

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ARDIS HEALTH, LLC; CURB YOUR CRAVINGS, LLC
And USA HERBALS, LLC,

Index No. 11 Civ 5013

Plaintiff,

- against -

ASHLEIGH NANKIVELL,

Defendant.

-----X

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. RULE 12 (B)(5)

THE LAW OFFICES OF GAIL I. AUSTER &
ASSOCIATES P.C.

17 Battery Place, Suite 711
New York, New York, NY 10004
(914) 707-4000
Attorneys for Defendant

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
ARGUMENT	5
I. THERE WAS INSUFFICIENT SERVICE OF PROCESS MANDATING DISMISAL OF THE COMPLAINT	5
A. PLAINTIFFS HAVE NOT MET THE REQUIREMENTS OF SERVICE UPON AN INDIVIDUAL DEFENDANT IN COMPLIANCE WITH NEW YORK STATE LAW	6
B. PLAINTIFFS' PROCESS SERVERS DID NOT EXERCISE DILIGENCE IN ACTUALLY ATEMPTING TO SERVE DEFENDANT IN THE MANNER MANDATED BY CPLR §308 (1) WHICH IS THE PREREQUISITE FOR SUBSTITUTED SERVICE PURSUANT TO §308 (4).	7
C. PLAINTIFFS HAVE NOT SERVED DEFENDANT IN THE MANNER MANDATED BY §308 (4) BECAUSE PLAINTIFFS' PROCESS SERVERS DID NOT AFFIX THE SUMMONS AND COMPLAINT TO DEFENDANT'S DOOR.	8
CONCLUSION	9

PRELIMINARY STATEMENT

Defendant Ashleigh Nankivell (“Nankivell” or “Defendant”) was employed by Plaintiff Curb Your Cravings LLC (“Curb Your Cravings”) as a video and social media producer for seven months from October 2008 until May 2009, and by Plaintiff USA Herbals LLC (“USA Herbals”) as a video and social media producer from October 2008 through June 2011. Both Curb Your Cravings and USA Herbals are in the business of selling health and diet products.

On or about June 23, 2011, Nankivell was dismissed by Jordan Finger (“Finger”), owner of USA Herbals, for seeking other employment. She was never employed by Plaintiff Ardis Health LLC.

Over time, Nankivell became increasingly unhappy at her job. She was subjected to a hostile work environment created by Finger who, among other actions, hosted a holiday party at a strip club. She was compelled to use a personal website and personal social sites to provide publicity with ads payable to Ardis Health, which was demanded by Finger. Also as demanded by Finger, she was compelled to use her personal equipment for work which were broken during production, for which she was not compensated. She was also forced by Finger to take on unreasonably increased responsibilities with no additional compensation as other employees were either fired or quit. Moreover, Plaintiff Curb Your Cravings and Plaintiff USA Herbals, along with Jordan Finger, who upon information and belief is the owner of both of these enterprises, have engaged in a pattern and practice of false claims, including misleading claims of “free trials” of products. As result of 26 complaints in the last three years, the Better Business Bureau (“BBB”) has

posted a report of these two businesses, which the BBB has linked together and which were given a grade of “F” on a scale of A+ to F. Exhibit 1.

On Nankivell’s own time which was not compensated by any of the plaintiffs, she developed a new social media platform called “Whatsinurs”, which is a niche beauty oriented social shopping and networking site. The name “Whatsinurs” refers to the question of “what’s in your makeup bag”. This project has been launched in its alpha version that Nankivell developed. Nankivell also developed the beta version which has not yet been launched. Although Nankivell started developing Whatsinurs from its inception in June 2010, Finger sought to take majority ownership of Whatsinurs, leaving Nankivell with only a 10% ownership interest, which she rejected.

STATEMENT OF FACTS

Following a period of negotiation after her termination, the present lawsuit was initiated by Plaintiffs, even though she was never employed by Plaintiff Ardis Health nor had she been employed by Curb Your Cravings since May 2009.

Service of process in this case was insufficient. Defendant was in fact in her home on occasions that plaintiff’s process server claims to have come to the premises to serve her. In addition, Defendant’s boyfriend who lives with her was also home on at least one such occasion. Plaintiff’s process server did not come on those occasions.

Plaintiffs have filed with this Court an Affidavit of Attempted Service of Joseph Sanchez (“Sanchez Affidavit”) dated August 4, 2011 submitted by Plaintiffs as evidence of proof of attempted service of the Summons and Complaint upon Nankivell and the contents thereof contain false statements (Exhibit 2). Affidavit of Ashleigh Nankivell dated 8/24/2011 (“Nankivell Aff.”), Para. 4.

The Sanchez Affidavit states that on July 29, 2011, at approximately 9:05 p.m., Joseph Sanchez (“Sanchez”) attempted to serve Defendant with the Summons and Complaint and other papers upon Nankivell by ringing the bell for apartment # 428 but did not receive an answer. However, he did not ring the bell for her apartment as she was home at this time and her boyfriend was home. No one rang Nankivell’ bell or attempted to serve her in any manner. Nankivell Aff., Para. 5.

The Sanchez Affidavit further states that on July 30, 2011 at approximately 4:39 p.m., Sanchez attempted to serve a copy of the Summons and Complaint by ringing the bell for Nankivell’s apartment and briefly spoke to a woman over the intercom. However, she was not called on the intercom nor did she speak to anyone on the intercom on July 30, 2011. Nankivell Aff. Para. 6.

The Sanchez Affidavit further claims that Sanchez told the woman over the intercom that he had a delivery for Ashleigh Nankivell and that she buzzed him into the building. However, Nankivell did not buzz him into the apartment building, although someone from another apartment may have buzzed him in. Nankivell Aff. Para. 7.

The Sanchez Affidavit further claims that when Sanchez went to the apartment door Nankivell would not open the door or even answer him. On that same date, a stranger did come to her door and refused to identify himself other than to say that he had a delivery. All deliveries go to the package room except for food deliveries, and Nankivell knew she had not ordered in food. There had recently been about 4 burglaries in her apartment building so without further indentifying information, she did not open her door. Nankivell Aff. Para. 8.

Plaintiffs have filed with this Court an Affidavit of Service of Randy Barona (“Barona Affidavit”) dated August 4, 2011 submitted by Plaintiffs as evidence of proof of service of the Summons and Complaint upon Nankivell and the contents thereof also contain false statements (Exhibit 3). Nankivell Aff. Para. 9.

The Barona Affidavit states that on 8/2/11, at approximately 7:17 p.m., Randy Barona (“Barona”) attempted to serve Nankivell with the Summons and Complaint by ringing the bell for the apartment but did not receive an answer. However, he did not ring the bell for her apartment as her boyfriend was home at that time and he informed her that no one rang her apartment bell on that evening. Nankivell Aff. Para. 10.

The Barona Affidavit further states that on August 3, 2011 at approximately 11:10 a.m., Barona attempted to serve a copy of the Summons and Complaint by ringing the bell for Nankivell’s apartment and later knocked on her door but did not receive an answer. However, he did not ring the bell for Nankivell’s apartment, as she was working at home at this time doing some freelance work and no one rang her bell except for two food deliverymen; moreover, no one knocked on the door. Nankivell Aff. Para. 11.

The Barona Affidavit further states that on August 3, 2011 at approximately 11:10 a.m. Barona personally affixed a copy of the Summons; Complaint and other papers to the door of apartment # 428. However, nothing was affixed to the door of Nankivell’s apartment, nor did she observe tape, glue, nails, staples, Velcro or any other material that would or could be used to affix the papers to the door of her apartment. Nankivell Aff. Para. 12.

The false claims of service are consistent with other false claims made by Plaintiffs that have been documented, as evidenced by consumer complaints filed with the Better Business Bureau.

Defendant now moves this Court for dismissal of this action pursuant to Fed.R.Civ.Pro. Rule 12 (b)(5) for insufficient service of process.

ARGUMENT

I. There was insufficient service of process mandating dismissal of the Complaint

Fed.R.Civ.Pro. Rule 4 (e) sets forth the requirements for service of a federal summons and complaint. The Rule provides, in pertinent part:

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual-other than a minor, an incompetent person or a person whose waived had been filed, may be served in a judicial district of the United States by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
 - (A) delivering a copy of the summons and of the complaint to the individual personally;
 - (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
 - (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

It is undisputed that Nankivell was not served personally nor was there service at her residence upon any person of suitable age or discretion who resides there, as set forth in Fed.R.Civ.Pro. Rule 4 (e)(2)(A), (B) or (C). Thus, the controlling law pursuant Fed.R.Civ.Pro. Rule 4 (e)(1) is New York State law, which must be followed for proper service of process upon Defendant.

A. Plaintiffs have not met the requirements of service upon an individual in compliance with New York State law.

The requirements for proper service of process pursuant to New York law are set forth in CPLR §308:

§308 Personal service upon a natural person

Personal service upon a natural person shall be made by any of the following methods:

1. By delivering the summons within the state to the person to be served; or
2. By delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business***; or
3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318***; or
4. where service under paragraphs one and two cannot be made by due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” ***proof of such service shall be filed with the clerk of the court designated in the summons with twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing***; or
5. in such manner as the court, upon motion without notice directs, if service is impracticable under paragraphs one, two and four of this section.

Under New York law, service of process is required to be made in strict compliance with the statutory methods set forth in CPLR §308. Accordingly, notice that is received by means other than those authorized by statute will not suffice, even where defendant received actual notice of the action. See *Macchia v. Russo*, 67 N.Y. 2d 592,

594 (1986); *Raschel v. Rish*, 69 N.Y. 2d 694, 697 (N.Y. Ct. of Appeals, 1986)(when the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents).

It is undisputed that service was not made upon Defendant in accordance with §308 (1), (2), (3) or (5). Plaintiff relied upon §308 (4) for service, which is otherwise known as “nail and mail” service.

B. Plaintiffs’ process servers did not exercise diligence in actually attempting to serve Defendant in the manner mandated by §308 (1) which is the §308 (4) prerequisite for substituted service.

It is well established that substituted “nail and mail” service may be used only where personal service cannot be made with due diligence. See, *O’Connell v. Post*, 811 N.Y.S.3d 441 (2 Dept. 2006). Courts in New York have concluded that three actual attempts to personally serve a defendant pursuant to §308 (1) or (2) may constitute the due diligence required to justify §308 (4) substituted service . See, *Lemberger v. Khan*, 18 N.Y.S. 2d 416 (2d Dept. 2005). However, Plaintiff’s process servers did not make three actual bona fide attempts to personally serve Defendant.

Defendant’s Declaration makes clear that no attempt was made to serve Nankivell personally on July 29, 2011 by process server Joseph Sanchez as he alleged in his affidavit. On July 30, 2011 a male who may or may not have been Joseph Sanchez came to Defendant’s door and refused to identify himself. The refusal of said male to identify himself was unreasonable and certainly was not in compliance with the requirement of due diligence. By contrast, Defendant’s refusal to open the door for a strange male who refused to identify himself in light of the fact that there had been four recent burglaries in Nankivell’s apartment building, was entirely reasonable. Even assuming, arguendo, that

Sanchez did attempt service at another time when Nankivell was not home, his refusal to identify himself under the aforementioned circumstances as he did on July 30, 2011 should be imputed as a lack of diligence at any time.

Defendant's Declaration further makes clear that no attempt was made to serve her personally on August 2, 2011 or on August 3, 2011 by process server Randy Barona.

Plaintiffs' process servers failed to exercise due diligence by making three bona fide attempts to personally serve Defendant as required by §308 (4) before resorting to substituted service. Accordingly, "nail and mail" service cannot substitute for personal service in the case at bar.

- C. Plaintiffs have not served Defendant in the manner mandated by §308 (4) because Plaintiffs, process servers did not affix the Summons and Complaint to Defendant's door.

In the event that this Court does find that Plaintiffs exercised diligence in its attempt to serve Defendant, Plaintiffs failed to meet the requirement of §308 (4) in that no Summons and Complaint were affixed to the door of Nankivell's apartment.

Simply stated, affixing a summons to the door is accomplished by use of a nail, tack, tape, rubber band or some other device which will insure a genuine adherence to the door, which is a strict requirement of §308 (4). *PacAmOr Bearings, Inc. v. Foley*, 460 N.Y.S.2d 62 (3d Dept 1983); See also *Werner v. Schweit*, 526 N.Y.S.2d 175 (2d Dept. 1988); *Desalvatore v. Washburn*, 747 N.Y.S.2d 695 (2002). Thus wedging pleadings in doorway of a defendant's residence did not constitute affixation to door of residence as required by statute. *Van Raalte v. Metz*, 56 N.Y.S.2d 12 (2d Dept. 1990); *Steltzer v. Eason*, 517 N.Y.S. 2d 193 (2d Dept. 1987). Likewise, leaving a Summons and Complaint on the floor by the Defendant's door would fail to meet the requirement of §308 (4).

Although Barona claimed to have affixed the Summons, Complaint and other papers to Defendant's door, this is disputed by Defendant who swore in her Declaration that nothing was affixed to the door of her apartment, nor did she observe tape, glue, nails, staples, Velcro or any other material that would or could be used to affix the papers to the door of her apartment. Plaintiffs have failed to satisfy the mandate of §308 (4). There is no personal jurisdiction over Defendant in the current action because of insufficiency of process, which requires dismissal of the Plaintiffs' Summons and Complaint.

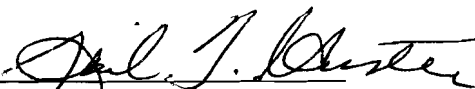
CONCLUSION

For the foregoing reasons, Defendant Ashleigh Nankivell respectfully requests that the Court grant her Motion to Dismiss in its entirety.

Dated: New York, New York
August 24, 2011

Respectfully submitted,

THE LAW OFFICES OF GAIL I. AUSTER &
ASSOCIATES P.C.

By: 
Gail I. Auster (GA-8428)
17 Battery Place, Suite 711
New York, New York, NY 10004
(914) 707-4000
Attorneys for Defendant