

U.S.A. Recycling v U.F.S. Indus., Inc.

2015 NY Slip Op 32801(U)

April 3, 2015

Supreme Court, Westchester County

Docket Number: 50129/2014

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
U.S.A. RECYCLING,

Plaintiff,

- against -

DECISION & ORDER
Index No. 50129/2014

U.F.S. INDUSTRIES, INC., individually and doing
business as SALLY SHERMAN FOODS & BALDWIN
ENDICO REALTY ASSOCIATES, INC.

Defendant.

-----X
WOOD, J.

By decision and order dated July 31, 2014, this court vacated the default judgment obtained by plaintiff, and referred the parties to the Settlement Conference Part to schedule a traverse hearing to determine whether service of process was effectuated properly upon defendant Baldwin Endico Realty Associates, Inc. ("Baldwin Endico"), on March 21, 2014, when the process server purports to have served it.¹ This court was subsequently assigned by the Trial Ready Part to conduct the traverse hearing. At the hearing, James R. Monteleon, plaintiff's process server, testified on behalf of the plaintiff, and Felix Endico (president of defendant Baldwin Endico) and Michael LoDolce (Vice President of U.F.S. Industries, Inc., doing business as Sally Sherman Foods ["U.F.S./Sally Sherman"] who physically accepted the papers) testified on behalf of the defendant.

¹ The procedural history is more fully set forth in the July 31, 2014 decision and order, and thus will not be repeated.

James R. Monteleon testified that he served the summons and verified complaint on defendant, Baldwin Endico, at 300 N. McQuestern Parkway, Mount Vernon, New York on March 21, 2012 between 9:00 A.M. and 10:00 A.M., by handing the papers to Michael LoDolce. Monteleon also testified that before doing so, he had researched the business address of Baldwin Endico on the "corporations website," and determined that the address was 300 N. McQuestern Parkway. Next, he testified that he was "buzzed in" at two doors of the Sally Sherman Foods warehouse, asked the receptionist for Felix Endico, and was directed to Sally Sherman Vice President of Operations, Michael LoDolce, to whom he gave three copies of the summons and verified complaint (see also Defendant's Ex. B).

LoDolce testified at the traverse hearing that he was the highest ranking person physically present at the premises at the time Monteleon attempted service, and has access to all rooms on site. Felix Endico testified that he is the president of Baldwin Endico, which he states has no office and no mailing address, but that rent checks are accepted, both by mail and in person, at 300 N. McQuestern Parkway, which is the headquarters of U.F.S./Sally Sherman Foods, of which Endico is also an officer. Endico and LoDolce both testified that LoDolce is in no way associated with Baldwin Endico, but rather the other defendant, U.F.S./Sally Sherman Foods. Both Felix Endico and LoDolce testified that LoDolce was not authorized to accept service of process for Baldwin Endico. LoDolce denies accepting service for Baldwin Endico, or advising Monteleon that he was authorized to do so, but did not testify that questioned or rejected service upon Baldwin Endico or that he could not accept on behalf of Baldwin Endico. Both LoDolce and Monteleone stated that "Debbie" or "Debra Gentile" were present on or about the time that the papers were accepted by LoDolce.

Defendant Baldwin Endico contends that LoDolce, as an officer of U.F.S./Sally Sherman, may have been authorized to accept service on behalf of U.F.S./Sally Sherman, but that he had no connection to Baldwin Endico, nor was he designated under CPLR 311 to accept service upon Baldwin Endico. Therefore, Baldwin Endico argues that service was not properly effectuated upon it, and thus, the court has no jurisdiction over it. Plaintiff argues that because LoDolce was the highest ranking person at the physical location that is shared by the two corporations, and that service upon LoDolce is proper. Alternatively, plaintiff argues that the process server had every reason to rely upon the receptionist's and LoDolce's statements that LoDolce could accept service for both corporations.

Thus, the court is presented with essentially a choice between the following two starkly opposed positions: (1) defendant Baldwin Endico's contention that a process server cannot serve a corporation under CPLR 311 without actually serving a person designated under that section; or (2) plaintiff's assertion that if two corporations share a physical location and principal officer, service upon both can be accomplished at the same time by handing two copies of the summons and complaint to a person authorized to accept service for only one of the corporations if the other corporation has no employees or person designated as authorized to accept service.

It is well-settled that the plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence (Mortgage Access Corp. v Webb, 11 AD3d 592-593 [2d Dept 2004]; Bankers Trust Company of California, NA v Tsoukas, 303 AD2d 343-344 [2d Dept 2003]). Also, "in evaluating whether service is to be sustained, the circumstances of the particular case must be weighed," and CPLR 311 is to be liberally construed (Fashion Page LTD. v Zurich Insurance Co. 50 NY2d 265 [1980]; see also Wells v Continuum Health Partners, Inc.

118 AD3d 632 [1st Dept 2014]).

Initially, the court finds that the testimony of Monteleon was credible. The court largely accepts his version of the relevant events. The testimony established that he made appropriate inquiry of the receptionist with whom he spoke with at 300 N. McQuestern Parkway, and that he handed copies of the summons and verified complaint to LoDolce, receiving his business card in return –which bore the title “Vice President of Operations” of Sally Sherman Foods (entered into evidence as Plaintiff’s exhibit “1”). The court also notes that the testimony of LoDolce, while differing with Monteleon in some regard, generally supports Monteleon’s account, except for Monteleon’s claim that LoDolce stated that he was authorized to accept service on behalf of Baldwin Endico.

After carefully considering the evidence, testimony, character and credibility of the witnesses, the court finds that the plaintiff has established by a preponderance of the evidence that Baldwin Endico was properly served with the summons with notice, notice of automatic orders and verified complaint pursuant to CPLR 311. It is noteworthy that Baldwin Endico is a closely held corporation, of which Felix and Bill Endico are the officers. It has no employees, no office, no separate mailing address, no payroll, and no phones, yet it utilizes the employees and physical plant of co-defendant U.F.S./Sally Sherman at 300 N. McQuestern Parkway to conduct its day-to-day operations, which consists of receiving its rent checks. Felix Endico testified that U.F.S./Sally Sherman employees know that mail and checks are to “go to his desk.”

Under these circumstances, the highest ranking person on site--Vice President of co-defendant U.F.S./Sally Sherman Foods--was authorized to accept service on behalf of Baldwin Endico (see Fashion Page LTD. v Zurich Insurance Co. 50 NY2d 265 [1980]). Such

authorization by the corporation is optional, does not need to be expressly given, and need not be done with any particular formality (50 NY2d at 272; CPLR 311). The court also notes that the Second Department has held that service upon an officer of a corporation constitutes service upon the corporation as well as the individual officer (Fernandez v Morales Bros. Realty, Inc. 110 AD3d 676 [2d Dept 2013]). Here, these unique circumstances demonstrate that service was accomplished on both U.F.S./Sally Sherman and Baldwin Endico when the process server served Michael LoDolce at 300 N. McQuestern Parkway, even though he was not an officer of Baldwin Endico. The testimony of Felix Endico established that Baldwin Endico enjoyed what amounts to a parasitic or “piggyback” relationship with U.F.S./Sally Sherman at its location at 300 N. McQuestern Parkway, which entailed U.F.S./Sally Sherman employees acting as agents of Baldwin Endico. Felix Endico’s unique status as an officer of both companies is a compelling factor that weighs heavily in reaching this determination. There can be no doubt that the evidence at the traverse hearing establishes that the process server acted reasonably, with due diligence, and in accordance with direction from U.F.S./Sally Sherman employees who clearly, although perhaps unwittingly, acted as agents of Baldwin Endico on a regular basis. As such, the fault for serving the wrong person lies with the defendant corporation (Belluardo v Nationwide Ins. Co. 231 AD2d 661 [2d Dept 1996]). Finally, it is noteworthy that, if the court were to accept Baldwin Endico’s argument, despite availing itself of a regular corporate presence at U.F.S./Sally Sherman’s physical location, and actually physically receiving its rent checks there, Baldwin Endico would not be subject to CPLR 311 service there, unless Felix Endico himself were come out to accept it. The court declines to accept such a narrow and limited interpretation of CPLR 311. In light of the foregoing, the motion to dismiss by defendant Baldwin Endico

(Sequence No. 2) is denied.

Accordingly, it is hereby

ORDERED, that defendant Baldwin Endico's motion to dismiss is DENIED, in its entirety; and it is further

ORDERED, that the parties shall appear in the Preliminary Conference Part, Courtroom 811, on May 4, 2015 at 9:30 A.M. at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

All other matters not herein decided are denied.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
April 3, 2015


HON. CHARLES D. WOOD, J.S.C.

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