth in the accompanying decision under Index No. 159044/2012 and otherwise denies plaintiff's motion.

FILED

MAR 19 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/28/14

Lucy Billings, J.S.C.

LUCY BILLINGS

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

STEPHAN HYUN,

Index No. 159044/2012

Plaintiff

- against -

DECISION AND ORDER

SALVUS SECURITY SERVICES, INC., 100
LAFAYETTE STREET, LTD, and "JOHN DOE"
#1 and "JOHN DOE" #2, intended as
employees of Salvus Security Services,
Inc., who assaulted the plaintiff,

Defendants

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-----X
LUCY BILLINGS, J.S.C.:

Plaintiff moves for additional time to serve defendant Salvus Security Services, Inc., and to serve it by alternative means, such as on the attorney who has appeared for Salvus Security Services in opposing plaintiff's motion or on Salvus Security Services' insurer Burlington Insurance Co. C.P.L.R. § 311(b). Alternatively, plaintiff moves for a default judgment against Salvus Security Services on its liability. C.P.L.R. § 3215. Plaintiff has withdrawn his motion to consolidate this action with his action in this court against Santos Party House under Index Number 116352/2010, C.P.L.R. § 602(a), and to compel disclosure in that action. C.P.L.R. § 3124.

I. PROCEDURAL HISTORY

Plaintiff's motion for additional time to serve Salvus Security Services is not the typical motion to extend his 120 days to serve this defendant, C.P.L.R. § 306-b, because, having

commenced this action December 19, 2012, plaintiff served this defendant, a corporation, by serving the New York Secretary of State February 15, 2013. C.P.L.R. § 311(a)(1); N.Y. Bus. Corp. Law (BCL) § 306(b)(1). On March 12, 2013, however, plaintiff learned that Salvus Security Services, an active corporation when plaintiff was injured December 19, 2009, was dissolved and its registered agent's authority to receive service was annulled October 26, 2011. See BCL §§ 305, 1006(b). Nevertheless, because a corporation's permitted designation of a registered agent for service is "[i]n addition to . . . designation of the secretary of state," which is automatic for that purpose, BCL § 305(a), and a dissolved corporation may be served through the distinct means of delivery to the Secretary of State, plaintiff's service on Salvus Security Services February 15, 2013, was effective. BCL § 1006(a)(4) and (b). E.g., Centennial El. Indus., Inc. v. Ninety-Five Madison Corp., 90 A.D.3d 689, 690 (2d Dep't 2011); Bruce Supply Corp. v. New Wave Mech., 4 A.D.3d 444, 445 (2d Dep't 2004).

"Service of process on such corporation shall be complete when the secretary of state is so served." BCL § 306(b)(1). Moreover, when the Secretary of State is served, the Secretary:

shall promptly send one of . . . copies by certified mail, return receipt requested, to such corporation, at the post office address on file in the department of state, specified for the purpose. If a . . . corporation has no such address on file in the department of state, the secretary of state shall so mail such copy . . . in care of any director named in its certificate of incorporation at the director's address stated therein

Id. Thus, while service is complete upon delivery to the

secretary of state, the secretary also forwards the process served to either a corporate address or a corporation director's address, again a destination distinct from the registered agent.

Despite the Secretary of State's duties upon receiving service, the communication regarding Salvus Security Services' dissolution and lack of registered agent conveyed to plaintiff that, even if service was effective, it might not reach any representative who would answer or access the corporation's available insurance, unless plaintiff directly served such a representative. Because the 120 days for service by an additional means was to run April 18, 2013, plaintiff previously moved, by an order to show cause signed April 9, 2013, for additional time to serve by an additional means. Burlington Insurance Co. opposed that motion, but the parties appearing for and against the motion resolved it by a stipulation, and the court did not determine whether plaintiff's service on Salvus Security Services via the Secretary of State February 15, 2013, was effective. The stipulation and the order based on the stipulation, dated May 7, 2013, allowed plaintiff until July 8, 2013, to serve Salvus Security Services via one of the corporation's officers or employees provided in C.P.L.R. § 311(a)(1), but did not allow service by any alternative means.

II. PLAINTIFF'S EFFORTS SINCE THE MAY 2013 STIPULATION

Plaintiff has not shown diligence in attempting to serve a corporate officer or employee as provided in C.P.L.R. § 311(a)(1) since May 7, 2013. See C.P.L.R. § 306-b; Khedouri v. Equinox, 73

A.D.3d 532 (1st Dep't 2010); Johnson v. Concourse Vil., Inc., 69 A.D.3d 410 (1st Dep't 2010); Esposito v. Isaac, 68 A.D.3d 483 (1st Dep't 2009). Despite having received affidavits sworn May 12, 2013, by A.J. Melino in the two related actions, attesting that he was "one of the principals of . . . Salvus Security," and its predecessor entity, which provided security services to the nightclub at which plaintiff was assaulted December 19, 2009, plaintiff attempted service at only one address between May 2013 and now. Plaintiff indicates that his process server asked for Salvus Security Services at that address, after the entity was dissolved, not for A.J. Melino, and does not indicate any other attempt to locate a residence or business address for Melino or for any other former officer or employee of Salvus Security Services.

In fact the address at which plaintiff attempted to serve a Salvus Security Services officer or employee in May 2013, 959 Wilmot Road, Scarsdale, New York, was an address for Salvus Security Services that plaintiff had learned from the nightclub's correspondence to Salvus Security Services' insurer two years earlier, in May 2011, before Salvus Security Services was dissolved. The summons issued December 19, 2012, in this action also shows plaintiff's knowledge of that address for Salvus Security Services. Yet plaintiff never attempted service at that address until May 2013.

[* 6]

III. THE RELIEF CURRENTLY SOUGHT

In opposition to plaintiff's current motion, Salvus Security Services contests the validity of plaintiff's service via the Secretary of State and suggests that, by moving initially for additional time to effect service by alternative means, plaintiff admitted the invalidity of the service pursuant to BCL § 306(b)(1). Whether plaintiff then may have been unaware of BCL § 1006(a)(4)'s provision for service on a dissolved corporation or for any reason doubted the validity of that timely service is immaterial. The validity of the service, not plaintiff's belief concerning the service, is the material point. Plaintiff has been candid about his motives: he seeks to serve Salvus Security Services by a means that actually will notify a Salvus Security Services representative of the action against Salvus Security Services, rather than to enter a default judgment against this defendant. Now realizing that it contests the prior service, plaintiff now also seeks to effect service by a means that will not be contested. In fact, since both Salvus Security Services' insurer and Salvus Security Services' attorney now are aware of this action, this objective may have become plaintiff's primary objective. None of these motives or objectives is to be discouraged. Salvus Security Services, on the other hand, appears more willing to risk a default judgment and to litigate service than to litigate the merits of the action.

For these reasons, and because plaintiff made a threshold showing of reasonable diligence by actually serving Salvus

Security Services adequately within the original 120 days permitted, C.P.L.R. § 306-b, the interests of justice in averting a default and protecting against a challenge to service if Salvus Security Services does respond to the complaint permit the relief plaintiff seeks. See Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104-105 (2001); Nicodene v. Byblos Rest., Inc., 98 A.D.3d 445, 446 (1st Dep't 2012); Frank v. Garcia, 84 A.D.3d 654, 655 (1st Dep't 2011); Lippett v. Education Alliance, 14 A.D.3d 430, 431 (1st Dep't 2005). Salvus Security Services already has received notice of plaintiff's action against this defendant and does not show any prejudice, such as lost rights, a change of position, or added expense, if this relief is granted. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 106-107; Nicodene v. Byblos Rest., Inc., 98 A.D.3d at 446; Henneberry v. Borstein, 91 A.D.3d 493, 496 (1st Dep't 2012); Yamamoto v. Yamamoto, 43 A.D.3d 372, 373 (1st Dep't 2007). See LoPresti v. Florio, 71 A.D.3d 574, 575 (1st Dep't 2012). Unquestionably it is in the interests of justice to decide claims on their merits. Hernandez v. Abdul-Salaam, 93 A.D.3d 522 (1st Dep't 2012); Henneberry v. Borstein, 91 A.D.3d at 497.

Consequently, the court grants plaintiff a final period of 60 days after notice of entry of this order, in which to identify, locate, and serve an officer or employee of Salvus Security Services, Inc., specified in C.P.L.R. § 311(a)(1) or to show that, despite diligent efforts, it is impracticable to do so. See C.P.L.R. § 311(b); Morgenthau v. Avion Resources Ltd.,

11 N.Y.3d 383, 391 (2008); Invar Intl., Inc. v. Zorlu Enerji Elektrik Uretim Anonim irketi, 86 A.D.3d 404, 405 (1st Dep't 2011); Cives Steel Co. v. Unit Bldrs., 262 A.D.2d 164 (1st Dep't 1999). Upon expiration of that period, absent service on a corporate officer or employee pursuant to C.P.L.R. § 311(a)(1) despite diligent efforts, plaintiff may move again for service by alternative means upon a showing of those efforts or may move timely for a default judgment against Salvus Security Services, Inc., C.P.L.R. § 3215(c) and (g)(4), upon an adequate showing of its liability. C.P.L.R. § 3215(f). The court also permits Salvus Security Services, Inc., to respond to the complaint during the 60 days after notice of entry of this order. See C.P.L.R. § 3012(d). This decision constitutes the court's order.

DATED: February 28, 2014

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 MAR 19 2014
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Lucy Billings

 LUCY BILLINGS, J.S.C.
 LUCY BILLINGS
 J.S.C.