

Alkyha Defense & Logistics, Inc. v D&P Constr., Inc.
2015 NY Slip Op 31479(U)
August 5, 2015
Supreme Court, Kings County
Docket Number: 503251/2014
Judge: Carolyn E. Demarest
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At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of August, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X
ALKYHA DEFENSE & LOGISTICS, INC. d/b/a
EXECUTIVE COMMERCIAL,

Plaintiffs,

- against -

D&P CONSTRUCTION, INC.,

Defendants.
-----X

**DECISION
AND
ORDER**

Index No. 503251/2014

The following papers read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	9-25
Opposing Affidavits (Affirmations)	29-33
Reply Affidavits(Affirmations)	34-36
Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	37-39

Defendant D&P Construction (defendant) moves for an order vacating the default judgment against it, pursuant to CPLR § 5015(a), and to dismiss the complaint, pursuant to CPLR § 3211(a)(8), for lack of personal jurisdiction due to improper service and plaintiff's, Alkyha Defense & Logistics, Inc. (plaintiff), failure to establish jurisdiction grounds under CPLR § 301 and 302. Default judgment was vacated by this Court on March 25, 2015 for plaintiff's failure to oppose without reasonable excuse.

BACKGROUND

This action arises out of an agreement entered into by the parties on or about November

9, 2012, pursuant to which defendant was to provide snow removal services at the Phillipsburg Mall in New Jersey, which is managed by plaintiff (the "Contract"). Defendant is a Pennsylvania corporation authorized to do business in New Jersey and the Contract was signed in defendant's office in Pennsylvania. On or about March 10, 2014, plaintiff sent correspondence to defendant seeking payment of \$358,000 for defendant's alleged failure to perform snow removal services pursuant to the Contract. On March 21, 2014, defendant replied stating that it was defendant that was owed money by plaintiff for performance of snow removal services.

On or about April 15, 2014, plaintiff filed a verified complaint against defendant for breach of contract. According to the affidavit of service of Denise Hinkle ("Hinkle"), the process server, she served the Summons and Complaint on June 5, 2014 at defendant's place of business in Pennsylvania upon Joe Lasso ("Lasso"), which Hinkle identifies in her affidavit of service as a "foreman". According to the affidavits of Danielle Mancino ("Mancino"), a partner and office manager of defendant, and Joseph Lasso, Lasso is not a director, officer, managing or general agent, or any other agent authorized to accept service for defendant. Both Lasso and Mancino further state that Lasso is not a foreman, and is not even an employee of defendant, but is actually a mechanic and a subcontractor of the defendant. Defendant claims that the process server merely stated to Lasso that she had some "paperwork" for the defendant and did not state that she was a process server or that defendant was being served with pleadings. Defendant claims that Lasso did not indicate that he was authorized to receive process on behalf of the defendant but only agreed to accept this "paperwork" and bring it to one of defendant's managers as a courtesy.

DISCUSSION

Defendant argues that plaintiff's action should be dismissed for lack of personal

jurisdiction because plaintiff did not properly serve the defendant. CPLR § 311(a)(1) provides for personal service upon a domestic or foreign corporation by delivering the summons “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.” “Because service of process is necessary to obtain personal jurisdiction over defendants, courts require strict compliance with the statutory methods of service” (*Pierce v Village of Horseheads Police Dept.*, 107 AD3d 1354, 1355 [3d Dept 2013]). The burden of proving jurisdiction lies with the plaintiff (*see Green Point Savings Bank v Taylor*, 92 AD2d 910 [2d 1983]). “When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents” (*Raschel v Rish*, 69 NY2d 694, 696 [1986]).

Defendant argues that, because strict compliance with statutory methods of service is required, plaintiff’s service upon Lasso was improper because Lasso is not an officer, director, managing or general agent, or cashier or assistant cashier or any other agent authorized by appointment or by law to receive service. Plaintiff maintains that defendant was properly served at its place of business and argues that this matter should be set for a traverse hearing to determine whether Lasso identified himself to the process server as a proper agent. In response, defendant argues that a traverse hearing is unnecessary and would be duplicative because all relevant witnesses who would be called to testify at a traverse hearing, including Joe Lasso, Danielle Mancino, and the process server, have already submitted affidavits. Defendant further argues that it can be determined that service was improper based on the affidavit of service alone, which states that service was made upon the “Agent or person in charge of the place of business: Joe Lasso/Foreman”, because service on a “foreman” of a foreign corporation is improper under

CPLR § 311(a)(1). Moreover, defendant claims that the affidavit of service improperly identifies Lasso as a foreman, and that Lasso is actually a mechanic and only subcontracts with defendant.

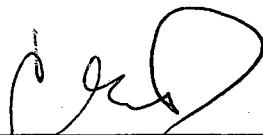
As there was no proper service upon the defendant, this matter must be dismissed for lack of personal jurisdiction¹ (*see Gleizer v American Airlines, Inc.*, 30 AD3d 376 [2d Dept 2006]). It is undisputed that Lasso was not authorized to accept service on behalf of defendant, and based on the affidavits of Danielle Mancino and Joe Lasso, the evidence is overwhelming that Lasso did not represent to the process server that he was authorized to accept service. There is no indication in the affidavit of service that Lasso represented to the process server that he was authorized to accept service on behalf of the defendant, and therefore, there is no issue of fact which would require determination at a traverse hearing.

CONCLUSION

Defendant's motion to dismiss is granted.

This constitutes the Decision and Order of the Court.

ENTER:



J.S.C.

HON. CAROLYN E. DEMAY

¹ Defendant also argues that plaintiff has failed to establish jurisdiction over a foreign corporation pursuant to either CPLR §§ 301 or 302. However, as this matter is dismissed based on lack of personal jurisdiction, this issue need not be discussed.