

**American Healthcare Supply, Inc. v Conva-Aids
Inc.**

2008 NY Slip Op 30436(U)

February 3, 2008

Supreme Court, Nassau County

Docket Number: 6082-07/

Judge: James P. McCormack

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

SUPREME COURT- STATE OF NEW YORK

Present: HON. JAMES P. McCORMACK, Acting Justice of the Supreme Court

TRIAL/IAS, PART 51
NASSAU COUNTY

AMERICAN HEALTHCARE SUPPLY, INC.,

Plaintiff,

Index No.: 016082/07

Motion Seq. No.: 001, 002

Submission Date: 11/14/07

-against-

CONVA-AIDS INCORPORATED d/b/a NEW
YORK HOME HEALTH CARE EQUIPMENT,

Defendant.

The papers read upon this Motion:

Notice of Motion.....X
Notice of Cross Motion and Opposition to Order to Show Cause.....X
Reply Affirmation and Opposition to Cross Motion.....X

Plaintiff, American Healthcare Supply (hereinafter "American") moves this court for an order pursuant to CPLR § 3215 granting default judgment in its favor against defendant, Conva-Aids Incorporated d/b/a New York Home Health Care Equipment (hereinafter "Conva-Aids") in the amount of \$85,337.85 with interest from April 13, 2007. Defendant Conva-Aids cross-moves this court for an order pursuant to CPLR § 3211(a)(2) dismissing this action for lack of jurisdiction, or in the alternative, pursuant to CPLR § 3012(d) extending the defendant's time to answer.

This action was brought on behalf of the plaintiff to recover the sum of \$85,337.86, plus interest from April 13, 2007, for goods allegedly delivered by plaintiff to defendant between February 23, 2007 and April 13, 2007. Plaintiff seeks a default without indicating anywhere in his papers when the Summons and Complaint was filed and served. An examination of the affidavit of service, signed by David Kleinberg, and submitted to the court as exhibit "A", indicates that the Summons and Complaint was served on defendant corporation by serving Ms. Sejal Dalal on September 21, 2007 at 12:00 p.m.. The affidavit also indicates that the deponent "knew said individual to be AUTHORIZED to accept service."

Defendant, cross moves by arguing that service of the Summons and Complaint has not been completed, and has provided an affidavit of Harry Ruddy, the President of defendant corporation, to establish that service of process was not made upon the defendant corporation pursuant to CPLR § 311 (a)(1). Mr. Ruddy unequivocally states that Sejal Dalal is a clerk that worked in the office and was not authorized to accept service of process. In addition, he states, the clerk, Ms. Dalal, told the process server she was not authorized to accept process and the man just shrugged and walked away.

The court must deal first with issue of jurisdiction before the issues of default or extending the time to file can be addressed. The question presented is whether the corporation was properly served pursuant to CPLR § 311 (a)(1) when the process server delivered the Summons and Complaint to Ms. Dalal, a clerk. CPLR § 311 (a)(1) provides that personal service upon a corporation, foreign or domestic, shall be made 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”.

In, *Fashion Page v. Zurich Ins. Co.*, 50 N.Y.2d 265, the Court of Appeals held that “a corporation may assign the task of accepting process and may establish procedures for insuring that the papers are directed to those ultimately responsible for defending its interests...Reliance may be based on the corporate employees to identify the proper person to accept service. In such circumstances, if service is made in a manner which, objectively viewed, is calculated to give the corporation fair notice, the service should be sustained”.

In the present case, the affidavit of the process server gives no indication what position or title Ms. Dalal held or whether he made such an inquiry (*Hailey v. Hyster Company, Inc.*, 190 A.D.2d 711). Rather, the affidavit states, in a conclusory manner, that the process server “knew said individual to be AUTHORIZED to accept service”. The basis of that knowledge is not contained within the affidavit. In opposition to that affidavit, the defendant has provided the court with an affidavit of the President of the corporation stating that he knows, “all of the officers and employees of the defendant corporation and their positions. Sejal Dalal is a clerk working in our office. [and] She is not authorized to accept service of process”.

The plaintiff has the burden of proving that jurisdiction has been obtained over the defendants by proper service of process (*see Spangenberg v. Chaloupka*, 229 A.D.2d 482; *Lexington Ins. Co. v. Schuyler Bumpers*, 125 A.D.2d 554). As a general rule, a process

server's affidavit of service constitutes prima facie proof of service (*see Kaywood v. Cigpak, Inc.*, 258 A.D.2d 623; *Manhattan Sav. Bank v. Kohen*, 231 A.D.2d 499).

However, where as in this case, the defendant provides the court a sworn affidavit denying that service was effectuated , the affidavit of service is rebutted and jurisdiction must be established by a preponderance of the evidence at a hearing (*see Elm Management Corp. v. Sprung*, 33 A.D.3d 753; *Matter of Griffin v. Griffin*, 215 A.D.2d 386; *D.H. Grosvenor, Inc. v. Fur Galleria*, 202 A.D.2d 548; *Lexington Ins. Co. v. Schuyler Bumpers, supra*)

The foregoing contradictory affidavits raise an issue of fact regarding the nature of the employment of Ms. Sejal Dalal and the extent to which she did or did not have the authority to accept service on behalf of the defendant corporation (*see Colbert v. International Sec. Bureau, Inc.*, 79 A.D.2d 448; *Todaro v Wales Chemical Co.*, 173 A.D.2d 696). Accordingly, the motion to dismiss will be decided after a hearing is held to determine if the defendant corporation was properly served (*see Matter of Estate of Gottesman*, 127 A.D.2d 563).

Although defendant has moved this court to dismiss this action for lack of jurisdiction, they have also, in the alternative, asked for the court to extend the time for defendants to answer and simultaneously to direct that the plaintiff accept the defendant's Answer which was previously served. The court cannot consider the defendant's request to extend time to answer and direct the plaintiff to accept the Answer due the jurisdictional question that has been raised as to whether or not proper service was

effectuated. It is “axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void” (see *Elm Management Corp. v. Sprung*, 33 A.D.3d 753, quoting, *McMullen v. Arnone*, 79 A.D.2d 496, 499). The fact that defendant subsequently received notice of the action does not serve to render potentially improper service valid (see *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111). Accordingly, it would be error for this court to grant the defendant’s motion to extend the time to answer and deem its Answer timely served prior to resolving the issue regarding whether the defendant was properly served.

Accordingly, defendant’s motion to extend time to answer and deeming its Answer timely served is denied pending the hearing to determine whether service of process was proper and whether the court has obtained jurisdiction over the defendant. Defendant is granted leave to renew the motion if the court makes the determination, after a hearing, that service was proper and that jurisdiction was obtained.

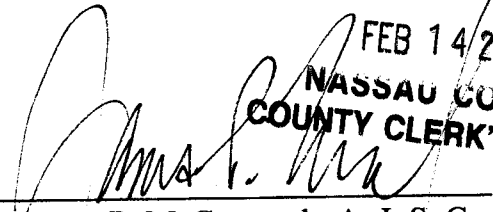
Similarly, the question of jurisdiction raised by the defendant in both their Answer and the Motion to Dismiss under motion sequence number two, renders the plaintiff’s request for a default judgment, under motion sequence number one, impossible to decide on the merits. The plaintiff moved for default judgment on October 21, 2007, a mere twenty-one days after the Summons and Complaint was allegedly served on September 21, 2007. The defendants served their Answer on October 15, 2007, approximately twenty-four days after the Summons and Complaint was allegedly served. The court can

not grant a default judgment without first resolving the outstanding issue regarding the service of process and whether the court has acquired jurisdiction over the defendant corporation. If in fact service had not been effectuated, the court would have no jurisdiction over the default judgment motion or the motion to extend time to answer and any further proceedings would be a nullity (*Mayers v. Cadman Towers, Inc.*, 89 A.D.2d 844, quoting *McMullen v. Arnone*, 79 A.D.2d 496, 499).

Notwithstanding the outstanding jurisdictional question, the court must nonetheless note, the delay complained of by the plaintiff is approximately four days. In view of the very short delay, the absence of any apparent prejudice to the plaintiffs, the existence of a possible meritorious defense, the lack of willfulness on the part of defendants and the public policy in favor of resolving cases on the merits, it is difficult for this court to apprehend the plaintiff's argument in favor of their motion for default judgment. (*see Jolkovsky v. Legeman*, 32 AD3d 418; *Rottenberg v. Preferred Prop. Mgt., Inc.*, 22 AD3d 826; *Kaiser v. Delaney*, 255 A.D.2d 362; *Robles v. Grace Episcopal Church*, 192 A.D.2d 515). However, in the event the court finds jurisdiction was acquired over the defendant corporation when the plaintiff served the clerk, Ms. Dalal, the plaintiff may then renew their application for a default judgment if deemed necessary

This constitutes the Decision and Order of the Court.

Dated: February 3, 2007
Mineola, N.Y.

ENTERED
FEB 14 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE


Hon. James P. McCormack, A. J. S. C.