

5W Pub. Relations, LLC v Path Med., P.C.
2017 NY Slip Op 30276(U)
February 8, 2017
Supreme Court, New York County
Docket Number: 655510/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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5W Public Relations, LLC,

Plaintiff,

Index No.
655510/2016

DECISION and
ORDER

- against -

Mot. Seq. #001

Path Medical, P.C., and Eric Braverman,

Defendants.
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HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by filing the Summons and Complaint on October 18, 2016. The instant action seeks money damages for breach of contract. Plaintiff alleges that the parties entered into a contract on June 23, 2016 in which Defendants hired Plaintiff as public relations counsel, commencing July 1, 2016 at a monthly fee of \$7,000 per month for a minimum of three (3) months, plus expenses. Plaintiff alleges that Plaintiff performed the services under the contract, Defendants were fully satisfied with Plaintiff's services, and Defendants breached the contract by failing to pay the outstanding balance due to Defendants.

On November 9, 2016, Defendants, Path Medical, P.C. ("Path Medical"), and Eric Braverman ("Braverman") (collectively, "Defendants") filed a motion to dismiss the action, pursuant to CPLR § 3211(a)(8), on the ground that the Court lacks jurisdiction based on improper service and venue. In support, Defendants submit the attorney affirmation of Diana Mohyi. Through Mohyi's affirmation, Defendants argue that service of process was not properly made pursuant to CPLR 308 and 311 nor was an alternative form of process made pursuant to BCL 306. Defendants argue that the summons and complaint was delivered to them via US mail to 304 Park Avenue South, Floor 6. New York 10010. Plaintiff opposes.

Pursuant to CPLR § 312-a:

As an alternative to the methods of personal service authorized by section 307, 308, 310, 311 or 312 of this article, a summons and complaint, or summons and notice, or notice of petition and petition may be served by the plaintiff or any other person by mailing to the person or entity to be served, by first class mail, postage prepaid, a copy of the summons and complaint, or summons and notice or notice of petition and petition, together with two copies of a statement of service by mail and acknowledgement of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender.

(CPLR § 312-a[a]).

CPLR § 312-a further provides that, “[s]ervice is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender. The signed acknowledgement of receipt shall constitute proof of service.” (CPLR § 312-a[b][1]).

In its opposition to Defendants’ motion, Plaintiff acknowledges that it failed to properly effect service upon Defendants in accordance with CPLR § 312-a because Plaintiff did not receive signed acknowledgments from either of the Defendants. Rather, Plaintiff claims that on November 15, 2016, after Defendants filed their motion, Plaintiff served Defendant copies of the Summons and Complaint by way of alternative methods. Plaintiff provide an affidavit of service attesting to service upon Path Medical by delivery of the Summons and Complaint to “John Smith” personally, “general agent” of Path Medical, at 304 Park Avenue South, New York, NY 10010, on November 16, 2016. Plaintiff provides another affidavit of service attesting to service upon Braverman by delivery of the Summons and Complaint to “John Smith,” Braverman’s co-worker, on November 16, 2016, and subsequent mailing. Plaintiff argues that service was therefore properly effected on November 16, 2016, and Defendants’ motion to dismiss should be denied.

In reply, Defendants contend that Plaintiff’s purported service on November 16, 2016 is not proper. Defendants submit the reply affirmation of Diana Mohyi; the affidavit of Glen Fink, dated November 28, 2016 and sworn to on February 4, 2017; and the affidavit of Braverman.

In his affidavit, Fink avers that he “is an employee of Defendant Path Medical P.C. in the medical records and collections department” and “am not authorized to accept serve [sic] on behalf of either Defendant listed above, Path Medical P.C. or Eric Braverman.” He further avers, “On or about November 15, 2016, I was called to the front desk. A process server never verified what my position was.” He further avers, “I explicitly told him that I was not authorized to accept the documents, nevertheless the affidavit of service, Plaintiff’s Exhibit C to its Affirmation, describes me.”

In his affidavit, Braverman avers that he is the “director of the Corporate Defendant Path Medical P.C.” and “the only person authorized to accept service of process for the corporate defendant Path Medical P.C.” He further avers, “I have not witnessed personal service of the complaint for the above captioned suit” or “any attempt of personal service for the above captioned suit upon me personally or on me on behalf the corporate entity Path Medical P.C. for which I am director.”

CPLR §3211(a)(8) states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant.

CPLR § 308 authorizes personal service upon a natural person, “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . of the person to be served and . . . by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .”. (CPLR § 308[2]). “Personal service by way of delivery to a suitable person at a defendant’s actual place of business is allowed because it is presumed that the business relationship between the deliverer and the defendant will induce the prompt redelivery of the summons to the defendant.” (*Glasser v. Keller*, 567 N.Y.S.2d 981, 982 [Sup. Ct. 1991]).

CPLR § 311 permits personal service upon a corporation by delivery of Plaintiff’s initiatory papers, “to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section

three hundred six or three hundred seven of the business corporation law.” (CPLR § 311[a][1]).

A process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]). By contrast, a defendant’s “sworn non-conclusory denial” of service is sufficient to dispute the veracity or content of a process server’s affidavit. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep’t 2004]; *Hinds v. 2461 Realty Corp.*, 169 AD2d 629 [1st Dep’t 1991]).

Where defendant swears to specific facts to rebut the statements in the process server’s affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D. 3d 459 [1st Dept. 2004]).

Here, as there is an issue as to whether Glen Fink is an “an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service” on Path Medical’s behalf, a traverse hearing is directed concerning whether service was properly effected on Path Medical. However, as for service upon Braverman, Defendants’ affidavits do not demonstrate how Fink, who is employed at Pain Medical, was not a “suitable person of age and discretion” within the meaning of CPLR § 308 to accept service on Braverman’s behalf.

Wherefore, it is hereby

ORDERED that Defendants’ motion to dismiss the Complaint as against defendant Eric Braverman based upon lack of personal jurisdiction is denied, and Eric Braverman shall serve an answer to the Complaint within 30 days; and it is further

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing with respect to service upon defendant Path Medical, P.C., and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 8, 2017

FEB 08 2017



Eileen A. Rakower, J.S.C.