

**A & W Certified Cooling Sys., Inc. v Yellin**

2014 NY Slip Op 31622(U)

June 24, 2014

Supreme Court, New York County

Docket Number: 160890/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
A & W CERTIFIED COOLING SYSTEMS, INC.,

Plaintiff,

Index No.  
160890/2013

Decision and  
Order

- against -

Mot. Seq. 001

TAMI YELLIN and J. COSTA CONSTRUCTION CORP.,

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, account stated, unjust enrichment and foreclosure of a mechanic’s lien. Plaintiff, A & W Cooling Systems, Inc. (“Plaintiff” or “A & W”), claims to have entered into a contract with defendants, Tami Yellin (“Yellin”) and J. Costa Construction Corp. (“J. Costa”) (collectively, “Defendants”), whereby Defendants allegedly engaged Plaintiff to perform construction services on Yellin’s real property, located at 235 West 76th Street, Apt. 11B, Borough of Manhattan, County of New York, State of New York and identified by the Tax Maps as New York County Block No. 1209, Lot No. 18 (the “76th Street Premises”). Plaintiff claims to have performed under the alleged contract, and to have provided Defendants with invoices for payment, which Defendants accepted without objection but have yet to pay in full.

Plaintiff filed a Notice of Mechanic’s Lien on March 19, 2013. In connection with the instant complaint, Plaintiff filed a Notice of Pendency against Yellin’s real property located at 35 West 95th Street, New York, New York (the “95th Street Premises”).

Defendant Tami Yellin now moves for an Order, pursuant to CPLR § 3211(a)(8), dismissing Plaintiffs’ complaint for lack of personal jurisdiction;

pursuant to Lien Law § 11, vacating the Mechanic's Lien; and, pursuant to CPLR § 6514(a), canceling the notice of pendency filed against the 95th Street Premises. Defendant J. Costa does not appear.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant;

CPLR § 308(4), also known as “nail and mail,” permits personal service upon a natural person, “where service under paragraphs one and two cannot be made with due diligence, 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 either mailing the summons to such person 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[4]).

“No rigid rule has been prescribed for determining whether ‘due diligence’ has been exercised in attempting to effect service so as to permit the use of substituted service pursuant to CPLR 308, subd. 4.” (*Hochhauser v. Bungeroth*, 179 A.D.2d 431, 431 [1st Dep't 1992]).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1<sup>st</sup> Dept 1991]).

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3 d 459 [1<sup>st</sup> Dept. 2004]).

In the affidavit of Andrew Kao (“Kao”), Plaintiff’s process server, Kao avers that he attempted to serve Yellin at her residence, located at 35 West 95th Street, New York, New York, 10025, on November 26, 2013, at approximately 3:30 p.m. Kao further avers that he observed New York City Department of Buildings work permits posted in the window of the 95th Street Premises, and that, as a result, he attempted to serve Yellin at the 76th Street Premises, which he believed was Yellin’s “alternate address.” Kao avers that he attempted to serve Yellin at the Premises on November 27, 2013, at approximately 1:30 p.m.

Kao further avers that he conducted a search of the New York City Department of Buildings records, which indicated that the 95th Street Premises was Yellin’s business address, as well as her residence. Kao avers that he attempted to serve Yellin at that address on December 3, 2013, at approximately 6:00 p.m.

Kao further avers that on December 3, 2013, at approximately 6:10 p.m., Kao affixed Plaintiff’s summons and complaint to the door of the 95th Street Premises. Kao avers that he mailed Plaintiff’s summons and complaint to Yellin at this address on December 4, 2013.

Yellin argues that Plaintiff’s process server failed to exercise “due diligence” before resorting to the “nail and mail” method of personal service under CPLR § 308(4). Yellin argues that Plaintiff’s process server effectively made one attempt to serve Yellin at her 35 West 95th Street residence before resorting to substituted service, and that this single attempt to serve Yellin at her last known address is insufficient to permit the use of “nail and mail” service, pursuant to CPLR § 308(4). Yellin also argues that Kao is not a licensed process server.

Here, even assuming that Kao attempted to effect service as set forth in his affidavit, Plaintiff’s process server failed to exercise due diligence so as to permit the use of substituted service pursuant to CPLR § 308(4). Accordingly, Plaintiff failed to acquire personal jurisdiction over defendant Yellin.

Section 11 of the Lien Law provides, “Within five days before or thirty days after filing the notice of lien, the lienor shall serve a copy of such notice upon the owner, if a natural person . . . by registered or certified mail addressed to his last known place of residence” (Lien L. § 11).

“The language of Lien Law § 11, however, is clear and unambiguous, and mandates vacatur of mechanic’s liens in the absence of strict compliance by the lienor with the provisions thereof.” (*146 W. 45th St. Corp. v. McNally*, 591 N.Y.S.2d 402, 403 [1st Dep’t 1992] [citations omitted]).

Yellin avers that she resides at the 95th Street Premises. Yellin further avers that she formerly resided at the 76th Street Premises, but that she has not lived there for approximately three years. Yellin argues that Plaintiff mailed the notice of lien to the 76th Street Premises, rather than the 95th Street Premises, and that, as a result, Plaintiff failed to comply with Lien Law § 11’s provision for service on the owner at its last known place of residence. Yellin further argues that Kao identified Yellin’s place of residence as the 95th Street Premises, and that Plaintiff could not have reasonably believed that Yellin resided at the 76th Street Premises.

Here, the affidavit of service of Plaintiff’s notice of mechanic’s lien indicates that Plaintiff served such notice on defendant Yellin at the 76th Street Premises, “by depositing a true copy of the same, enclosed in a certified, registered postpaid, properly addressed wrapper, in an official depository of the United States Postal Service in New York State.” Accordingly, Plaintiff failed to serve Yellin at her last known place of residence, and the lien must be discharged under Lien Law § 11.

CPLR § 6514(a) provides for “mandatory cancellation” of a notice of pendency. This statute provides:

The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a

final judgment against the plaintiff has not been stayed pursuant to section 5519.

(CPLR § 6514[a]).

CPLR § 6512 provides that, “[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed.” (CPLR § 6512).

A notice of pendency is an “extraordinary privilege” that requires “strict compliance with the statutory procedural requirements” (*5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320, 321 [1984]).

“The word abate has been commonly interpreted to mean ‘to put an end to’ or ‘to nullify’ . . . which results when the defendant pleads a matter that defeats the action, either for the time being or permanently. An action which has abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause of action remains.” (*Nastasi v. Nastasi*, 26 A.D.3d 32, 40 [2d Dep’t 2005] [citations omitted]).

Accordingly, dismissal of the instant complaint requires cancellation of the notice of pendency filed against the Premises.

Wherefore it is hereby,

ORDERED that the motion to dismiss Plaintiff’s complaint as to defendant Tami Yellin is granted; and is further

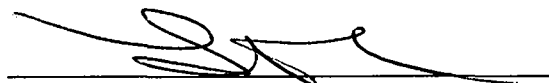
ORDERED that Plaintiff’s claims as against defendant J. Costa Construction Corp. are severed and shall proceed; and it is further

ORDERED that the Clerk of the Court for New York County is hereby directed to take the appropriate action to vacate the notice of mechanic’s lien filed against the real property located at 35 West 95th Street, New York, New York, 10025; and it is further

ORDERED that the Clerk of the Court for New York County is hereby directed to take the appropriate action to cancel and vacate the Notice of Pendency filed in its office on February 11, 2014, by A & W Cooling Systems, Inc., as against the above-named defendants, Tami Yellin and J. Costa Construction Corp., pertaining to the real property located at 35 West 95th Street, Borough of Manhattan, County of New York, State of New York and identified by the tax maps as New York County Block No. 1209, Lot No. 18.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: June 24, 2014



Eileen A. Rakower

**HON. EILEEN A. RAKOWER**