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| People v Ultimate Sec. Force, Inc. |
| 2017 NY Slip Op 30690(U) |
| April 3, 2017 |
| Supreme Court, New York County |
| Docket Number: 450807/16 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE PEOPLE OF THE STATE OF NEW YORK, by.
ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York,

Index No. 450807/16

Mot. seq. no. 002

Plaintiff,

DECISION AND ORDER

-against-

ULTIMATE SECURITY FORCE, INC. a/k/a U.S.F. a/k/a
DELTA SERVICES, INC., and JEFFREYS PAULINOS,
individually, and as principal of ULTIMATE SECURITY
FORCE, INC. a/k/a U.S.F. a/k/a DELTA SERVICES, INC.,
and DELTA SERVICES, INC.,

Defendants.

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BARBARA JAFFE, J.:

For plaintiff:
Jeanna E. Hussey, AAG
Eric T. Schneiderman
Attorney General of the State of New York
Bureau of Consumer Frauds and Protection
Office of the New York State Attorney General
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New York, NY 10271
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By summons and complaint, plaintiff commenced this action against defendants, alleging that they are engaged in fraudulent and illegal conduct, deceptive acts or practices, and false advertising related to their business of placing individuals in positions of maintenance, security, or similar positions. They are also accused of offering worthless training courses and unlicensed career services. Plaintiff contends that defendants violated Executive Law 63(12) by engaging in repeated and persistent fraudulent conduct, violated Executive Law 63(12) and General Business Law (GBL) 349 by engaging in persistent violations of the GBL, violated Executive Law 63(12) and GBL 350 by engaging in false advertising, and violated Executive Law 63(12) and GBL

Article 11 by operating an employment agency without a license and other violations. Plaintiff thus seeks an order permanently enjoining defendants from operating the agency, directing them to make full monetary restitution and pay damages to all injured persons, directing them to disgorge all profits resulting from the fraudulent acts, and additional relief. (NSYCEF 1).

I. PROCEDURAL BACKGROUND

On July 7, 2016, plaintiff filed a proposed order to show cause, seeking a temporary restraining order and preliminary injunction against defendants, and ultimately a permanent injunction. The order to show cause was submitted *ex parte* as plaintiff believed that notifying defendants of the application would harm plaintiff. (NYSCEF 3, 4).

I signed the order to show cause, and directed that plaintiff serve defendants on or before July 8, 2016, by personal delivery of a copy of the order, supporting papers, and summons and complaint to defendants Ultimate Security Force, Inc. a/k/a U.S.F. and Delta Services, Inc., at the address designated by them to receive service of process, and defendant Paulino at his last known address. The return date for the motion was set for July 14, 2016. (NYSCEF 29).

Plaintiff's affidavits of service reflect the following:

- (1) Defendant Delta was served on July 8, 2016, at 10:50 pm by delivery upon the receptionist, whom the process server attested was "an officer of said corporation or other agent authorized to receive service for said corporation";
- (2) Defendant U.S.F. was served at the same date and time, and in the same manner as Delta;
- (3) Defendant Paulino was served at the same date and time, and in the same manner as Delta and U.S.F. by delivery to the receptionist; there is no indication that the papers were mailed to Paulino; and
- (4) Paulino was also served on July 8, 2016, at an address in the Bronx, by delivery to one Miriam Reyes, identified as a person of suitable age and discretion at his

actual place of business, dwelling place, or usual place of abode. According to the process server, Reyes told him that she is Paulino's stepmother and that she lives with Paulino's father. There is no indication that the papers were mailed there.

(NYSCEF 30-33).

By affidavit dated July 13, 2016, a paralegal states that she mailed a copy of the papers to Paulino at a different Bronx address by overnight mail. (NYSCEF 34).

On July 14, 2016, the return date of the motion, Paulino appeared without an attorney. I advised him that corporate defendants must appear by an attorney, and that he could represent himself. I also observed that plaintiff's affidavits of service on defendants appeared to be problematic, as they were allegedly served at their business address at 10:50 pm, and the receptionist was not identified. According to plaintiff's attorney, the affidavits are incorrect as the papers were served at 10:50 am. I granted Paulino's request for time to hire an attorney and adjourned the motion to July 27, 2016. (NYSCEF 58).

Plaintiff claims that on July 14, in court, Paulino admitted service of the papers on him, and consented to service of the papers on behalf of the corporate defendants, and to the jurisdiction of the court on their behalf. (NYSCEF 52). The colloquy follows:

Paulino: I said the paper was . . . it was received on Friday afternoon and it's like too short of a time for me to do anything . . .

...

Plaintiff's counsel: Your honor, he's conceded that he's been served. We are willing to give him additional time, but as long as he concedes that the corporation has received service of process as well.

Paulino: Excuse me? If I received service of process?

Counsel: The papers were filed.

Paulino: Yes, they were sent, but it was just too late for me to do anything to . . .

...

Counsel: At the same time, Your Honor, that he consents that the corporations have been served.

Court: I'll look into that

(NYSCEF 58).

An admission that papers are received does not constitute an admission of service of process. (). Rather, I rebuffed counsel's disingenuous attempt to obtain from an unrepresented individual an admission on the record. (NYSCEF 58).

On July 18, 2016, plaintiff filed corrected affidavits of service, reflecting that U.S.F., Delta, and Paulino had been served at 10:50 am, rather than pm. (NYSCEF 35, 38). Plaintiff also filed an affidavit of service reflecting that it served Paulino at the second Bronx address on July 13, 2016, by delivering the papers to a Madia Espino, identified as a resident of the apartment along with Paulino, and mailed the papers to him; the process server states that the address is Paulino's actual place of business, dwelling place, or usual place of residence. (NYSCEF 37).

On July 27, 2016, the motion's adjourned date, Paulino appeared without an attorney and stated he had been unable to find one. I continued the TRO, and directed Paulino to file an answer. (NYSCEF 39).

On September 12, 2016, plaintiff filed an affidavit of service, providing that on July 8, 2016, it served Paulino with the order to show cause and other papers by mailing them to him in a "sealed pre-paid package" to the address in the Bronx where it had served Reyes. (NYSCEF 47).

Plaintiff now moves for a default judgment against defendants. By affidavits of service filed on December 7, 2016, plaintiff states that it served defendants U.S.F. and Delta with a copy of the notice of motion. (NYSCEF 63, 65). No affidavit is filed for service on Paulino.

II. ANALYSIS

Pursuant to CPLR 3215, a default judgment may be entered upon a party's failure to answer or appear timely. The moving party must file proof of service of the summons and complaint along with proof of the facts constituting the claim and default. (CPLR 3215[f]).

The mode of service provided for in an order to show cause must be followed literally and is jurisdictional in nature. (*Gonzalez v Haniff*, 144 AD3d 1087 [2d Dept 2016]; *Smith v New York County Dist. Attorney's Office*, 104 AD3d 559 [1st Dept 2013] [failure to serve respondent as directed by order to show cause resulted in lack of jurisdiction and required dismissal of proceeding]).

A. Service on Paulino

Pursuant to CPLR 308, service on a natural person may be made, as pertinent here, by delivering the summons within the state to the person to be served, otherwise known as personal delivery (CPLR 308[1]), or by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode to the person to be served and by mailing the summons at his or her last known residence, by first-class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, otherwise known as delivery and mailing or substitute service (CPLR 308[2]). The

delivery and mailing must be made within 20 day of each other and proof of service must be filed with the court within 20 days of the later of the delivery or mailing; service is complete 10 days after the filing. The proof of service must identify the person of suitable age and discretion. (CPLR 308[2]).

“Personal delivery” is service pursuant to CPLR 308(1) or by delivery in hand to the person to be served. (*Ntl. Bank of N. New York v Grasso*, 79 AD2d 871 [4th Dept 1980]). Thus, delivery of process to another person does not constitute personal delivery to the person to be served, even if that person immediately gives the process to the person to be served. (*Macchia v Russo*, 67 NY2d 592 [1986]). If service is not performed correctly, it does not matter if the party to be served receives notice of it. (*Id.* at 595).

Here, plaintiff failed to serve Paulino by personal, in-hand delivery to him. Rather, plaintiff served him by substitute service to a receptionist at his alleged place of business, and by substitute service to his alleged stepmother at the address where his father resides. There is no indication that petitioner resided or used to reside at that address with his father and stepmother. Plaintiff’s additional substitute service on Paulino on July 13, 2016, is irrelevant as the order to show cause required service by July 8, 2016. However, the process servers in the two affidavits reflecting service on Paulino at two different Bronx addresses each swear that the address where they served Paulino was his actual dwelling place or usual place of residence, which is contradictory and inconsistent.

Moreover, plaintiff fails to establish that it mailed the papers to Paulino after substitute service on him on July 8, 2016 by first-class mail and in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or

otherwise, that the communication is from an attorney or concerns an action against the person to be served. (CPLR 308[2]).

As plaintiff failed to serve Paulino as required by the order to show cause, it has not established personal jurisdiction over him. (*Macchia*, 67 NY2d at 592). That he received the papers or had notice of them is of no moment. (*Id.*). Nor did he concede the propriety of service. Plaintiff also failed to submit proof that it served the instant motion on him.

B. Service on corporate defendants

Pursuant to CPLR 311(a)(1), personal service on a corporation may be made, as pertinent here, by delivering process 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.

Plaintiff served U.S.F. and Delta by delivering the papers to a receptionist, whom the process server conclusorily states is an officer of the corporations or other agent authorized to receive service for the corporations, which is insufficient proof that the corporation was served personally and properly. (*See Austrian Lance & Stewart, PC v Rockefeller Ctr., Inc.*, 163 AD2d 125 [1st Dept 1990] [receptionist is not generally person authorized to accept service for corporation defendant]; *see eg Hossain v Fab Cab Corp.*, 57 AD3d 484 [2d Dept 2008] [personal jurisdiction not obtained over defendants as process server served process upon receptionist and no evidence offered that receptionist was officer, director, managing agent, cashier, or agent authorized by appointment to accept service on defendants' behalf]; *Gleizer v Am. Airlines, Inc.*, 30 AD3d 376 [2d Dept 2006] [service not properly made on corporation pursuant to CPLR 311 as process server handed papers to receptionist, and there was no evidence that receptionist was

agent authorized by appointment or law to accept service on corporation's behalf]; *Hoffman v Petrizzi*, 144 AD2d 437 [2d Dept 1988] [same]).

Moreover, plaintiff's first affidavits of service on the corporations reflect that they were served at 10:30 pm on a weekday night, which seems improbable as most businesses are not open that late on a weeknight. When I pointed that out to counsel at the first return date, she said it was a mistake and that service was made at 10:30 am. While plaintiff thereafter filed corrected affidavits of service with the time of service at 10:30 am, plaintiff did not submit an affidavit from the process server attesting to the fact that he made service during the day and not at night and that his first affidavit was erroneous. Nor did counsel submit a copy of the process server's log which would have reflected the accurate time of service.

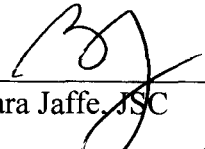
As Paulino neither conceded that the corporations were personally served, nor did he consent to jurisdiction over them, plaintiff fails to establish that the corporate defendants were properly served. Given the important goal of seeing that the public is not harmed in the manner alleged in the complaint, plaintiff's apparent inattention to the pertinent rules governing service of process is disturbing.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a default judgment is denied.

ENTER:



Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: April 3, 2017
New York, New York