STATE OF NEW YORK
COUNTY COURT: COUNTY OF NIAGARA

BUFFALO AUTO ACCEPTANCE CORPORATION

Plaintiff-Respondent

vs. Index. No. 177561/22

CASSANDRA HAMILTON

Defendant-Appellant

CIVIL APPEAL
DECISION AND ORDER

WOJTASZEK, J.

The Defendant-Appellant here appeals a decision of the Niagara Falls City Court, Hon. James J. Faso, Jr., rendered on May 13, 2022, denying her motion to vacate the default judgment entered against her based upon lack of jurisdiction under CPLR §5015(a)(4) and dismiss the action for lack of jurisdiction under CPLR §3211(a)(8), due to alleged defective service of process. Defendant-Appellant filed a timely Notice of Appeal on June 3, 2022. Defendant-Appellant now appeals on the basis that the evidence presented at the traverse hearing failed to demonstrate Plaintiff-Respondent's strict adherence to CPLR §308(4) in effectuating service and therefore the lower court's decision was against the weight of the credible evidence.

Background

On June 30, 2016, Plaintiff-Respondent commenced an action against Defendant-Appellant for an alleged default on a motor-vehicle retail installment contract.

An Affidavit of Service indicated a service date of August 8, 2016, by affixing process to the door at 2910 Highland Avenue, Apartment 21C, Niagara Falls, New York. Upon Defendant-Appellant's failure to answer, appear or move with respect to the Summons and Complaint, Plaintiff-Respondent thereafter moved for default judgment, which was granted by the lower court on December 2, 2016, in the amount of six thousand eight hundred sixty-three and 43/100 dollars ($6,863.43).

Defendant-Appellant, reportedly upon learning of the garnishment of her wages applied for, by sworn affidavit, an Order to Show Cause to vacate the default judgment on the basis of improper service of process. The lower court granted the Order to Show Cause on January 28, 2020, and thereafter a traverse hearing was held on August 17, 2021, before Judge James J. Faso, Jr., with all parties present.

At the hearing, Plaintiff-Respondent called the process server, Rocco Zendano, Jr. Relying on the Affidavit of Service, which was received in evidence, Zendano testified that he made five attempts to serve Defendant-Appellant at the apartment located at 2910 Highland Avenue, Apartment 21C, Niagara Falls, New York, to no avail, before leaving the summons and complaint at the door on his fifth and final attempt. He testified that after his first attempt, he returned to that same address, relying upon a postal check completed by a non-testifying third party, which indicated that no change of address existed for Defendant-Appellant relative to this Highland Avenue address. On cross-examination, Zendano further testified he that he was able to ascertain that this was Defendant-Appellant's "actual dwelling place" by observing, during one attempt at service, mail bearing her name in the open mailbox associated with the service address. Zendano also cited an exchange with a neighbor during one

attempt at personal service. He testified that the neighbor was "not real happy" about his knocking. (A 128). During this exchange, Zendano testified that when he asked about Defendant-Appellant, the neighbor stated "well, she ain't there right now" (A 128). Zendano testified upon examination by the Court, however, that the neighbor asked him who he was looking for and he told them he was looking for Cassandra Hamilton. In response, the process server testified that the neighbor stated, "well, apparently she's not home." (A 135). Zendano also testified that his reason for going back to the same address for service was that "we would have done a postal check after the second one and it would have – and it did come back that it was a good address." (A 122-123). The process server recalled that on his fifth and last attempt at the Highland Avenue residence, on August 8, 2016, at 5:35 p.m., he left the summons at the door. Zendano testified that he did take notes relative to these attempts, however he did not retain them due to the passage of time.

Defendant-Appellant testified that the Highland Avenue address where the summons was affixed was not, by that time, her dwelling place or usual place of abode. She also submitted Defendant's 1-4 (A 97-101), which were received into evidence via the lower court's Decision and Order, in an effort to provide documentation to the Court evidencing her residing at a different address – 458 ½ 5th Street, Niagara Falls, New York - at the time of service. Defendant-Appellant testified that in August 2016 and during all service attempts testified to by Zendano, she had no association with the address of 2910 Highland Avenue, Apartment 21C, Niagara Falls, New York. Defendant-Appellant testified that she lived at 2910 Highland Avenue, Apartment 21C, Niagara Falls, New York from September 30, 2014, until July 31, 2015. Defendant-

Appellant offered various documents into evidence, including a Memorandum from the Niagara Falls Housing Authority (Defendant's 1; A 106), which reiterated these move-in and move-out dates relative to this Highland Avenue address. Additionally, a Niagara County Department of Social Services shelter verification (Defendant's 2; A 107-108), a lease agreement (Defendant's 3; A 109) and Defendant-Appellant's 2016 federal tax return (Defendant's 4; A 104-105) were offered by Defendant-Appellant. The shelter verification form notes that it was received by Niagara County Department of Social Services on November 16, 2026, however indicates within the document that the "date tenant moved in" as January 12, 2016. The lease agreement is dated at the top of the document as January 12, 2016, yet within the document indicates that the lease was to begin on January 12, 2017. Defendant-Appellant testified that she filled out the lease agreement and wrote the year 2017 in error. The document also shows a stamp from the Niagara County Department of Social Services dated May 23, 2016. The federal tax return is undated, but notes the address of 453 ½ 5th Street, Niagara Falls, NY 14301 as Defendant-Appellant's home address for the 2016 return. At the hearing, the Court reserved decision on the admissibility of these documents, however, in its written Decision and Order, admitted these documents into evidence.

Following the traverse hearing, Judge James J. Faso, Jr. issued a Decision, dated May 13, 2022, finding that service of process was properly effectuated upon the Defendant-Appellant, denying Defendant-Appellant's motion to vacate the default judgment. The lower court held that "service of process was effectuated on the Defendant properly in this case," finding that, "although the process server was unable to provide his log book or notes, his recollection of the case and the detail and

specificity of the affidavit of service coupled with his investigatory efforts at the time he was attempting service all comply with the statute and his obligations and duties as a process server exercising due diligence."

Appellate Argument

Defendant-Appellant appeals on the basis that the lower court failed to evaluate a legitimate claim of improper service and never decided whether the Court had personal jurisdiction over the Defendant-Appellant. Defendant-Appellant argues that, in order for "nail-and-mail" service to be utilized in accordance with CPLR §308(4), personal service or substitute service must first be attempted. Additionally, Defendant-Appellant argues, "nail-and-mail" service must be made at the "actual dwelling place" of the person being served, not the "last known address," and, at the time of service, the address of service was not Defendant-Appellant's actual dwelling place. Defendant-Appellant argues that the failure to strictly adhere to CPLR §308(4) is fatal, that Plaintiff-Respondent therefore did not sustain his burden at the traverse hearing, and that the lower court's decision was against the weight of the credible evidence.

Plaintiff-Respondent, in their response, argued that they met their burden at the traverse hearing, by a preponderance of the evidence, that Defendant-Appellant was properly served under CPLR §308(4). Plaintiff-Appellant argues that the lower court's factual and credibility determinations are entitled to great deference on appeal. Moreover, Plaintiff-Respondent argues, Defendant-Appellant did not, through her testimony and documents received into evidence, effectively rebut the presumption of proper service established at the traverse hearing through the process server.

The Court has reviewed the record below and written submissions of the parties.

CPLR 308(4) and Review on Appeal

CPLR §308 sets out the methods by which personal service upon a natural person shall be made. Personal service may be effectuated by delivering the summons within the state to the person to be served (CPLR §308[1]); or 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 ... (CPLR §308[2]).

Where service under CPLR §308(1) and CPLR §308(2) cannot be made with due diligence, pursuant to CPLR §308(4), the "affix-and-mail" or "nail-and-mail" provision, personal service may be accomplished 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 mailing the summons to such person at his or her last known residence. Consequently, service under CPLR §308(4) first requires a showing that service under paragraphs (1) and (2) could not be performed with "due diligence." Then, to properly effect substituted service under CPLR §308(4), the summons must be affixed to the door of defendant's "actual place of business, dwelling place or usual place of abode" and, applicable here, mailing it to such person at his or her last known residence.

At a traverse hearing, the plaintiff bears the burden of proving personal jurisdiction by a preponderance of the evidence. Further, '[i]t is * * * well established that matters of credibility are properly determined by the hearing court, whose decision

should not be disturbed if supportable by a fair interpretation of the evidence' " *Torres v. Corpus*, 131 AD2d 463 (2nd Dept 1987). Here, the lower court determined that the process server acted with due diligence. Giving deference to the lower court's credibility determinations, a fair interpretation of the evidence at the traverse hearing would support a finding that the process server acted diligently in attempting to serve the Defendant-Appellant in a manner contemplated by CPLR §308(1) or CPLR §308(2). However, the inquiry does not end there. The Plaintiff-Respondent was also tasked in establishing at the traverse hearing, by a fair preponderance of the evidence, that when diligent efforts to serve under CPLR §308(1) and CPLR §308(2) proved fruitless, the summons was affixed at the Defendant's "actual place of business, dwelling place or usual place of abode" at the time service was effectuated (in addition to mailing to Defendant's last known address). A postal check by a non-testifying third party, the process server's observations of mail bearing Defendant-Appellant's name in the mailbox, as well as a neighbor stating, "apparently she's not home" or "well, she ain't there right now" (both of which were testified to by the process server), does not, upon this Court's review, tip the scale in favor of Plaintiff-Respondent establishing, by a preponderance of the evidence, that address as Defendant-Appellant's "dwelling place" or "usual place of abode" on the date of service. Rather, accepting everything that the process server testified to as factual and credible, his testimony established, at best, that he exercised due diligence in attempting service under CPLR §308(1) and CPLR §308(2), and, when those efforts were fruitless, affixed the summons and complaint to the last known address of Defendant-Appellant. The term "dwelling" or "usual place of abode" may not be equated with the "last known residence" of the defendant (See *2837*

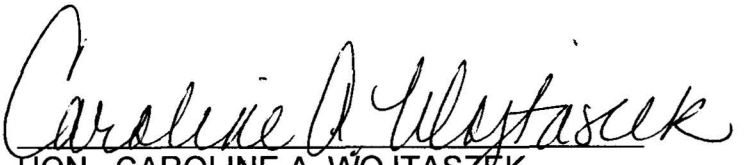
Bailey Corp v. Gould 143 AD2d 523 [4th Dept 1988]) and affixing the summons and complaint on the door to the defendant's last known address is insufficient to constitute valid service of process on defendant. *Olscamp v. Fasciano*, 118 AD3d 1472 (4th Dept 2014); see also *Gilbert v. Lehman*, 73 AD2d 793 (4th Dept 1979). Thus, while a "last known residence" suffices for the mailing requirement, it does not suffice for the affixing requirement. (See *Feinstein v. Bergner*, 48 NY2d 234 [1979]; see also *Commissioners of State Ins. Fund v. Khondoker*, 55 AD3d 525 [2nd Dept 2008]).

Although the burden remains on Plaintiff-Respondent, it should also be noted that Defendant-Appellant testified at the traverse hearing that she did not receive actual notice of process, and, at the time of the service, she was no longer living at the Highland Avenue address. The memo from the Niagara Falls Housing Authority, which was received into evidence by the Court, corroborated her testimony that the Highland Avenue address was not her "actual place of business, dwelling place or usual place of abode" on August 8, 2016. Defendant-Appellant had moved out of this residence on July 31, 2015, over a year prior to the date the summons was affixed to the Highland Avenue address. Moreover, the record contains no evidence that the Defendant-Appellant engaged in conduct calculated to prevent the Plaintiff-Respondent from learning her actual dwelling place. (See, *Feinstein v. Bergner*, supra).

This Court therefore finds that the weight of the credible evidence adduced at the traverse hearing fails to support, by a preponderance of the evidence, that Plaintiff-Respondent met their burden to establish that proper service was relative to Defendant-Appellant as required under CPLR §308(4). Since the statutory provisions for substituted service under CPLR §308(4) were not complied with, the lower court did not

obtain personal jurisdiction of the case. Absent proper service to achieve jurisdiction, a default judgment is a nullity and must be vacated (*Feinstein v. Bergner*, supra; *Sapienza v. Haag*, 89 AD2d 816 [4th Dept 1982]). This Court therefore reverses the decision and order of the lower court and grants Defendant's motion to vacate the default judgment and dismiss the complaint.

DATED: August 21, 2023



HON. CAROLINE A. WOJTASZEK
NIAGARA COUNTY COURT JUDGE