

**Spectrum Rests. LLC v Chinese Staff & Workers'  
Assn., Inc.**

2017 NY Slip Op 30985(U)

May 8, 2017

Supreme Court, New York County

Docket Number: 159737/16

Judge: Gerald Lebovits

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 7**

SPECTRUM RESTAURANTS LLC,

Index No.: 159737/16

Plaintiff,

- against -

**DECISION/ORDER**

CHINESE STAFF AND WORKERS'  
ASSOCIATION, INC., 318 RESTAURANT  
WORKERS UNION, and NATIONAL  
MOBILIZATION AGAINST SWEATSHOPS, INC.,

Defendants.

GERALD LEBOVITS, J.:

This action arises out of an ongoing dispute between plaintiff Spectrum Restaurants LLC, which owns and operates Manhattan Valley restaurant, located at 2636 Broadway, New York, New York (the restaurant), and defendants Chinese Staff and Workers' Association, Inc. (CSWA), 318 Restaurant Workers Union (Union), and National Mobilization Against Sweatshops, Inc. (NMASS), who have been picketing outside plaintiff's restaurant to protest labor practices. The complaint alleges three causes of action, for private nuisance, defamation, and tortious interference with business, and seeks monetary damages and injunctive relief.

Plaintiff moves for a preliminary injunction during the pendency of this action, and ultimately seeks a permanent injunction, to enjoin defendants from continuing picketing activities in front of the restaurant that allegedly involve excessive noise and defamatory signs and statements, and interference with people going in and out of the restaurant. Defendants oppose the motion and cross move to dismiss the complaint, based on, among other grounds, improper service and failure to state a cause of action.

The court turns first to the branch of defendants' cross motion seeking dismissal of the complaint, pursuant to CPLR 3211 (a) (8), for lack of jurisdiction based on improper service. Defendants contend that they were not served in accordance with the requirements of CPLR 311 (a) (1). The order to show cause by which plaintiff brought the instant motion directed service of the summons and complaint, and the motion papers, to be made on defendants by "personal service."

"[P]ersonal service on a corporation may only be made pursuant to CPLR 311." *LTD Trading Enters. v Vignatelli*, 176 AD2d 571, 571 (1st Dept 1991); *see also Astrologo v Serra*, 240 AD2d 606, 607 (2d Dept 1997) (court has no authority to direct service upon corporate defendants other than in accordance with CPLR 311). CPLR 311 (a) (1) provides that personal service on a corporation shall be made by delivering the summons "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.” *Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 271 (1980); accord *Faravelli v Bankers Trust Co.*, 85 AD2d 335, 340 (1st Dept 1982).

“[P]roper service of process is necessary to fulfill the ‘notice’ component of jurisdiction.” *Franklin v Moss*, 2013 WL 5434004, \*1, 2013 NY Misc LEXIS 4391, \*2, 2013 NY Slip Op 32331(U) (Sup Ct, NY County 2013). “Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.” *Macchia v Russo*, 67 NY2d 592, 595 (1986); see *Feinstein v Bergner*, 48 NY2d 234, 241 (1979); *Clarke v Smith*, 98 AD3d 756, 756 (2d Dept 2012); see also *Gonzalez v Haniff*, 144 AD3d 1087, 1088 (2d Dept 2016) (“‘mode of service provided for in the order to show cause is jurisdictional in nature and must be literally followed’” [citation omitted]); *Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 (1st Dept 1996) (same).

“Accordingly, ‘[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents.’ *Raschel v Rish*, 69 NY2d 694, 696 (1986); see *Macchia*, 67 NY2d at 594 (“In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment.”). Defective service “is not cured by the defendant’s subsequent receipt of actual notice of the action, ‘since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court.’” *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 (2d Dept 2009), quoting *Feinstein*, 48 NY2d at 241 (other citation omitted); see also *McDonald v Ames Supply Co.*, 22 NY2d 111, 115 (1968); *People v Ultimate Sec. Force, Inc.*, 2017 WL 1330491, 2017 NY Misc LEXIS 1287, 2017 NY Slip Op 30690(U) (Sup Ct, NY County 2017). “A contrary rule would negate the statutory procedure for setting aside a defectively served summons, since the motion itself is usually evidence that the summons has been received.” *McDonald*, 22 NY2d at 115.

On a motion to dismiss for improper service, plaintiff has the burden to demonstrate that proper service was effectuated. See *Jacobs v Zurich Ins. Co.*, 53 AD2d 524, 525 (1st Dept 1976); *Green Point Sav. Bank v Taylor*, 92 AD2d 910, 910 (2d Dept 1983); see also *Stewart v Volkswagen of Am., Inc.*, 81 NY2d 203, 207 (1993) (“once jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites”). “In evaluating whether service is to be sustained, the circumstances of the particular case must be weighed” (*Fashion Page*, 50 NY2d at 273), and CPLR 311 is to be “liberally construed.” *Id.* at 271; see *Wells v Continuum Health Partners, Inc.*, 118 AD3d 632, 632 (1st Dept 2014).

Thus, under some circumstances, service on a corporation may be sustained, even when the person served is not specifically authorized in CPLR 311 (a) (1), if that person claims to be authorized to accept service, or corporate employees identify the person as authorized to accept service, and the process server reasonably relies on such representations. See e.g. *Fashion Page*, 50 NY2d at 273 (service on secretary, identified by defendant’s receptionist and secretary herself as authorized to accept service, was valid); *Arvanitis v Bankers Trust Co.*, 286 AD2d 273, 273-

274 (1st Dept 2001) (service upheld where building security guard referred process server to defendants' mail office and process server reasonably believed that person who accepted papers was authorized); *American Home Assur. Co. v Morris Indus. Bldrs., Inc.*, 176 AD2d 541, 543 (1st Dept 1991) (service upheld where process server made proper inquiry and was directed to secretary who previously accepted legal papers).

Where, however, the person served is not authorized to accept service and the process server makes no inquiry to determine whether the person is authorized or what relationship the person has to the defendant, service generally will not be sustained. *See Fashion Page*, 50 NY2d at 273 (delivering summons to building receptionist without any inquiry as to whether she was company employee would not be sufficient); *Hailey v Hyster Co.*, 190 AD2d 711, 712 (2d Dept 1993) (service on accounts payable clerk, not authorized to accept service, improper where process server made no inquiry as to recipient's authorization to accept service or relationship to defendant); *Persaud v New York City Health & Hosp. Corp.*, 183 AD2d 705, 705 (2d Dept 1992) (service improper where administrative assistant, not authorized to accept service, agreed to take papers but process server made no inquiries as to her authority or relationship to defendant); *Hoffman v Petrizzi*, 144 AD2d 437, 438-439 (2d Dept 1988) (service invalid where process server left papers with receptionist without further inquiry).

In addition, "New York Courts have consistently held that service of process on one corporation does not confer jurisdiction over another, 'even where one corporation may wholly own another, or where they may share the same principals.'" *McKibben v Credit Lyonnais*, 1999 WL 604883, \*3, 1999 US Dist LEXIS 12310, \*9 (SD NY 1999), quoting *Matter of Crespo*, 123 Misc 2d 862, 865 (Sup Ct, NY County 1984); *see Smith v Giuffre Hyundai, Ltd.*, 60 AD3d 1040, 1042 (2d Dept 2009); *Donley v Gateway 2000, Inc.*, 266 AD2d 184 (2d Dept 2014) (service on corporate employee defective as to other corporation where no showing that corporation served is "so dominated" by other corporation that it appears to be a "mere department"). "The fact that [corporations] have the same address and even may have the same shareholders and officers [also] will not suffice to validate service on one as service on the other." *Rinzler v Jafco Assocs.*, 21 AD3d 360, 362 (2d Dept 2005); *see Pugliese v Paneorama Ital. Bakery Corp.*, 243 AD2d 548, 549 (2d Dept 1997); *see also AICPA v Affinity Card*, 8 F Supp 2d 372, 377-78 (SD NY 1998) (service on one corporation was not service on another despite corporations sharing some employees and having a common address and phone number).

Generally, "[a] process server's affidavit stating that personal service was effected by delivering a copy of the summons with notice to an authorized agent, and providing a description of that person, constitutes prima facie evidence of proper service pursuant to CPLR 311 (a) (1)." *Purzak v Long Is. Hous. Servs., Inc.*, \_\_ AD3d \_\_, 2017 WL 1393666, \*1, 2017 NY App Div LEXIS 2967, \*4, 2017 NY Slip Op 03027 (2d Dept 2017) (citations omitted). However, while "[a] properly executed affidavit of service gives rise to a presumption of valid service . . . it is a [rebuttable] presumption . . . [and] not conclusive proof of service if there is a sworn denial of receipt." *Sutton Pl. Rest. & Bar, Inc. v Garnett*, 20 Misc 3d 1104(A), 867 NYS2d 21, 2008 NY Misc LEXIS 3523, \*\*10-11 (Sup Ct, NY County 2008), citing *Empire Natl. Bank v Judal Constr. of New York*, 61 AD2d 789, 789-790 (2d Dept 1978) (other citation omitted); *see NYCTL*

1998-1 *Trust v Rabinowitz*, 7 AD3d 459, 460 (1st Dept 2004). “Where service of process is denied, the affidavit of service is rendered inconclusive and it is incumbent on the party asserting jurisdiction to demonstrate service by a fair preponderance of the evidence.” *Blue Spot, Inc. v Superior Mdse. Elecs. Co.*, 150 AD2d 175, 176-177 (1st Dept 1989) (citations omitted); see *Velez v Forcelli*, 125 AD3d 643, 644 (2d Dept 2015). Moreover, when “the deficiency of the manner of service is apparent of the face of the affidavit of service, no traverse hearing is necessary” to determine the propriety of service. *Sutton Pl. Rest. & Bar, Inc.*, 2008 NY Misc LEXIS 3523, at \*\*10-11, citing *Weinberg v Hillbrae Bldrs., Inc.*, 58 AD2d 546 (1st Dept 1977); see *Patrick v 118 E. 60th Owners Inc.*, 20 Misc 3d 1131(A), 872 NYS2d 692, 2008 NY Slip Op 51695(U) (Sup Ct, Bronx County 2008).

In this case, according to the affidavit of service of plaintiff’s process server, all three defendants were served at the same time and place, 345 Grand Street, New York, New York, by delivering the summons and verified complaint, memorandum of law, amended order to show cause and affidavits, to a person described as “Male, Chinese/Asian, Black Hair, 60 years old, 175 pounds, 5’5” tall.” Affidavit of Service of Pat Kaegi, NYSCEF Doc. No. 19. The process server does not otherwise identify the person purportedly served; does not attest that the person was an authorized agent for any of the defendants or otherwise had authority to accept service on defendants’ behalf; and does not indicate that any inquiry was made to determine what the person’s relationship was to defendants and whether the person was authorized to receive service on behalf of any one or more of the defendants.

Absent any requisite factual and descriptive information to show that plaintiffs’ summons and complaint were properly served on defendants under CPLR 311, the affidavit of service is defective on its face. See *De Zego v Donald F. Bruhn, M. D., P. C.*, 67 NY2d 875, 877 (1986); *Levin v Dorian*, 171 AD2d 415, 416 (1st Dept 1991) (where affidavit of service did not recite that individual served was authorized to receive service on behalf of corporation, defense of improper service sustained); *Samson Moving & Stor. Corp. v Drake Bus. Sch.*, 2000 WL 33529056, 2000 NY Misc LEXIS 643, 2000 NY Slip Op 40023(U) (Civ Ct, NY County 2000) (service invalid where process server did not attest that person served was defendant’s authorized agent or had authority to accept service on defendant’s behalf); see also *Ainbinder v R.C.R. Contr., Inc.*, 204 AD2d 582, 583 2d Dept 1994) (service on woman identified only as Alyssa “Doe” was faulty where process server failed to ascertain unknown woman’s status with regard to the corporation).

Even if, as plaintiff contends, the affidavit could be entitled to a presumption of validity, that presumption is overcome by the sworn testimony of CSWA employee Irene Shen, which plaintiff does not rebut with any evidence, or even address. See *De Zego*, 67 NY2d at 877. In her affidavit, Ms. Shen avers that she started working at CSWA in November 2016 as an advocate organizer, and has no authority to accept service on behalf of CSWA. Affidavit of Irene Shen, ¶¶ 2, 11, 12. She attests that, on December 1, 2016, a man came into CSWA’s office, during a busy afternoon when about 20 people were in the office, and asked her if she worked there and then handed her an envelope, which she did not know contained legal papers. *Id.*, ¶¶ 3-6, 12. She attests that he then asked her something about NMASS, and she pointed outside to show that its

office was next door, and he then threw two other envelopes onto a chair and left. *Id.*, ¶ 7.

Defendants also submit an affidavit from JoAnn Lum, Executive Director of NMASS, who attests that NMASS and CSWA are independent organizations with separate office spaces. She further attests that she received the summons and complaint in this action only when a NMASS volunteer, who had been at a meeting at CSWA, gave her an envelope and told her it had been left in CSWA's office. Affidavit of JoAnn Lum, ¶¶ 2, 4-7.

In opposition to defendants' cross motion, plaintiff makes no attempt to explain or otherwise address the deficiencies of the affidavit of service, but asserts that a deficient description of the person served does not invalidate service. *See Plaintiff's Memorandum of Law in Opposition to Defendants' Cross Motion* (P. Memo in Opp.), at 22. Contrary to plaintiff's contention, the inadequacies of the affidavit of service are more than mere irregularities in the execution of the affidavit. *Compare Mendez v Yoo*, 23 AD3d 354 (2d Dept 2005) (when service is properly effected, a mistake in the affidavit incorrectly identifying the person served, is a "mere irregularity and not a jurisdictional defect"). Even without consideration of Ms. Shen's controverting affidavit, the affidavit of service does not state that the person served was authorized to accept service on behalf of any of the defendants. Plaintiff makes no effort to correct the defective affidavit of service, by, for instance, offering an amended affidavit of service. *See Matter of Tanash v Amien*, 82 AD3d 1252 (2d Dept 2011) (even where defect was mere irregularity, affidavit of service not valid unless defect cured).

Plaintiff also does not dispute that the defendants are independent corporations, and that three sets of papers were left in CSWA's office without any attempt to serve the other defendants at their places of business. To the extent that plaintiff argues that service nonetheless was proper because "three copies of the papers were all personally served on an agent with apparent authority according to affidavit of service" and all defendants admittedly received the documents (P. Memo in Opp., at 22), the affidavit of service, as previously noted, does not indicate that service was made on a person authorized by any of the corporations to accept service on its behalf. There is, therefore, no merit to plaintiff's contention that service was proper because defendants received actual notice of the action. *See Raschel*, 69 NY2d at 697; *Krisilas*, 63 AD3d at 889.

Defendants have submitted competent, undisputed evidence that plaintiff did not serve an employee or agent who was authorized to accept service, and plaintiff submits no evidence that the person served was authorized or that the process server made any inquiry as to authority or position of the person served, or that the person served made any representation to process server of having authority to receive service. The court thus finds, based on the parties' submissions, that service on defendants was improper. *See Global Connect Strategic Voice of Broadcasting Corp. v Oxford Collection Agency, Inc.*, 50 AD3d 737 (2d Dept 2008) (service improper where no inquiries made by process server and no representations made by recipient); *Borello v Trustees of the Cent. Presbyterian Church*, 233 AD2d 212 (1<sup>st</sup> Dept 1996) (same, finding plaintiff under those circumstances failed to demonstrate that defendants were served in a manner which was calculated to give the corporation fair notice); *see also Kovalesky v A.M.C.*

*Associated Merchandising Corp.*, 551 F Supp 544 (SD NY 1982) (service improper where process server threw papers in corporation’s lobby in front of a receptionist who was not authorized to receive service). In view of defendants’ uncontested evidence and plaintiff’s facially deficient affidavit of service, there are no issues of fact requiring a traverse hearing. See *Alkyha Defense & Logistics, Inc. v D&P Constr., Inc.*, 2015 WL 4656515, 2015 NY Misc Lexis 2882, 2015 NY Slip Op 31479(U) (Sup Ct, Kings County 2015); *Patrick*, 20 Misc 3d 1131(A); see also *Fernandez v Town of Babylon*, 104 AD3d 643 (2d Dept 2013) (affidavit of service and affidavit denying recipient was authorized sufficient to determine service was improper).

Accordingly, it is

ORDERED that defendants’ cross motion to dismiss for lack of jurisdiction is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff’s motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 8, 2017

J.S.C.   
**HON. GERALD LEBOVITS**  
J.S.C.