Auto-Chlor Sys. of N.Y. City, Inc. v Better Living Food Corp.
2018 NY Slip Op 31058(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 157742/2016
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

AUTO-CHLOR SYSTEM OF NEW YORK CITY, INC. d/b/a AUTO-CHLOR SYSTEM OF NEW YORK CITY,

Plaintiff,

- v -

BETTER LIVING FOOD CORP. d/b/a VANDAAG and ELIAS BATALIAS,

Defendants.

INDEX NO. 157742/2016

MOTION DATE 5/8/18

MOTION SEQ. NO. 001

NYSCEF Doc Nos. 2–9 were read on this motion for an order directing the entry of a default judgment.

Motion by Plaintiff Auto-Chlor System of New York City, Inc. d/b/a Auto-Chlor System of New York City ("Auto-Chlor") pursuant to CPLR 2001 for an order granting Auto-Chlor permission to file a late affidavit of service nunc pro tunc and pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Auto-Chlor and against Defendants Better Living Food Corp. d/b/a Vandaag ("Vandaag") and Elias Batalias ("Batalias") is granted in part and denied in part, and the action is dismissed.

BACKGROUND

Auto-Chlor commenced the instant action on September 15, 2016, by e-filing a summons and verified complaint ("Complaint"). As a first cause of action, the Complaint alleges that, on or about June 11, 2010, Auto-Chlor entered into two written agreements with Batalias, both on behalf of Vandaag and as personal guarantor, wherein Auto-Chlor would lease out certain dishwashing equipment to Defendants. The Complaint further alleges that, since March 29, 2012, Defendants have failed to pay as required under the agreements and that $1,850.58 is presently due and owing to Plaintiff as rental arrears on the equipment.

As a second cause of action, the Complaint alleges that Defendants have breached the rental agreements and that, pursuant to an acceleration clause in paragraph seven of each of the contracts, the full amount of the rent, $20,721.09, is due and owing to Auto-Chlor.

As a third cause of action, the Complaint alleges that the contracts provided for an award of attorney's fees and that $7,523.89 is due and owing to Plaintiff for said attorney's fees.

The Complaint alleges, upon information and belief, that Vandaag's principal place of business is located at 103 Second Avenue, New York, New York 10003 (the "Second Avenue

Address") and that Batalias "resides" at 80 Stonehill Drive East, Manhasset, New York 11030 (the "Stonehill Address") "at all times hereinafter mentioned." (Complaint ¶¶ 4–5.) The Complaint also alleges that Defendants have failed to pay Plaintiff "up to the present time." (*Id.* ¶ 7.) The Complaint is dated August 22, 2016, with a verification dated August 30, 2016.

As Defendants have not answered the Complaint or appeared in the instant action, Auto-Chlor now moves pursuant to CPLR 2001 for an order granting Auto-Chlor permission to file a late affidavit of service nunc pro tunc and pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Auto-Chlor and against Defendants.

Plaintiff filed the instant motion on February 26, 2018. Plaintiff submits an "affidavit of conspicuous service," dated December 2, 2016, stating that a Robert Piaskowy of Bruce Schwartz Process served "ELIAS BATALIAS" with process by: (1) on December 1, 2016, at 6:28 p.m., affixing a copy of process at 356 East 50th Street, Apartment A, New York, New York 10022 (the "Apartment A Address"), to the door of the premises, allegedly Batalias' "actual place of abode"; and (2) on December 2, 2016, mailing a copy of process to the Apartment A Address. (Cohen aff, exhibit 4, at 10 [the Piaskowy Affidavit"].)[1] The Piaskowy Affidavit states that the affiant had made two prior attempts to serve process at the Apartment A Address: on November 7, 2016, at 2:44 p.m. and on November 19, 2016, at 7:29 a.m.

Beneath the statements in the Piaskowy Affidavit having to do with the affixing and mailing of process, on a separate line, there is the following statement: "REFUSED TO GIVE NAME." On the next line, there is the following statement: "Deponent spoke to 'JANE DOE' BABYSITTER." On the next line, there begins the following paragraph:

> "Inquired as to the defendants place of business and received a negative reply and confirmed the above address of defendant and asked whether defendant was in active military service of the United States or the State of New York in any capacity, or is a dependant [sic] of anyone in the military and received a negative reply and that the defendant always wore civilian clothes and no military uniform. The source of my information and the grounds of my belief are the conversations and observations above narrated. Upon information and belief [sic] I aver that the defendant is not in the military service of New York State or of the United States as that the term [sic] is defined in either the State or in Federal statutes."

Plaintiff argues that Plaintiff's counsel's office inadvertently did not file the affidavit of service timely. (Cohen aff ¶ 13.) Plaintiff argues that "no party has been or will be prejudiced by plaintiff's inadvertent failure to file Affidavit of Service [sic] after the expiration of the statutory period. (*Id.* ¶ 14.) Plaintiff then requests that the Court deem the Piaskowy Affidavit proper and filed timely and complete on January 2, 2017, 30 days after the service of the summons and

[1] Movant submits a combined "Notice of Motion," "Affidavit in Support Plaintiff's [sic] Motion for Default Judgment and Late Filing of Affidavit of Service" by Robert N. Cohen, and "Affidavit of Facts Upon Application for Default Judgment" by Anthony Cioffi. (NYSCEF Doc No. 2.) Movant's "affidavit" in support is not notarized, but the Court notes in paragraph 1 that the document is referred to as an "Affirmation in Support" and as such will overlook the "affidavit" in the title of the document as a mere irregularity and consider it an attorney's affirmation.

complaint. (*Id.* ¶ 15.) Plaintiff then argues that Defendants would have been in default for failing to answer or appear by February 2, 2017. (Cohen aff ¶ 18.)

Plaintiff further argues, in sum and substance, that it failed to seek a default judgment within one year of Defendants' alleged default because:

> "[w]hile the plaintiff's attorneys timely served the summons and complaint, the affidavit of service was not filed with the Clerk of the Court. Thus upon drafting of the default judgment [sic] our office was unexpectedly met with lack of filing issue [sic] and subsequently attempted to cure said filing [sic]. Due to these efforts the default judgment was not timely filed. Once the same was discovered, we immediately went to work preparing the instant motion for the relief sought herein. Due to these efforts the default judgment is now being filed with a short delay."

(*Id.* ¶ 22.) Plaintiff argues it has a reasonable excuse for its late filing and a meritorious claim demonstrated by its verified complaint, affidavit of facts, and documentary evidence submitted with the instant motion.

The submitted documentary evidence includes two copies of a "Dishwashing Machine Agreement" dated June 11, 2010. (Cohen aff, exhibit 1.) Vandaag's address is listed on the contract as the Second Avenue Address. (*Id.*)

The submission also includes certain invoices dated March 1, 2012, March 29, 2012, and May 3, 2012, which each have Vandaag and the Second Avenue Address in the header. (Cohen aff, exhibit 2.) The May 3, 2012 invoice states "SERVICE SUSPENDED DUE TO NON-PAYMENT." (*Id.* at 3.)

The submission also includes two demand letters dated April 29, 2016, and two "second and final" demand letters dated May 31, 2016. (Cohen aff, exhibit 3.) All four of the letters are addressed to "Mr. Batalias." (*Id.*) On each date, one copy of the letter was addressed to Batalias at "356 E. 50th Street, Apt. 1, New York, NY 10022" (the "Apartment 1 Address") and another copy of the letter was addressed to Batalias at the Stonehill Address.

Plaintiff submits an affidavit of service, dated February 26, 2018, stating that a copy of the instant motion was mailed to Batalias at the Stonehill Address, allegedly his "last known address." (NYSCEF Doc No. 7.)

DISCUSSION

CPLR 2001 provides that, "[a]t any stage of an action . . . the court may permit a mistake, omission, defect or irregularity[] . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded[.]" The Appellate Division, First Department has held that a "[d]elay in filing proof of service under CPLR 308 is merely a procedural irregularity, not jurisdictional, and may be

corrected nunc pro tunc by the court." (*Lancaster v Kindor*, 98 AD2d 300, 306 [1st Dept 1984]; *see also Matter of Savitt*, —NYS3d—, 2018 NY Slip Op 02913, *3 [1st Dept, April 26, 2018].) In the instant motion, Auto-Chlor submits the Piaskowy Affidavit, dated December 2, 2016. Further, Auto-Chlor has requested that the Court, in effect, deem the Piaskowy Affidavit filed timely as of December 22, 2016, 20 days after the date of the Piaskowy Affidavit and the maximum number of days that Plaintiff had to file the affidavit of service timely pursuant to CPLR 308 after service of process was allegedly made. Based upon such a timely filing, Auto-Chlor requests that this Court consider Defendants in default as of February 2, 2017. This calculation accounts both for the ten additional days until service would be complete under CPLR 308 and for the 30 days allowed to a defendant to answer or appear under CPLR 320.

Without yet making any finding regarding Auto-Chlor's request as to Defendants' default, the Court will for the purposes of the instant motion deem the Piaskowy Affidavit timely filed nunc pro tunc as of December 22, 2016.

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Based upon the submitted papers, the Court finds that Defendants have failed to appear or to answer the Complaint. The Court finds further that Auto-Chlor has for the purposes of the instant motion submitted adequate proof of the facts constituting its claims by means of its verified complaint, affidavit of facts, and the contracts, invoices, and demand letters. Nevertheless, significant issues relating to Defendants' alleged default remain.

Assuming for the sake of argument that Defendants defaulted in answering or appearing as of February 2, 2017, Plaintiff has failed to file the instant motion pursuant to CPLR 3215 within a year of Defendants' alleged default. CPLR 3215 (c) provides, in relevant part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." The Appellate Division, First Department has recently defined a showing of "sufficient cause" as the setting forth of "a viable excuse for the delay" and "a meritorious cause of action." (*Selective Auto Ins. Co. of New Jersey v Nesbitt*, —NYS3d—, 2018 NY Slip Op 03616, *1 [1st Dept, May 17, 2018]; *see also Seide v Calderon*, 126 AD3d 417 [1st Dept 2015]; *Diaz v Perez*, 113 AD3d 421 [1st Dept 2014]; *Utak v Commerce Bank Inc.*, 88 AD3d 522 [1st Dept 2011].)

In the instant motion, Plaintiff's argument—which, in effect, amounts to a bald assertion of law office failure—is unavailing. It was Plaintiff's own failure to file a timely affidavit of service of process which, Plaintiff itself argues, was "unexpected" and resulted in "efforts" that delayed the filing of the instant motion. If a failure to file the affidavit of service at the outset caused any delay to Plaintiff, the delay was self-created, regardless of its duration, and cannot form the basis of a viable excuse as to why it took Plaintiff over one year from when Defendants allegedly defaulted to file the instant motion. As such, the Court finds that Plaintiff has not shown sufficient cause why the Complaint should not be dismissed pursuant to CPLR 3215 (c), and if Defendants had been in default since February 2, 2017, then the Court would dismiss the Complaint.

Nevertheless, in the instant motion, the Court finds that Plaintiff has failed to show prima facie that Defendants were served with process. The Court finds further that Defendants are not in default, which means that Plaintiff has not failed to take proceedings for the entry of judgment within one year after a default as is required for a dismissal pursuant to CPLR 3215 (c). Rather, Plaintiff has failed to serve Defendants with process within 120 days after the commencement of the action pursuant to CPLR 306-b.

As a preliminary matter, the Court notes that Plaintiff has submitted no affidavit of service of process as to Vandaag. The Piaskowy Affidavit states that it served process on Batalias, only. Further, even if Plaintiff had shown that Batalias was an enumerated person with whom process could be left pursuant to CPLR 311 (a) (1) to effectuate service of process upon Vandaag, substituted service methods under CPLR 308 cannot be used to serve a corporation. (*See Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984], *affd* 65 NY2d 865 [1985]; *see also Knopf v Sanford*, 132 AD3d 416, 417 [1st Dept 2015].) The Piaskowy Affidavit indicates that service of process upon Batalias was attempted pursuant to CPLR 308 (4), a substituted service provision. As such, Plaintiff has failed to show that process was served upon Vandaag.

Auto-Chlor has sued Batalias in his individual capacity. "Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308." (*Washington Mut. Bank v Murphy* (127 AD3d 1167, 1175 [2d Dept 2015] [internal quotation mark and citations omitted].) CPLR 308 provides:

> "Personal service upon a natural person shall be made by any of the following methods:
>
> "1. by delivering the summons within the state to the person to be served; or
>
> "2. 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 of the person to be served and by either mailing the summons to the person to be served 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 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, . . . ; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, . . . ; or . . .
>
> "4. 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 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, such affixing and mailing to be effected within twenty days of each other; . . . ; . . .
>
> "6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business."

Ordinarily, a "process server's affidavit constitutes prima facie evidence of proper service." (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; *see also Nazarian v Monaco Imports, Ltd.*, 355 AD2d 265, 266 [1st Dept 1998].) The Piaskowy Affidavit indicates that the process server attempted to serve Batalias pursuant to CPLR 308 (4), commonly referred to as "nail-and-mail" service. CPLR 308 (4) "may only be used where service under CPLR 308 (1) or (2) cannot be made with 'due diligence.'" (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007], citing *Rossetti v DeLaGarza*, 117 AD2d 793, 793–794 [2d Dept 1986].)

Here, based upon the Piaskowy Affidavit, and looking to no other documents in the motion submission, it appears to the Court that process could have been delivered pursuant to CPLR 308 (2) by leaving a copy of process with Jane Doe, babysitter, if she was a person of suitable age and discretion. While it is possible that the babysitter was not a person of suitable age and discretion, the process server's failure to indicate the babysitter's age or appearance in his affidavit weighs against a finding that sufficient diligent efforts were made to serve Batalias pursuant to CPLR 308 (1) or (2) before resorting to CPLR 308 (4). The Piaskowy Affidavit indicates that the affiant spoke with Jane Doe about Batalias' place of business, about whether the address was correct for Batalias, and about Batalias' military status and affiliations. As such, the Court finds that CPLR 308 (4) was not available in the instant action and that Plaintiff has failed to show prima facie that Batalias was served with process.

Assuming for the sake of argument that CPLR 308 (4) had been available to Plaintiff, the Piaskowy Affidavit indicates that the process server made two attempts to serve process on Batalias at the Apartment A Address before attempting nail-and-mail delivery, with both the "nailing" and the "mailing" allegedly being made at the Apartment A Address, Batalias' "actual place of abode."

"[Usual place of abode] may [not] be equated with the 'last known residence' of the defendant." (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979] [internal citations omitted].) This distinction is no "mere redundancy." (*Id.* at 241.) To "blur the distinction between [usual place of abode] and last known residence . . . would be to diminish the likelihood that actual notice will be received by potential defendants" (*id.* at 240), contrary to the legislature's intent.

In *Feinstein*, a process server attempted to complete the "nail" prong of CPLR 308 (4) at Bergner's last known residence. As a result,

> "the purported service was ineffective, since the plaintiff failed to comply with the specific mandates of CPLR 308 [(4)]. The summons here was affixed to the door of defendant's last known residence rather than his actual [or usual place of] abode. That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court."

(*Id.* at 241 [internal citation omitted].) As such, the plaintiff in *Feinstein* failed to meet its burden of proof that it had satisfied the "nail" prong of CPLR 308 (4). Similarly, in *Washington* (at 1174), "the plaintiff failed to meet its burden of proof that its mailing of copies of the summons and complaint satisfied the mailing requirement of CPLR 308 (2)," which is analogous to the "mail" prong of CPLR 308 (4), by failing to mail the summons to Murphy's last known residence.

Here, the Complaint alleges upon information and belief that Batalias "resides" at the Stonehill Address. Further, the instant motion was allegedly served on Batalias when a copy was mailed to the Stonehill Address, allegedly Batalias' "last known address," on February 26, 2018. Further, copies of the demand letters were allegedly mailed to the Stonehill Address. While the demand letters were also allegedly mailed to the Apartment 1 Address, Plaintiff has not shown that the Apartment 1 Address is the same as the Apartment A Address. As such, even if CPLR 308 (4) were available—and it is not—Plaintiff's own submission would have created an issue of fact as to whether the Stonehill Address, not the Apartment A Address, was Batalias' last known residence as of December 2, 2016, for the purposes of the "mail" prong of CPLR 308 (4). Plaintiff's own submission creates a further issue of fact as to whether the Apartment A Address was the correct address for Batalias at all or if the Apartment 1 Address is the correct address, in which case a mailing to the Apartment A Address may not have been properly sent.

Pursuant to CPLR 306-b, "[i]f service is not made upon a defendant within [120 days after commencement of the action], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." In *Diaz v Perez*, the Appellate Division, First Department upheld a motion court's decision to dismiss a complaint sua sponte against a defendant on a plaintiff's motion pursuant to CPLR 3215 for entry of a default judgment where the motion court found that the defendant had not been served with the summons and complaint as required by CPLR 306-b. (113 AD3d 421, 421 [1st Dept 2014].) The court stated that "there exist[ed] no reason to disturb the dismissal of the complaint as against" the individual defendant in a case where, similarly to

the instant action, the movant had sought a default judgment against both an individual and a corporate entity and the movant had failed to take proceedings for a default judgment within a year of a supposed default by the defendants. (*Id.*)

There appears to be a split of authority between the Appellate Division, First Department and the Appellate Division, Second Department regarding whether a court shall dismiss an action pursuant to CPLR 306-b without a motion to dismiss made by a defendant. In *Daniels v King Chicken & Stuff, Inc.*, the motion court denied the plaintiff's motion for leave to enter a default judgment because the plaintiff had failed to present proof of valid service of process on the defendant. (35 AD3d 345 [2d Dept 2006].) The motion court then dismissed the complaint for lack of personal jurisdiction. The Appellate Division, Second Department held that, pursuant to CPLR 306-b, it was error for the motion court to dismiss the complaint not "upon motion" of the defendant but sua sponte, upon its own initiative. (*Id.*; *see also Rotering v Satz*, 71 AD3d 861 [2d Dept 2010].)

This Court is bound by the Appellate Division, First Department's decision in *Diaz*. The *Diaz* Court explicitly endorsed the "sua sponte" dismissal of a complaint pursuant to CPLR 306-b. This Court infers that the "upon motion" requirement of CPLR 306-b means that a motion must be made by either party and considered by a court. The motion need not seek the specific remedy of dismissal of an action nor raise a CPLR 306-b issue explicitly. Rather, the motion court need only determine that CPLR 306-b has not been complied with.

In the instant action, the Court finds that there is not sufficient good cause, and it is not in the interest of justice, to extend Plaintiff's time to serve Defendants, where over a year has passed since the action was commenced, there is no indication that Defendants are aware that the action was commenced, and there were not timely, diligent efforts made to serve Defendants. (*See Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]; *see also Goldstein Group Holding, Inc. v 310 East 4th Street Hous. Dev. Fund Corp.*, 154 AD3d 458 [1st Dept 2017].)

(THIS SPACE IS INTENTIONALLY LEFT BLANK.)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Auto-Chlor System of New York City, Inc. d/b/a Auto-Chlor System of New York City pursuant to CPLR 2001 for an order granting Plaintiff permission to file a late affidavit of service nunc pro tunc and pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Auto-Chlor and against Defendants Better Living Food Corp. d/b/a Vandaag and Elias Batalias is granted in part and denied in part to the extent that it is

ORDERED that the branch of the motion pursuant to CPLR 2001 is granted, and the affidavit of service dated December 2, 2016, is deemed timely filed nunc pro tunc as of December 22, 2016; and it is further

ORDERED that the balance of the motion pursuant to CPLR 3215 is denied; and it is further

ORDERED that the action is dismissed sua sponte pursuant to CPLR 306-b.

The foregoing constitutes the decision and order of the Court.

Dated: May 30, 2018
New York, New York

HON. ROBERT D. KALISH, J.S.C.
J.S.C.

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE