

Hsu v Shields

2012 NY Slip Op 33761(U)

January 19, 2012

Sup Ct, Queens County

Docket Number: 31767 2010

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

cross motion. The two additional purported motions by plaintiffs merely present arguments in opposition to the cross motion and in further support of plaintiffs' motion for a default judgment, and are deemed opposition and reply papers.

Plaintiffs' moving papers do not include proof of service of the summons with notice as required on an application for a default judgment. (CPLR 3215[f].) The affidavit of service on defendants of the summons with notice has been submitted, however, by defendants and in plaintiffs' reply papers. A review of the affidavit demonstrates that plaintiffs were not properly served with process to obtain jurisdiction over them. Insofar as is pertinent to the attempted service made here, service on the individual defendants is governed by CPLR 308 while service on defendant limited liability partnership (LLP) is governed by CPLR 310-a. Plaintiffs' affidavit of service states that the summons with notice was served on defendants by mail and by depositing the summons with Fed Ex Express for overnight delivery. The affidavit, on its face, establishes that service was not made in a manner that satisfies CPLR 308 and/or CPLR 310-a.

While CPLR 2103(b)(6) authorizes service of interlocutory litigation papers by an overnight delivery service after jurisdiction has been secured, CPLR 2103 is not applicable to the service of a summons for the purpose of obtaining jurisdiction. (CPLR art 3; CPLR 2103; see, Siegel, NY Prac § 202, at 343-344 [5th ed]; see also, *Foster v Piasecki*, 259 AD2d 804 [1999]; *Happy Age Shops v Matyas*, 128 AD2d 754 [1987].) Service of process is only effective when it is made pursuant to the appropriate method authorized by CPLR article 3; actual notice of the action is not sufficient to sustain jurisdiction over a person when there has been no compliance with the specific statutory mandates for service. (See, *Macchia v Russo*, 67 NY2d 592, 595 [1986]; *Feinstein v Bergner*, 48 NY2d 234, 244 [1979].) Furthermore, the statutory time period for effecting proper service of the summons with notice expired on May 13, 2011 (CPLR 306-b), before the cross motion to dismiss was made. (Cf., *Rink v Fulgenzi*, 231 AD2d 562 [1996].) In the absence of jurisdiction over defendants, a default judgment is not available and dismissal of the complaint is warranted. (CPLR 3215[f], 3211[a][8].)

Plaintiffs' other contentions are either without merit or do not affect the outcome here. While the individual defendants, as parties to the action, were not entitled to serve or file attorneys' affirmations in lieu of affidavits (CPLR 2106), the truth of the statements in the affirmations was not in issue since plaintiffs' affidavit of service establishes the insufficiency of service on defendants and the resultant lack of jurisdiction. (See

generally, *Matter of Sassower v Greenspan, Kanarek, Jaffe & Funk*, 121 AD2d 549 [1986]; *Kaminsky v Herrick, Feinstein LLP*, 2008 NY Slip Op 30127[U] [2008], *affd* 59 AD3d 1 [2008].) Furthermore, the requirement that a corporation must appear by an attorney does not extend to an LLP (CPLR 321[a]; see, *Gilberg v Lennon*, 212 AD2d 662, 664 [1995]), and defendants' demand for the complaint did not constitute an appearance in the action. (CPLR 3012[b].)

Accordingly, the motion for a default judgment is denied. Defendants' cross motion is granted and the complaint is dismissed.

Dated: January 19, 2012

J.S.C.