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| <b>Matthews v Chaudhri</b>   |
| 2014 NY Slip Op 34041(U)   |
| March 26, 2019   |
| Supreme Court, Broome County   |
| Docket Number: 2013-2813   |
| Judge: Jeffrey A. Tait   |
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 27th day of June 2014.

PRESENT: HONORABLE JEFFREY A. TAIT  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

**KATHLEEN H. MATTHEWS,**

Plaintiff,

**DECISION AND ORDER**

-against-

**Index No. 2013-2813  
RJI No. 2014-0461-M**

**KAMRAN I. CHAUDHRI, M.D. and  
OPHTHAMALIC ASSOCIATES OF THE  
SOUTHERN TIER, P.C.,**

Defendants.

APPEARANCES:

Joseph Cote, Esq.  
Cote & Van Dyke, LLP  
*Attorneys for Plaintiff*  
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**HON. JEFFREY A. TAIT, J.S.C.**

This matter is before the Court on the motion of the defendant Kamran I. Chaudhri, M.D. to dismiss the complaint of the plaintiff Kathleen H. Matthews based on improper service.

Ms. Matthews commenced this medical malpractice action seeking damages stemming from cataract surgery performed by Dr. Chaudhri on February 1, 2011. The summons and complaint were filed on November 25, 2013. According to the respective affidavits of service, the summons and complaint were served on Ophthalmic Associates of the Southern Tier, P.C.<sup>1</sup> on December 13, 2013 via service on an authorized agent (Nicole Miner) and on Dr. Chaudhri on December 13, 2013 via service on a person of suitable age and discretion (Lori Hunsinger, Technician) and mailing to Dr. Chaudhri at 2517 Vestal Parkway East, Vestal, NY.

In support of this motion, Dr. Chaudhri submits his affidavit, with exhibits, his counsel's affidavit, a memorandum of law, and a letter memorandum of law. In opposition to the motion, Ms. Matthews submits her counsel's affidavit, with exhibits.

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<sup>1</sup>  
Which employed Dr. Chaudhri.

### **Arguments of the Parties**

In his affidavit, Dr. Chaudhri states that he has not been personally served with the summons and complaint or received a copy by first class mail at his residence. He points out that he does not reside at the 2517 Vestal Parkway East, Vestal, NY address, which is where his office is located. He states that the custom and practice of his office staff is not to open mail that is addressed to him if it is marked “Personal and Confidential” and that the summons and complaint provided to him by a staff member was not in an envelope.

In opposition, Ms. Matthews’s counsel asserts that the affidavit of service of the Deputy who served the summons and complaint on a person of suitable age and discretion “details that a copy of the complaint was thereafter forwarded to the Defendant in an envelope marked personal and confidential in compliance with the CPLR” (*see* Van Dyke affidavit at ¶ 3). She points out that Dr. Chaudhri did not actually see the envelope containing the summons and complaint and suggests that his office’s failure to follow the procedure he described is not a basis on which to defeat jurisdiction.

### **Law**

Pursuant to CPLR § 3211(a)(8), a party may move to dismiss one or more causes of action against him or her based on lack of personal jurisdiction. A process server’s sworn affidavit of service constitutes prima facie evidence of proper service (*see Dunn v. Pallett*, 42 AD3d 807, 808 [3d Dept 2007]). However, the law is clear that “a defendant may rebut that affidavit with a ‘detailed and specific contradiction of the allegations in the process server’s affidavit’ sufficient to create a question of fact warranting a hearing” (*U.S. Bank Natl. Assn. v.*

*Vanvliet*, 24 AD3d 906, 908 [3d Dept 2005]; quoting *Bankers Trust Co. of Cal. v. Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003]).

### **Analysis**

On its face, the affidavit of service with respect to Dr. Chaudhri demonstrates proper service, as it indicates that he was served with a summons and complaint via a person of suitable age and discretion at 2517 Vestal Parkway East, Vestal, NY and that a copy was mailed to him “in a postpaid sealed wrapper” at his “last known residence at 2517 Vestal Parkway East, Vestal, NY.”

The problem here is that 2517 Vestal Parkway East, Vestal, NY is the address for Dr. Chaudhri’s office and not his residence. CPLR § 308(2) requires that envelopes mailed to a business address pursuant to that section bear the legend “Personal and Confidential.”

As noted above, Dr. Chaudhri states that his office’s procedure is not to open envelopes marked “Personal and Confidential” and that the summons and complaint he received from a staff member was not in an envelope. In other words, assuming that the staff member followed the office procedure in that instance would lead to the conclusion that the envelope was not marked “Personal and Confidential.” This would, of course, be clearer if the record contained an affidavit from the (as yet unidentified) staff member who opened the envelope containing the summons and complaint which describes the envelope – or at least the process that he or she followed when opening it. However, no such affidavit was provided.

Similarly, other than the form affidavit of service notarized December 16, 2013, the plaintiff has not submitted an affidavit from the Deputy who served the summons and complaint on Dr. Chaudhri. While the Deputy checked the box indicating that she served a

person of suitable age and discretion, she did not circle, strike out, or otherwise indicate whether the premises at which she served that person was Dr. Chaudhri's "actual place of business—dwelling place—usual place of abode." In addition, the box the Deputy checked for mailing incorrectly indicates that the mailing was to Dr. Chaudhri's "last known residence at 2517 Vestal Parkway East, Vestal, NY," when it is clear that the mailing was actually to his office. Finally, despite plaintiff's counsel's statements to the contrary,<sup>2</sup> the affidavit of service does not indicate that the envelope used to mail the summons and complaint was marked "Personal and Confidential."<sup>3</sup>

In light of the foregoing, there is no way of knowing based on this record whether the envelope containing the summons and complaint which was mailed to Dr. Chaudhri's place of business bore the legend "Personal and Confidential." Ms. Matthews's counsel – who does not have personal knowledge of the particular envelope used to mail the summons and complaint – indicates that it did, while Dr. Chaudhri – who never actually saw the envelope – suggests that it did not.

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In her affidavit, Ms. Matthews's counsel twice references the Deputy having sent the summons and complaint to Dr. Chaudhri in an envelope marked "Personal and Confidential." However, the Court was unable to locate any such notation on the affidavit of service signed by the Deputy. While Ms. Matthews's counsel indicated at oral argument of the motion that the envelopes the deputies use for service of process are pre-stamped "Personal and Confidential," there is no affidavit or other evidence in the record which establishes this.

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This is likely because the pre-printed form language in the mailing section of the affidavit of service provides for mailing to a residence, which does not require that the envelope bear the legend "Personal and Confidential" (*see* CPLR § 308[2]).

As there are issues of fact regarding whether the envelope at issue was marked “Personal and Confidential,” a hearing is appropriate (*see Caci v. State*, 107 AD3d 1121 [3d Dept 2013])[noting that upon a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence]).

Accordingly, **a hearing will be held on that limited issue on Wednesday, October 29, 2014 at 1:00 PM at the Broome County Courthouse in Binghamton, NY.**

The law is clear that Dr. Chaudhri is entitled to dismissal of the action against him unless the plaintiff establishes that the envelope containing the summons and complaint contained the legend “Personal and Confidential” (*see Mastropierro v. Bennett*, 233 AD2d 483 [2d Dept 1996]; *Olsen v. Haddad*, 187 AD2d 375 [1st Dept 1992]).

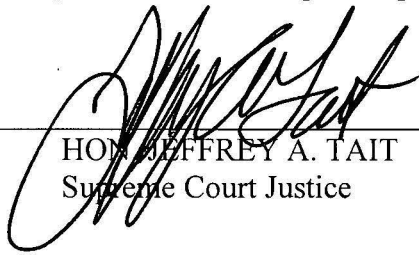
On the other hand, if it is established that the envelope at issue did bear the legend “Personal and Confidential” and that the failure to indicate that in the affidavit of service was an error, the motion to dismiss will be denied. Such a defect or deficiency in an affidavit of service is typically considered “merely a ‘nonjurisdictional irregularity’ and would not defeat the action if shown to be properly commenced” (*Ellis v. Schlanger & Schlanger, LLP*, 41 Misc3d 127(A) [App Term, 1st Dept 2013])[noting that a hearing was required in order to determine whether service was made by first class mail and the envelope used bore the legend “personal and confidential” and any defects in the affidavit of service with respect to those issues would not defeat the action]; *State of N.Y. Higher Educ. Servs. Corp. v. Sparozic*, 35 AD3d 1069 [3d Dept 2006])[misspelling of defendant’s name on summons with notice and affidavit of service were mere irregularities which did not impact jurisdiction]).

**Conclusion**

A decision on the motion to dismiss is held in abeyance pending the outcome of the hearing, which shall be held on Wednesday, October 29, 2014 at 1:00 PM at the Broome County Courthouse in Binghamton, NY.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: September 15, 2014  
Binghamton, New York

  
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HON. JEFFREY A. TAIT  
Supreme Court Justice

**FILED**  
SEP 17 2014  
BROOME COUNTY CLERK