

DNP Bldrs., LLC v NY Estimating Servs., Inc.,
2019 NY Slip Op 30667(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 652981/2018
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 652981/2018

DNP Builders, LLC, D/B/A O+D Builders,

MOTION SEQ. NO. 001

Plaintiff,

- v -

NY Estimating Services, Inc.,
George Sreckovich, and
Richard Allegretti,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for MOTION TO DISMISS

Azzolini & Benedetti, LLC (Thomas J. Benedetti of counsel), for plaintiff DNP Builders, LLC.
R. David Marquez, P.C. (R. David Marquez, of counsel), for defendants NY Estimating Services, Inc., and George Sreckovich.

Gerald Lebovits, J.

Plaintiff moves under CPLR 3213 for summary judgment in lieu of complaint to enforce a default judgment against defendant from a New Jersey court. Defendant cross-moves to dismiss plaintiff's complaint under CPLR 3211 (a) (3) and (a) (7). Plaintiff's motion and defendant's cross-motion are denied without prejudice. The action is referred to a Special Referee to hear and determine the validity of service of the complaint in the underlying New Jersey action.

BACKGROUND

Plaintiff DNP Builders, LLC, is a construction management and general-contracting firm. Defendant NY Estimating Services, Inc., (NYES), provides cost estimates for contractors and construction managers like DNP Builders. In 2017, DNP Builders brought an action in New Jersey Superior Court against NYES, two of its officers (defendants George Sreckovich and

Richard Allegretti), and non-parties Kaila Contracting (another construction contractor) and its owner, arising out of a construction project in Newark, New Jersey.

In 2018, DNP Builders obtained a default money judgment against NYES, Sreckovich, and Allegretti for \$310,502.75. (*See DNP Builders, LLC d/b/a O + D Builders v NY Estimating Services, Inc. George Sreckovich, Richard Allegretti, Kaila Contracting Corp., and Jose S. Rodrigues, Jr.*, under Docket Number ESX-L-5547-17.)

DNP then brought this action by motion for summary judgment in lieu of complaint under CPLR 3213 to domesticate the New Jersey judgment against defendants. Defendants cross-move to dismiss under CPLR 3211(a) (3) and (7), arguing that the New Jersey court that had rendered the default judgment never obtained personal jurisdiction over defendants.

Defendants NYES, Sreckovich, and Allegretti contend that they were never served with a summons and complaint in the New Jersey action and that they first learned about that action when Sreckovich received default judgment in the mail. The affidavits of service offered by plaintiff state that plaintiff's process server, Yisroel Simon, effected service on August 21, 2017, between 3:56 p.m. and 4:01 p.m. at 100 Shames Drive, Suite #3, Westbury, New York 11590. The affidavits of service state that Simon served a "person authorized to accept service, e.g., managing agent, registered agent, etc." Simon stated in the affidavit of service that she refused to give her name but was a white female, age 30, height 5'9," weighing 165 lbs, with black hair.

Defendants submitted an affidavit by Sreckovich, stating that an individual matching the description Simon gave never worked at 100 Shames Drive, Suite #3, and that the office closed by 4:00 p.m., making it unlikely that any officer or employee would be in the office. Sreckovich also alleges that two other offices are on the same floor and that Simon may have mistakenly served the summons and complaint to a representative of another company.

Defendants argue that the New Jersey court that entered the default judgment lacked personal jurisdiction over defendants because service was improper — and therefore that DNP Builders is not entitled to enforce the New Jersey judgment in a New York court.

DISCUSSION

New York courts must under Article IV of the United States Constitution enforce judgments rendered in other states. (*See* art 4, § 1.) In a New York action to enforce a sibling-state judgment, "the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served, and did not appear in the action." (*Vilas v Plattsburgh & M.R. Co.*, 123 NY 440, 455 [1890]; *accord All Terrain Properties, Inc. v Hoy*, 265 AD2d 87, 91 [1st Dept (2000)].)

If a defendant in a New York action to enforce a foreign default judgment challenges the personal jurisdiction of the foreign court to have entered that judgment, the plaintiff bears the burden of proving personal jurisdiction. (*Cadle Co. v Tri-Angle Assocs.*, 18 AD3d 100, 103 [1st Dept 2005]). If plaintiff fails to establish that personal jurisdiction existed in the foreign action,

the judgment is ineffective and will not be enforced by a New York court. (*All Terrain Props.*, 265 AD2d at 91.)

Under New Jersey law, personal jurisdiction requires proper service of process. (NJ Ct Rule 4:4-4.) New Jersey's Rules of Court permit a plaintiff to obtain personal jurisdiction over a defendant through out-of-state service where the plaintiff is unable despite diligent inquiry to make personal service on a defendant within the state — and submits an affidavit attesting to that inquiry — as long as due process of law also permits such jurisdiction.¹ A plaintiff may serve a defendant personally in another state “in the same manner as if service were made within this state.” (NJ Ct Rule 4:4-4 (b) (1) [A].)

To serve an individual defendant properly, Rule 4:4-4 (a) (1) requires that a plaintiff deliver “a copy of the summons and complaint to the individual personally, or by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein.” To serve a corporation, a plaintiff must effect service

“on any officer, director, trustee or managing or general agent, or any person authorized by appointment or by law to receive service of process on behalf of the corporation, or on a person at the registered office of the corporation in charge thereof.” (NJ Ct Rule 4:4-4.)

Service is proper under Rule 4:4-4 when the individual served holds a corporate position that would enable the individual to “know what to do with the papers” served and when it would be “fair, reasonable and just” for the process server to assume that the individual has “the authority to receive service.” (*O'Connor v Altus*, 67 NJ 106, 128 [1975]; accord *Davis v DND/Fidoreo, Inc.*, 317 NJ Super 92, 98-99 [NJ App Div 1998] [describing requirements].)

In this case, plaintiff submits in support of its motion an affidavit attesting to service upon “a person authorized to accept service.” Defendants contest the validity of service by an affidavit stating that no individual matching the description given in plaintiff's affidavit of service ever worked at the address where plaintiff effected service, and that it was unlikely that anyone at all would have been present at that address at the alleged time of service.

These opposing affidavits create a factual dispute regarding the validity of service in the underlying New Jersey action that requires an evidentiary hearing to resolve. (*See Franzblau Dratch, PC v Martin*, 452 NJ Super 486, 493 [NJ App Div 2017]; accord *Nationstar Mortgage LLC v McCallum*, 167 AD3d 523, 524 [1st Dept 2018].)

Accordingly, it is hereby

¹ The record in this case does not contain plaintiff's affidavit of inquiry. Defendants have not challenged the validity of service on that ground, however, and this court need not reach that issue.

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is DENIED without prejudice; and it is further


ORDERED that Defendant's cross motion to dismiss is DENIED without prejudice; and it is further

ORDERED that the issue of the validity of service in the underlying New Jersey action is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the plaintiff shall, within 14 days from the date of this order, serve a copy of this decision and order with notice of entry on the Special Referee Clerk in the General Clerk's Office in Rm. 119 at 60 Centre Street, and the Special Referee Clerk is directed to set a date for the reference to a Special Referee.

3/18/2019

DATE


HON. GERALD E. LEBOVITS
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: