

Wells v Continuum Health Partners, Inc.

2012 NY Slip Op 33988(U)

September 14, 2012

Supreme Court, Bronx County

Docket Number: Index No. 21254/2011E

Judge: Alexander W. Hunter, Jr.

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A**

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Varlense Wells,

Index No.: 21254/2011E

Plaintiff,

Decision and Order

-against-

Continuum Health Partners, Inc. and St. Luke's
Roosevelt Hospital Center,

Defendants.
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HON. ALEXANDER W. HUNTER, JR.

The motion by defendants for an order pursuant to C.P.L.R. §3211(a) dismissing plaintiff's complaint against them on the ground that the court does not have jurisdiction over the defendants is hereby reserved and a traverse hearing is hereby ordered.

This cause of action is for medical malpractice and was commenced by the filing of a summons and complaint on or about July 6, 2011. Defendants move to dismiss the complaint against them on the ground that this court does not have personal jurisdiction over defendants. Defendants contend that they are corporations and that personal service upon them pursuant to C.P.L.R. §311 must be made, "...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." Defendants refer to the affidavit of the process server, Joshua Reece, who avers that he delivered the summons and complaint to a Ms. Nafeesa Greatheart. Defendants contend that Ms. Greatheart has secretarial responsibilities and is not an officer, director, managing or general agent, or cashier or assistant cashier of defendants. Moreover, she is not authorized to accept service of process on behalf of defendants. Defendants submit an affidavit from Ms. Greatheart confirming same. Defendants argue that the prevailing case law holds that service of process on a medical office secretary who is not authorized to accept process is not valid.

In her affidavit, Ms. Greatheart contends that she was employed as an Executive Assistant to the Director of Customer Service/Self Pay/Vendor Collection and was not authorized to accept service on behalf of the corporate entity nor had she ever accepted service on behalf of the corporation in the past. She states that she did not recall the name of the person who came to her desk on November 4, 2011 and did not recall if the person was male or female. Moreover, the process server did not inquire as to what her position or title was. Ms. Greatheart avers that she did not tell the person that she was an officer, director or managing agent of the defendant and was authorized to accept service of the summons and complaint. (Exhibit C).

Defendants aver that there is no evidence in the record to suggest that Ms. Greatheart had authority to accept service of process on behalf of the corporation or that she had supervisory duties or administrative powers akin to those of a managing agent for purposes of service of process. Additionally, the process server did not make the necessary inquiry of Ms. Greatheart in order to diligently fulfill his responsibilities as process server. Defendants further assert that Ms. Greatheart, in her affidavit, claims that she received "paperwork" and did not look at it or read it, she simply put it into a "batch" along with other paperwork. (Exhibit C). She also did not recall

signing any documents upon receipt of the paperwork. As such, defendants argue that plaintiff has failed to sustain her burden of establishing that defendants were properly served.

Defendants further point out that plaintiff's summons indicates that the legal department for defendant Continuum Health Partners is located at 555 West 57th Street, New York, New York 10019. The summons also lists an address for St. Luke's Roosevelt Hospital Center at 1000 Tenth Avenue, New York, New York 10019. However, plaintiff attempted to serve the complaint at a building located at 160 Water Street, New York, New York which, according to the affidavit from Ms. Greatheart is where the Customer Service/Self Pay/Vendor Collection department for defendant Continuum Health Partners, Inc., is located. Defendants aver that said department is totally unrelated to defendant's legal department and the location of Ms. Greatheart's employment was in a department that does not accept service of a summons and complaint. Therefore, since there are no signs or directories at Customer Service/Self Pay/Vendor Collection indicating that anyone there is authorized to accept service of a summons and complaint and no one in that department has authority to accept service of the summons and complaint, plaintiff's attempt at service was improper and this court does not have jurisdiction over the defendants.

Plaintiff opposes the motion and argue that defendants were served with the summons and complaint by personal service on November 4, 2011. Defendants' time to respond to the complaint elapsed on November 24, 2011. On February 24, 2012, plaintiff sent defendants a good faith letter advising them that plaintiff would move for a default judgment if they failed to make an appearance within twenty (20) days. Defendants then joined issue by separate verified answers on March 13, 2012. Defendants, thereafter, served amended verified answers on March 20, 2012 in which they raised the defense of lack of jurisdiction due to alleged improper service on the part of plaintiff. Plaintiff submits the affidavit of its process server, Joshua Reece and argues that service on the corporate defendants was proper pursuant to C.P.L.R. §311 as the person who accepted service on their behalf, Ms. Greatheart, held herself out as an agent who was authorized to accept service after Mr. Reece made a reasonable inquiry as to her status as an agent.

Plaintiff cites to case law including the Court of Appeals case of, **Fashion Page, Ltd. v. Zurich Insurance Company**, 50 N.Y.2d 265 (1980), which holds that a corporation is properly served pursuant to C.P.L.R. §311 when the process server serves an employee of the corporation who holds him or herself out as an agent. In that case, the process server went to defendant's offices to inquire as to who could accept service of the summons and complaint. He was thereafter directed to an area where a receptionist was sitting and when the process server asked if the receptionist was authorized to accept service, she stated, "I can take it." **Id.** at 270. Although the Court of Appeals held that the receptionist was not an officer or managing agent of the corporation and she had not been expressly authorized to accept service, the Court upheld the trial court's decision that service was proper. Plaintiff contends that the court's holding was that the process server has a duty to act reasonably by conducting a proper inquiry into an employee's fitness to accept service as an agent of the corporation and it was reasonable for the process server to rely on the representation of the defendant's employees. If that summons was served on the wrong person, then the fault lies with the defendant and not with the process server who did all that should be expected.

In his affidavit, Joshua Reece states that when he arrived at defendants' office suite, he

asked three (3) to four (4) individuals at the front/reception area for a person authorized to accept service of a summons and complaint for a lawsuit against the defendants. He was directed by said individuals, who were employees of defendants, to an area they called the “legal department” for that location. When he reached the legal department, several individuals stated that they worked for defendants’ legal department. Mr. Reece avers that he then asked if any of the individuals were authorized to accept service of a summons and complaint commencing a lawsuit against the defendants. Ms. Nafeesa Greatheart then volunteered that she was authorized to accept service of process. Mr. Reece handed her two (2) copies of the summons and complaint and asked for and received Ms. Greatheart’s name. (Exhibit E). Mr. Reece attests in his affidavit that in effectuating service against the defendants, he, “...merely followed the directions of the Defendants’ employees who directed me to an area where a Ms. Greatheart stated she could accept service. Had Ms. Greatheart never held herself out to be a person who was authorized to accept service of process, I would have never served her with a copy of the Summons and Complaint.” (Exhibit E, para. 9).

Additionally, plaintiff asserts that if the 160 Water Street office is solely a customer service or vendor collection location as defendants allege, then it is unclear why defendants’ employees told Mr. Reece that there was a legal department at the location and that they were authorized to accept service. None of defendants’ employees directed Mr. Reece to another location if no one at the 160 Water Street office was authorized to accept service of process, particularly when Mr. Reece made clear in his affidavit that he announced to defendants’ employees that his purpose for being there was to serve a summons and complaint initiating a lawsuit against the defendants. Plaintiff argues that defendants, a hospital corporation with several locations in the City of New York, are regularly engaged in litigation and that it is “unbelievable” that defendants own employees are ignorant of defendants’ procedures for dealing with process servers. Moreover, Mr. Reece states in his affidavit that he had previously served defendants at the office at 160 Water Street in another action venued in Bronx County. Accordingly, service of papers on Ms. Greatheart, who volunteered that she was authorized to accept service of process, was proper and gave defendants fair notice of the lawsuit against them.

Plaintiff contends that since several facts in Ms. Greatheart’s affidavit contradict several of the facts attested to by Mr. Reece, a hearing is necessary so that plaintiff can establish that defendants were properly served with process and that the court has jurisdiction over them.

In reply, defendants argue that plaintiff’s reliance on **Fashion Page v. Zurich Ins. Co.** (*supra*), is misplaced as the process server in that case specifically told the receptionist he had a summons and complaint to serve. However, in the case at bar, Ms. Greatheart specifically states in her affidavit that she never told the process server that she was authorized to accept service of a summons and complaint. She did not look at the paperwork and did not read it. Moreover, Mr. Reece claims that he asked three (3) to four (4) individuals in the front/reception area of the office for a person authorized to accept service of a summons and complaint. However, Mr. Reece does not indicate the names of the individuals and does not state the titles of the individuals or whether they were in fact employed by defendants. Thus, it is clear that Mr. Reece failed to act with diligence and make a proper inquiry to defendant’s employees in serving the summons and complaint.

C.P.L.R. §3211(a)(8) permits a party to file a motion to dismiss a cause of action on the ground that the court does not have jurisdiction over the person of the defendant.

Defendants herein are alleged to be corporations. C.P.L.R. §311 states that personal service upon a corporation shall be made, "...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..."

In the case at bar, there are two (2) conflicting affidavits. One is from the process server, Joshua Reece, who indicates that after making reasonable inquiry, a receptionist at defendants' offices, Ms. Greatheart advised him that she was authorized to accept service of the summons and complaint on behalf of defendants. The other is from Ms. Greatheart who states that she never informed Mr. Reece that she was authorized to accept service of the summons and complaint and she was merely handed paperwork without being asked what her position or title was.

It is well established that a process server's sworn affidavits of service constitute prima facie evidence of proper service. However, the affidavits can be rebutted by submission of, "...the affidavits of the persons who accepted service denying that they were authorized to do so..." (citations omitted). **Bevilacqua v. Bloomberg, L.P., 70 A.D.3d 411, 412 (1st Dept. 2010)**. The court in that case held that the affidavits were "sufficiently specific" to warrant a traverse hearing. **Id.**

Given the conflicting affidavits submitted by the parties, this court finds that a traverse hearing must be held in order to determine if defendants were properly served with the summons and complaint and if this court has personal jurisdiction over defendants.

The hearing will be held on Thursday, October 18, 2012 at 9:30 A.M. in room 408 of 851 Grand Concourse, Bronx, New York.

Defendants are directed to submit a copy of this order with notice of entry upon the plaintiff and file proof thereof with the clerk's office.

This constitutes the decision and order of the court.

Dated: September 14, 2012



J.S.C.
ALEXANDER W. HUNTER JR.