Rosenberg v Yankee Clipper Distrib. of California, Inc.
2018 NY Slip Op 31586(U)
February 28, 2018
Supreme Court, New York County
Docket Number: 152158/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

MICHAEL A. ROSENBERG,

Plaintiff,

- v -

YANKEE CLIPPER DISTRIBUTION OF CALIFORNIA, INC., and PAVAN MAKKER, Individually,

Defendants.

INDEX NO. 152158/2017

MOTION DATE 2/28/18

MOTION SEQ. NO. 001

The following papers, numbered 15–25, were read on this motion for entry of a default judgment.

Notice of Motion—Affirmation in Support—Aff in Support—Exhibits A–F—Aff of Service—RJI | **Nos. 15–25**

Motion by Plaintiff Michael A. Rosenberg ("Rosenberg") pursuant to CPLR 3215 for entry of a default judgment against Defendants Yankee Clipper Distribution of California, Inc. ("Yankee Clipper") and Pavan Makker ("Makker") is denied. Plaintiff has failed in the instant motion to show prima facie that Defendants have been served with process.

BACKGROUND

Rosenberg commenced the instant action against Defendants on March 7, 2017, by e-filing a summons and verified complaint. Rosenberg seeks to recover from Defendants on an alleged contract to perform certain legal services under which $5,716.00 is allegedly due and owing. Rosenberg alleges in the verified complaint that he performed certain work, labor, and services for Yankee Clipper pursuant to a written retainer agreement between December 10, 2015, and November 4, 2016. Rosenberg further alleges that Makker, an alleged principal of Yankee Clipper, personally guaranteed in an oral agreement the obligations of Yankee Clipper. The verified complaint states four causes of action: two for breach of contract, a third for account taken and stated, and a fourth for unjust enrichment.

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

Rosenberg alleges that process was served upon Yankee Clipper on April 19, 2017, by serving its registered agent, Makker, by affixing a copy of the summons and verified complaint to the front door at 3199 E Phillips Ct, Brea, Orange County, CA 92821 (the "Brea Address"). Rosenberg further alleges that process was served upon Makker individually on April 19, 2017, by: (1) affixing a copy of the summons and verified complaint to the front door at the Brea Address; and (2) completing a first class mailing of the summons and complaint. Both affidavits of service included in the instant motion reference nine attempts, on different dates and at varied times of day, to find a person of suitable age and discretion to serve at the Brea Address.

Rosenberg alleges that an additional copy of the summons and complaint was mailed to Makker pursuant to CPLR 3215 (g) "at his last known addresses," the Brea Address and another address, 768 Turnbull Canyon Road, City of Industry, CA 91745 (the "Turnbull Address"). Rosenberg further alleges that the instant motion was served on Defendants on October 30, 2017, by mailing a copy to Yankee Clipper at the Brea Address and a copy to Makker at both the Brea Address and the Turnbull Address.

As Defendants have not answered or appeared in this action, Rosenberg now moves for entry of a default judgment against them, jointly and severally, for the sum certain of $5,716.00, plus interest from November 4, 2016, plus costs.

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 Ave. I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

On the instant motion, Plaintiff fails to show prima facie that process was served upon Defendants in this action. Defendants were allegedly served in California pursuant to a method of service available in New York, but not

California. Pursuant to CPLR 313, "[a] person . . . subject to the jurisdiction of the courts of the state . . . may be served with the summons without the state, in the same manner as service is made with in the state." (*See Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 389 [2008], holding that "CPLR 313 . . . has both the intention and effect of removing state lines, and the plaintiff is to use the service methodologies of CPLR 308, 309, 310, 311, and 312-a, etc. wherever the defendant (or person authorized to accept service on defendant's behalf) may be found.") Further, Plaintiff has indicated it has followed the rules of service in the CPLR respecting the CPLR 3215 (g) notice allegedly sent to Defendants. As such, Plaintiff must show that it served Defendants in accordance with the CPLR.

Yankee Clipper is a corporation. As such, Yankee Clipper must be served in accordance with the CPLR and the Business Corporation Law. CPLR 311, "Personal service upon a corporation or governmental subdivision," provides, in pertinent 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. . .
> .

CPLR 311 has been interpreted to mean 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 affidavit of service of process upon Yankee Clipper suggests that the process server attempted to serve Yankee Clipper c/o its registered agent, Makker, pursuant to CPLR 308 (4), a form of substituted service commonly known as "nail and mail," discussed in detail *infra* in relation to the purported service of process upon Makker. Even if nail and mail were effective against a corporation—and it is not—Plaintiff has failed to show in the instant motion that the summons was "mailed" to Yankee Clipper pursuant to CPLR 308 (4); the affidavit of service states that a copy was affixed to the front door of the

Brea Address but does not state whether a copy was then mailed, which would be required to effectuate service of process under 308 (4). As such, this Court has no jurisdiction over Yankee Clipper and the motion is denied as to it.

Makker was allegedly served process in his individual capacity pursuant to CPLR 308 (4). "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:
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> "1. by delivering the summons within the state to the person to be served; or
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> "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."

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]).

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 has indicated nine attempts on different dates and at varied times of day to serve Makker with process at the Brea Address. Critically, the process server's affidavit does not explicitly indicate a connection between Makker and the Brea Address. Nowhere in the affidavit is there an indication that the Brea Address is Makker's dwelling place, usual place of abode, actual place of business, actual dwelling, actual abode, actual residence, or last known residence. Instead, the Brea Address is provided in the affidavit without explanation.

Assuming for the sake of argument that Rosenberg had shown prima facie that the Brea Address was Makker's actual place of business when service of process was attempted, the April 19, 2017 mailing would have satisfied the "nail and mail" requirements of CPLR 308 (4). But if the Brea Address was a home address, Rosenberg would have been required to show prima facie that: (a) in the first instance, the Brea Address was Makker's dwelling place or usual place of abode; and (b) the Brea Address was also Makker's 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 Brea Address is Makker's dwelling place, usual place of abode, actual place of business, actual dwelling, actual abode, actual residence, or last known residence. Further, the alleged CPLR 3215 (g) (3) annexed to the instant motion alleges a second "last known address[]" for Makker—the Turnbull Address. As such, Plaintiff has failed

to show prima facie that the process server effectuated service of process upon Makker pursuant to CPLR 308 (4).

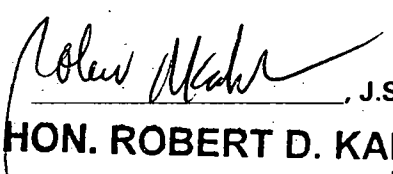
CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Michael A. Rosenberg pursuant to CPLR 3215 for entry of a default judgment against Defendants Yankee Clipper Distribution of California, Inc. and Pavan Makker is denied.

The foregoing constitutes the decision and order of the Court.

Dated: February 27, 2018
New York, New York



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

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE