

**What's Rockin', LLC v DMG USA, Inc.**

2009 NY Slip Op 30940(U)

April 16, 2009

Supreme Court, New York County

Docket Number: 602646/2008

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: LOUIS B. YORK  
J.S.C.

PART 2

Index Number : 602646/2008  
WHAT'S ROCKIN'. LLC  
VS.  
DMG USA, INC.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
APR 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: April 16, 2009

Levy  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

2 ]  
**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2**

-----x  
WHAT'S ROCKIN', LLC and JEANELLA VANDENBERG,

Plaintiffs,

Index No. 602646/2008

-against-

DMG USA, INC. AND DIDIER BAROUKH

Defendants.  
-----x

**LOUIS B. YORK, J.:**

**Background**

Plaintiffs What's Rockin', LLC and Jeanella Vandenberg allege that in the spring of 2007, Defendants DMG USA, Inc. and Didier Baroukh hired them to be sales representatives in New York City. Plaintiffs were to receive commissions for the customers they solicited that purchased garments from Defendants. Plaintiffs worked for Defendants from May, 2007 until Defendants terminated them in June of 2008. Plaintiffs allege that Defendants owe them for the sales commissions they earned during that time. Plaintiffs bring an action to recover the money owed to them plus double damages, attorney's fees and court costs pursuant to N.Y. Labor § 191(c).

DMG is a foreign corporation that has North Miami, Florida as its primary place of business. On September 29, 2008, Plaintiffs attempted to serve process on DMG at its place of business in Florida. The process server, Oswald Diaz, gave the summons and

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complaint to a warehouse employee, Emilio Marquez.

Defendants brought this action on December 9, 2008 to dismiss the complaint against Defendant DMG for lack of jurisdiction due to defective service of process under CPLR § 3211(a)(8) and to dismiss the action against Defendant Mr. Baroukh for failure to state a cause of action. CPLR § 3211(a)(7).

On December 18, 2008, Plaintiffs attempted to remedy the defect in the service by serving Patrick Moyal, the registered agent for DMG. The process server, Zak Okosh, delivered the summons and complaint to the office of Mr. Moyal where employee Jackie Johny accepted the papers and tendered Mr. Moyal's business card.

#### **Discussion**

Personal service upon a corporation shall be made by delivering a 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." CPLR § 311(a)(1). Service upon an out of state Defendant must be made in accordance with New York law. CPLR § 313, Breer v. Sears, Robuck and Co., 184 Misc.2d 916, 922, 709 N.Y.S.2d 798, 802 (N.Y. Sup. 2000). If a corporation appoints an agent to accept service of process, and service is made in a manner reasonably calculated to give the corporation notice, a court will sustain the service. Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 272, 428 N.Y.S.2d 890, 894 (1980).

Defendants contend that service upon warehouse employee Emilio Marquez was defective because he is not an officer, director, or cashier, and he has no authority to accept service of papers. Furthermore, Mr. Marquez did not claim to be a managing agent or officer.

Plaintiffs do not contend that service upon Mr. Marquez was proper. Rather, Plaintiffs argue that they have remedied the defect with proper service upon DMG's registered agent, Mr. Moyal. They request that Defendants withdraw their motion to dismiss.

Defendants contend that the service upon Mr. Moyal is defective and refuse to withdraw the motion. They argue that Plaintiffs did not comply with New York law in that the affidavit of service does not contain a physical description of the person who accepted service. See CPLR § 306(b). Furthermore, the affidavit states that service complied with Florida law, as authorized by CPLR § 313. Defendants also claim that Plaintiffs did not comply with the mailing requirement for substituted service on an individual required by CPLR § 308(2).

If the Court dismisses the action against DMG, Defendants argue that it must also dismiss the action against Mr. Baroukh. They assert that Plaintiffs cannot seek to pierce the corporate veil if DMG is no longer a Defendant. State v. Robin Operating Corp., 3 A.D.3d 769, 771, 773 N.Y.S.2d 137, 139 (3d Dept. 2004).

Plaintiffs contend that Florida law governs the question of who may receive service of process for DMG's registered agent. Shepard v. Morning Pride Mfg., Inc., 138 A.D.2d 74, 76, 530 N.Y.S.2d 305, 307 (3d Dept. 1988). Plaintiffs argue that service upon an employee of the registered agent is proper under Fla. Stat. § 48.081 (3)(a) and § 48.091. Plaintiffs also contend that Ms. Johny was apparently authorized to accept service on behalf of Mr. Moyal as she tendered his business card upon receipt of the papers. They argue that service complied with New York law. Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 428 N.Y.S.2d 890 (1980).

Under Fla. Stat. § 48.081 (3)(a) and § 48.091 service may be made upon an employee of the registered agent if the agent is not available between the hours of 10:00 a.m. and 12 noon, except Saturday and Sunday, but the affidavit of service lists the time as 12:40 p.m.

However, Plaintiffs complied with the relevant New York Statutes, CPLR § 311 (a)(1) and CPLR § 313, by serving process upon an employee of the registered agent of corporate Defendant DMG. CPLR § 308 (2) applies to service upon a natural person. Lakeside Concrete Corp. v. Pine Hollow Bldg. Corp. 104 A.D.2d 551, 551, 479 N.Y.S.2d 256, 257 (2nd Dept. 1984). There is no requirement for a mailing under CPLR § 311(a) (1).

The fact that the affidavit of service does not provide a physical description of the recipient does not invalidate the service. CPLR § 306(b) provides for a physical description in cases involving a natural person so a court can be certain that the correct individual was served. It does not apply to a corporate defendant. Moreover, a defect in an affidavit of service does not establish a lack of jurisdiction. See Mendez v. Kyung Yoo, 23 A.D.3d 354, 356, 806 N.Y.S.2d 67, 69 (2<sup>nd</sup> Dept. 2005).

The purpose of CPLR § 311 is to provide notice to a corporation of the commencement of a suit. It should not be read narrowly. Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 273, 428 N.Y.S.2d 890, 892 (1980). Here, Plaintiff served process upon an employee of the registered agent at the agent's office. This is reasonably calculated to give notice. The process server may rely on corporate employees to identify the proper person to receive service, and Ms. John tendered Mr. Moyal's business card to Mr. Okosh. Id at 272, 894.

Therefore, because service of process complied with CPLR § 311(a)(1) and CPLR § 313, the Court denies Defendants' motion to dismiss.

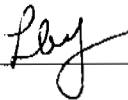
**Conclusion**

Based on the above, therefore, it is

ORDERED that Defendants' motion to dismiss is denied.

Dated: April 16, 2009

ENTER

  
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LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

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