Tetteh v Infinite Beauty NYC, LLC
2017 NY Slip Op 32452(U)
November 17, 2017
Supreme Court, New York County
Docket Number: 155932/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH **PART 29**
Justice

SOPHIA TETTEH,

Plaintiff,

- v -

INFINITE BEAUTY NYC, LLC,

Defendant.

INDEX NO. 155932/2017

MOTION DATE 9/18/17

MOTION SEQ. NO. 001

The following papers, numbered 5–9, were read on this motion for entry of a default judgment.

Notice of Motion – Affirmation in Support – Exhibits A–B – Affidavit of Service	**Nos. 5–9**

Motion by Plaintiff Sophia Tetteh pursuant to CPLR 3215 for entry of a default judgment against Defendant Infinite Beauty NYC, LLC is denied.

BACKGROUND

Plaintiff brought this action to collect from Defendant $58,953.11, plus exemplary and punitive damages and all costs and any attorney's fees allowable by law, relating to allegations of conversion, breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, and fraud and misrepresentation.

Plaintiff commenced this action against Defendant on August 31, 2017 by e-filing a summons and complaint. (Stallone affirmation, exhibit A.) Plaintiff alleges that a licensed New York City process server served process upon Defendant by: (1) on July 21, 2017, affixing a copy of the summons and complaint to the door at 152 West 141st Street, Apartment 2D, New York, New York 10030; and (2) on July 24, 2017, mailing a copy of the same to that same address. (Stallone affirmation, exhibit B.) The process server's affidavit indicates that process was served upon specific individual Shannon Burroughs ("Burroughs"), "known to [the

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

process server] to be the registered agent for [Defendant]." (*Ibid.*) The process server's affidavit indicates further that "[p]revious attempts were made on: July 10th[,] 2017 and July 15th[,] 2017. Occupants of the address were present but would not open the door to speak to me." (*Ibid.*)

As Defendant has not appeared in this action, Plaintiff now moves for entry of a default judgment.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

A cause of action for breach of contract requires allegations of "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." (*JP Morgan Chase v. J.H. Elec. Co. of NY, Inc.*, 69 AD3d 802, 803 [2d Dept 2010].)

On the instant motion, Plaintiff fails to show prima facie that process was served upon Defendant in this action. Defendant is a limited liability company ("LLC"). As such, Defendant must be served in accordance with the CPLR and the Limited Liability Company Law. CPLR 311-a provides, in relevant part:

> "(a) Service of process on any domestic or foreign [LLC] shall be made *by delivering a copy personally* to (i) *any member* of the [LLC] in this state, if the management of the [LLC] is vested in its members, (ii) *any manager* of the [LLC] in this state, if the management of the [LLC] is vested in one or more managers, (iii) to *any other agent* authorized by appointment to receive process, or (iv) to *any other person* designated by the [LLC] to receive process, *in the manner provided by law for service of a summons as if such person was a*

> *defendant*. Service of process upon a[n LLC] may also be made pursuant to article three of the limited liability company law."

(Emphases added.) Limited Liability Company Law § 303 provides:

> "(a) Service of process on the secretary of state as agent of a domestic [LLC] or authorized foreign [LLC] shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, *at the office of the department of state in the city of Albany*, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such [LLC] shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such [LLC] at the post office address on file in the department of state specified for that purpose.
>
> "(b) Nothing in this section shall limit or affect the right to serve any process required or permitted by law to be served upon a[n LLC] in any other manner now or hereafter permitted by law or applicable rules of procedure."

(Emphasis added.) Plaintiff does not indicate under which provision of the CPLR or the Limited Liability Company Law process was allegedly served upon Defendant. While Plaintiff alleges that Burroughs was Defendant's registered agent at the time of the attempted service of process, service of process was not completed upon Defendant in the instant case pursuant to Limited Liability Company Law § 303 because Burroughs was not served "at the office of the department of state in the city of Albany."

Alternatively, process could have been served upon Defendant pursuant to CPLR 311-a. CPLR 311-a (a) authorizes service of process on an LLC by "delivering a copy personally to . . . (i) any member . . . (ii) any manager . . . (iii) any other agent authorized by appointment to receive process, or . . . (iv) any other person designated by the [LLC] to receive process, in the manner provided by law for service of a summons as if such person was a defendant." Limited Liability Company Law § 302 states that an LLC "may *designate* a registered agent upon whom process against the [LLC] may be served." (Emphasis added.) The language

of Limited Liability Company Law § 302 is in accord with the language of CPLR 311-a (a) (iv). As such, Burroughs, to the extent her name is listed on the process server's affidavit as Defendant's registered agent, fits under CPLR 311-a (a) (iv) specifically—she is neither a member nor a manager of the LLC and is in a position defined by statute as being "designated," not appointed, by the LLC.

As one court has noted, "[t]here is a paucity of cases referable to service of process on LLCs." (*Supple v Brockbilt Homes LLC*, 2007 WL 4857221 [Sup Ct, Suffolk County 2007].) Currently there is a split of authority in New York courts as to whether substituted service is effective upon a person authorized by CPLR 311-a to receive service of process on behalf of an LLC or if CPLR 311-a requires delivery directly into the hands of such a person. The *Supple* court found that substituted service on the wife of a member of the LLC was invalid. The court grounded its decision in cases interpreting CPLR 311—which provides for methods of service of process upon a corporation—and holding that substituted service is ineffective upon corporations. (*See Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984], *affd for reasons stated below* 65 NY2d 865 [1985]; *see also Faravelli v Bankers Trust Co.* 85 AD2d 335 [1st Dept 1982], *affd for reasons stated below* 59 NY2d 615 [1983]; *Perez v Garcia*, 8 Misc3d 1002 [A] [Sup Ct, Bronx County 2005], holding that "[s]ervice on a corporation may not be made in accordance with the substitute methods of service authorized for the personal service of process on individuals.") The *Supple* court held that "a[n] LLC is an entity much like a corporation and not an individual" and that "since an LLC has the attributes of a voluntary association with corporate limited protection, this court will treat an LLC as an entity which is a cross between an association and a corporation."

CPLR 311 provides, in relevant part, that

> " (a) Personal service upon a corporation . . . shall be made by delivering the summons as follows:
>
> "1. upon any domestic or foreign corporation, 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."

Unless an individual with a specific status enumerated by CPLR 311 is served directly with the summons, service is not effectuated as against the corporation. Similarly, in the line of authority that treats LLCs like

corporations, unless an individual with a specific status enumerated by CPLR 311-a (a) is served directly with the summons, service is not effectuated as against the LLC.

Other courts have held that substituted service is effective against a person enumerated under CPLR 311-a (a). In *Bd. of Mgrs. of Dragon Estates Condominium v Omansky* (2010 WL 10932238 [Sup Ct, NY County 2010], a managing member of an LLC was served under CPLR 308 (4), which is a method of personal service whereby the summons is left at a person's door and then mailed to them (a detailed discussion of this method of personal service appears *infra*). The court distinguished *Lakeside* in that it dealt with service on a corporation as governed by CPLR 311 and held that CPLR 311-a, unlike CPLR 311, authorizes the use of forms of personal service upon a natural person pursuant to CPLR 308 to effectuate service upon an LLC.

In *Right Choice Holding, Inc. v 199 Street LLC* (48 Misc3d 227 [Sup Ct, Kings County 2015]), the court stated that "[a] plaintiff who attempts to effectuate personal service on a domestic [LLC] through service on an individual possessing the [CPLR 311-a (a)] specific status must serve the specific status individual in accordance with CPLR 308.

This Court notes that CPLR 311-a differs in its language from CPLR 311. There is no mention of delivering a copy "personally" in CPLR 311 nor is there language to the effect that service of process may be accomplished "in the manner provided by law for service of a summons as if such person was a defendant," as stated in CPLR 311-a. CPLR 311-a's language tracks precisely with its cousin statute, CPLR 310-a, which applies to limited partnerships and provides, in relevant part, that

> (a) Personal service upon any domestic or foreign limited partnership shall be made by delivering a copy personally to any managing or general agent or general partner of the limited partnership in this state, to any other agent or employee of the limited partnership authorized by appointment to receive service or to any other person designated by the limited partnership to receive process, in the manner provided by law for service of summons, as if such person was the defendant.

The language of CPLR 310-a is identical in structure to CPLR 311-a. The only differences between the two provisions are that the former refers to partnerships and individuals specific to them (e.g., partners) while the latter refers to LLCs and individuals specific to them (e.g., members). Critically, the beginning and final clauses between the two statutes are virtually identical: "[p]ersonal service upon any [limited partnership/LLC] shall be made by delivering a copy personally to . . . any other person designated by the [limited partnership/LLC] to receive process, in the manner provided by law for service of summons, as if such person was the defendant." The Appellate Division, Second Department has analyzed the legislative history of CPLR 310-a, which was created by amending CPLR 310, as follows:

> "The amendment [to CPLR 310] was prompted by the belief that it was unduly difficult to serve a partnership under prior law. The supporting memorandum offered by the law's principal sponsors, Assemblyman Ivan Lafayette and Senator Dale Volker, explained the purpose and intent of the new law:
>
> > 'Purpose:
> >
> > 'To provide for additional means, including substituted service, of personal service of the summons on a partnership.
> >
> > 'Summary of Provisions:
> >
> > 'The existing paragraph is to be identified as a subdivision 1 (a) and the requirement that the partner be served within the state is deleted since this section must be read in conjunction with CPLR 313.
> >
> > 'The additions to the existing Section provide two means of substituted service, modeled on CPLR 308, and permit service on any authorized agent or employee or a person so authorized in an instrument filed in the county clerk[']s office. Finally, as with CPLR 308 the court is authorized to enter an order fashioning the mode of service.

> 'Justification:
>
> 'Present law makes it very difficult to serve the partnership itself and is misleading since it states service must be made within the state on the partner. This bill would treat a partnership as a business entity composed of more than its partners and permit service in some respects in the manner in which a corporation is served. There is no good reason why a managing agent, other authorized employee, or person in charge of the partnership office should not receive service. There may be instances where none of the partners are available for service in the state. Moreover, the court should have the power to fashion the means and manner of service (Mem of Dale M. Volker, Member of the Senate and Ivan Lafayette, Member of the Assembly; Bill Jacket, L. 1991, ch. 338).'

"In a letter authored by cosponsor Assemblyman Ivan Lafayette, it was reiterated that, "[t]his legislation provides alternative methods for personal service on a partnership * * * [which] are consistent with the court tested provisions of CPLR 308" (Letter of Ivan Lafayette, dated July 1, 1991, Bill Jacket, L. 1991, ch. 388).

"The defendant contends that in view of the 1991 amendments, CPLR 310(a) and the phrase "personally serving" should now be construed to only authorize personal delivery of process to an individual partner and that the alternative methods of substituted service upon the partnership are limited to those specifically enumerated in the amended statute. This construction is more limited than the construction this court accorded the term as it appeared in CPLR former 310.

"Contrary to the defendant's argument, it is quite clear from the statute's legislative history that the intent of the statute was to make it easier to serve a partnership rather than to make it more difficult. Thus, if CPLR 308 is not incorporated into [CPLR 310-a], that intent would obviously be frustrated.

"Moreover, it is a fundamental rule of statutory construction that "the language of an amendment should be construed in the light of previous judicial decisions construing the original act and the Legislature is presumed to have known of existing judicial decisions

> in enacting amendatory legislation." (*Conesco Indus. v. St. Paul Fire & Mar. Ins. Co.*, 184 A.D.2d 956, 958–959 [1992]). As noted above, this court had previously construed CPLR 310 so as to incorporate the language of CPLR 308(2) into that statute, and the Legislature retained unchanged the prior language of CPLR 310 as new subdivision CPLR 310(a). The amended statute incorporated essentially intact the language of the prior law. Thus, our prior rulings are consistent with the newly amended statutory scheme.
>
> "Under the circumstances, the Legislature must be presumed to have been aware of the existing case law which construed the reference to "personal service" in former CPLR 310 as incorporating the personal service methods set forth in CPLR 308. If the Legislature intended the term personal service in this context to mean personal "delivery" only, it could have easily stated as much. Since the Legislature retained the language of the former statute—and its prominent reference to personal service—the inference is persuasive that the framers of the law approved of, and intended to perpetuate, preexisting law with regard to that very same language. This conclusion is buttressed by the fact that the objective of the Legislature was to simplify service on a partnership. We are reluctant to adopt a construction of the term personal service which narrows the plain meaning of the term as defined by CPLR 308 and which departs from the construction previously accorded by this court to the same preamendment language."

(*Foy v 1120 Ave. of Americas Assoc.*, 223 AD2d 232, 235–237 [2d Dept 1996].) The Appellate Division, First Department has adopted the same view. (*See Bell v Bell*, 246 AD2d 442 [1st Dept 1998].) As such, this Court extends the Appellate Division's holdings in *Foy* and *Bell* and finds that CPLR 311-a, which uses the same language as CPLR 310-a respecting personal service and was passed in the same legislative session (L.1999, c. 341, § 1, eff. July 27, 1999), authorizes the effectuating of service of process upon an LLC by means of the use of the substituted service provisions of CPLR 308 upon any of the enumerated persons in CPLR 311-a (a).

"Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308." (*Washington Mut. Bank v Murphy* (127 AD3d 1167, 1175 [2d Dept 2015] [internal quotation mark and citations omitted].) CPLR 308 provides:

"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 in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, . . . ; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, . . . ; or

. . .

"4. where service under paragraphs one and two cannot be made with 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 such person 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" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; . . . ;

. . .

"6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business."

The affidavit of service of process upon Defendant suggests that the process server attempted to serve Burroughs pursuant to CPLR 308 (4), commonly known as "nail and mail" service.

To reach CPLR 308 (4), a plaintiff must first have attempted service under CPLR 308 (1) and (2) "with due diligence." "The requirement of due diligence must be strictly observed because there is a reduced likelihood that a defendant will actually receive the summons when it is served pursuant to CPLR 308 (4)." (*Serraro v Staropoli*, 94 AD3d 1083, 1084 [2d Dept 2012].) "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality." (*Id.*)

The Appellate Division, First Department held in *Ayala v Bassett* (57 AD3d 387 [1st Dept 2008]) that a process server exercised due diligence where three different attempts were made to serve a defendant at the defendant's residence on three different days, at times of day that were in the morning, the afternoon, and the evening, over a 22-day period. The Appellate Division, First Department has also held that attempts at service were not diligent where two attempts were made at times when it was likely the defendant was in transit to or from work. (*Wood v Balick*, 197 AD2d 438 [1st Dept 1993]). Here, the affidavit of service of process does not indicate at what times the process server made attempts on two of the three visits to the Address—the first two visits, on July 10, 2017 and July 15, 2017. As such, Plaintiff has not shown prima facie that the first two attempts at service of process were of a sufficient quality with respect to timing.

The Appellate Division, Second Department has held that "[f]or the purpose of satisfying the due diligence requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment." (*Serraro* at 1085.)

In the instant action, the process server does not indicate in his affidavit the substance of the colloquy he had at the threshold of the Address, if any, with those inside. There is no indication that the process server tried to determine Burroughs' whereabouts or place of employment. The process server's statement that "[o]ccupants of the address were present but would not open the door to speak to me" is vague and suggests that no conversation occurred. The statement does not indicate how the process server knew "occupants" were inside, whether the process

server knocked on the door or rang the bell or whether anyone inside said anything in response to any knocking or ringing.

It is also therefore unclear whether the alleged occupants "would not open the door" because, e.g., no one knocked or rang the bell, they were infants instructed not to open the door to a stranger, or they refused to open the door to evade service of process. The Court of Appeals has held that, "if the person to be served interposes a door between himself and the process server," or "upon the refusal of a person of suitable age and discretion to open the door to accept [service]", a process server may effectuate process under CPLR 308 (1) and (2) by, "leaving a copy [of the summons and complaint] outside the door of the person to be served . . . provided the process server informs the person to whom deliver is being made that this is being done." (*Bossuk v Steinberg*, 58 NY2d 916, 918 [1983].) Here, while the process server did leave a copy of the summons and complaint outside of the door of the person to be served, the Plaintiff fails to show prima facie that the process server informed the alleged occupants of the Address that this was being done. As such, Plaintiff fails to show prima facie that the alleged service of process falls under the Court of Appeals' "interposed door" exception to personal service of process under CPLR 308 (1) and (2).

Assuming for the sake of argument that Plaintiff had made a showing that the process server had attempted service under CPLR 308 (1) and (2) "with due diligence," the first prong of service of process pursuant to CPLR 308 (4), the "nailing," would have to have occurred at Burroughs' dwelling place, usual place of abode, or actual place of business. Critically, the process server's affidavit does not explicitly indicate a connection between Burroughs and the Address. While the process server indicates that he served the summons and complaint upon Burroughs by affixing a true copy of it to the door of the Address, nowhere in the affidavit is there an indication that the Address is Burroughs' dwelling place, usual place of abode, actual place of business, actual dwelling, actual abode, actual residence, or last known residence. Instead, the Address is provided in the affidavit without further explanation.

The Court takes judicial notice that, per a search of the New York State Department of State's Division of Corporations Entity Information online database as of the date of this order, Burroughs is Defendant's registered agent and is registered at the Address. It is unclear whether the Address was in use by the registered agent when service of process was attempted. Further, Limited Liability Company Law § 302 (b) (1) provides that the registered agent may be either "a

resident of [New York]" or have "a business address in [New York]." It is unclear from Plaintiff's papers whether the Address is Burroughs' home address or business address. As such, Plaintiff has failed to show prima facie that the process server affixed the summons and complaint to the door of Defendant's registered agent's dwelling place, usual place of abode, or actual place of business.

Assuming for the sake of argument that Plaintiff had shown prima facie that the Address was Burroughs' actual place of business when service of process was attempted, the July 24, 2017 mailing would have satisfied the "mail" requirement of CPLR 308 (4). But if the Address was a home address, Plaintiff would have been required to show prima facie that: (a) in the first instance, the Address was Burroughs' dwelling place or usual place of abode; and (b) the Address was also Burroughs' last known residence.

"[Usual place of abode] may [not] be equated with the 'last known residence' of the defendant." (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979] [internal citations omitted].) This distinction is no "mere redundancy." (*Id.* at 241.) To "blur the distinction between [usual place of abode] and last known residence . . . would be to diminish the likelihood that actual notice will be received by potential defendants" (*id.* at 240), contrary to the legislature's intent.

In *Feinstein*, a process server attempted to complete the "nail" prong of CPLR 308 (4) at Bergner's last known residence. As a result,

> "the purported service was ineffective, since the plaintiff failed to comply with the specific mandates of CPLR 308 [(4)]. The summons here was affixed to the door of defendant's last known residence rather than his actual [or usual place of] abode. That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court."

(*Id.* at 241 [internal citation omitted].) As such, the plaintiff in *Feinstein* failed to meet its burden of proof that it had satisfied the "nail" prong of CPLR 308 (4). Similarly, in *Washington* (at 1174), "the plaintiff failed to meet its burden of proof that its mailing of copies of the summons and complaint satisfied the mailing requirement of CPLR 308 (2)," which is analogous to the "mail" prong of CPLR 308 (4), by failing to mail the summons to Murphy's last known residence.

In the instant action, there is no indication as to whether the Address is Burroughs' dwelling place, usual place of abode, actual place of business, actual dwelling, actual abode, actual residence, or last known residence. As such, Plaintiff has failed to show prima facie that the process server mailed a copy of the summons and complaint to Burroughs' actual place of business or last known residence pursuant to CPLR 308 (4).

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff Sophia Tetteh's motion pursuant to CPLR 3215 for entry of a default judgment against Defendant Infinite Beauty NYC, LLC is denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 17, 2017
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check if appropriate:..... **MOTION IS:** ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE