SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

ROBERT MULLANE,

Plaintiff,

-against-

CEVA LOGISTICS U.S., INC., WELNA'S TRUCKING INC., WELNA'S TRUCKING LLC, WELNA'S EXPRESS LLC, CONNECTICUT STORAGE FUND and PUBLIC STORAGE, INC.,

Defendants.

Index No.
615849/18

Motion Seq:
001 MG
003 MD
004 MD
Decision/Order

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	14-21; 32-39; 49-53
Answering Papers.....	32-39; 42-43
Reply.....	46; 47
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Plaintiff sued the named defendants to recover damages for personal injuries he allegedly sustained when his foot became wedged between two pallets located inside his employer's storage unit. Plaintiff alleged that the incident giving rise to this action occurred on September 10, 2015, while plaintiff was in the employ of Eco Lab, Inc. The storage unit where the incident occurred was rented/leased by Eco Lab, Inc.

By this series of motions, defendants Connecticut Storage Fund and Public Storage, Inc. seek dismissal of the complaint and all cross-claims alleged against them on the ground that the Court lacks personal jurisdiction over them because they were not properly served (Motion Sequence 001); plaintiff opposes Motion Sequence 001 and seeks leave to amend the complaint to add Public Storage as a party defendant (Motion Sequence 002), and plaintiff moves this

Court unopposed for an Order directing entry of a default judgment against the Welna's defendants (Motion Sequence 004).

Motion for a Default Judgment against the Welna's Defendants (Motion Sequence 004)

CPLR §3215(f) requires "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney" (*see also* ***Fried v. Jacob Holding, Inc.***, 110 AD3d 56 [2d Dept 2013]).

The complaint alleges, *inter alia*, that the Welna's defendants created a hazardous condition when they delivered certain materials to Eco Lab's storage unit and negligently placed and/or stored those materials inside the storage unit.

In this case, plaintiff has annexed to his motion papers an affidavit sworn to on October 16, 2019 since the complaint filed in this action is verified only by counsel. In his affidavit, plaintiff avers that he suffered various injuries to his left knee when he was accessing the storage unit rented by his employer, Eco Lab, Inc. He states that his foot became wedged in between two pallets, causing him to fall to the ground. Plaintiff further states that, "[t]he subject pallets were improperly placed within the storage unit by the Welna's Defendants." This affidavit is sufficient to establish plaintiff's claims against the Welna's defendants.

Counsel's affirmation, however, does not establish the Welna's defendants' defaults in answering. The complaint alleges that the Welna's defendants are foreign business corporations/limited liability companies duly organized and existing under the laws of the State of New Jersey, and that they are each authorized to do business in the State of New York; however, the affidavits of service aver that the corporate defendant was served pursuant to Business Corporations Law (BCL) § 307 (Service of process on unauthorized foreign corporation) and the limited liability companies were served pursuant to Limited Liability Company (LLC) Law § 304 (Service of process on unauthorized foreign limited liability companies). This Court has examined the electronic records available on the New York Secretary of State's website (dos.ny.gov) and it takes judicial notice of the fact that none of the Welna's defendants are registered with New York's Secretary of State; therefore, they are unauthorized foreign corporations/limited liability companies who are to be served in accordance with the requirements of BCL § 307 and LLC Law § 304.

BCL § 307 provides for service of process on an unauthorized foreign corporation. According to the statute in pertinent part, service may be made by personally serving New York's Secretary of State, together with notice of such service and a copy of such process mailed "by registered mail with return receipt requested" to the address on file in the department of state for that corporation, in the jurisdiction of its incorporation, or to the last address of the foreign corporation known to the plaintiff (***BCL § 307 [b][2]***).

Furthermore, where service of a copy of process is effectuated by mailing in accordance with this statute, "proof of service shall be by affidavit of compliance with this section filed, together with the process, within thirty days after receipt of the return receipt signed by the foreign corporation, or other official proof of delivery or of the original envelope mailed. If a copy of the process is mailed in accordance with this section, there shall be filed with the affidavit of compliance either the return receipt signed by such foreign corporation or other official proof of delivery or, if acceptance was refused by it, the original envelope with a notation by the postal authorities that acceptance was refused. . . Service of process shall be complete ten days after such papers are filed with the clerk of the court" (***BCL § 307 [c][2]***).

The provisions of LLC Law § 304 essentially mirror those of BCL § 307, in that service upon New York's Secretary of State, combined with the mailing of process by registered mail, return receipt requested, requires plaintiff to file the same affidavit of compliance as required by BCL § 307 (***LLC Law § 304 [b], [c][2], [e]***).

Failure to precisely comply with the mandates of the foregoing statutes deprives the Court of jurisdiction over the corporate/limited liability company defendants. That defect is jurisdictional and does not constitute a 'mere irregularit[y]' subject to cure (***Flannery v. General Motors Corporation***, 86 NY2d 771, 772 [1995], citing ***Flick v. Stewart-Warner Corporation***, 76 NY2d 50, 57 [1990]; *see also* ***Stewart v. Volkswagen of America, Inc.***, 81 NY2d 203 [1993]; ***Global Liberty Insurance Co., v. Surgery Center of Oradell, LLC***, 153 AD3d 606 [2d Dept 2017] [default judgment application properly denied where plaintiff has failed to demonstrate its strict compliance with LLC Law 304's requirements concerning mailing]; ***TAZ Productions, Inc. v. Rentacom, Inc.***, 19 Misc3d 965 [Civ Ct New York County 2008] [defect based on lack of proper service pursuant to BCL 307 is not cured by defendant's subsequent receipt of actual notice of the action])

In this case, as noted, process for each of the Welna's defendants was served on New York's Secretary of State on December 5, 2018. The affidavits of service sworn to on December 17, 2018 each state that the Summons, Verified Complaint and Notice of Electronic Filing were sent to each of the Welna's defendants by registered mail on December 13, 2018; however, there is no indication that the initiatory documents were sent via return receipt requested mail, as required by the relevant statutes governing service in these circumstances. Furthermore, no return receipt has ever been filed in this case, nor has an affidavit of compliance and any other type of proof of delivery been filed in this matter with respect to the Welna's defendants. Accordingly, plaintiff has failed to comply with the strict requirements of BCL §§ 304 and 307, thereby depriving this Court of jurisdiction over the Welna's defendants and warranting denial of plaintiff's motion for default judgment.

Connecticut Storage Fund and Public Storage Inc.'s Motion to Dismiss (Motion Sequence 001)

These defendants seek dismissal of the complaint and any and all cross-claims pursuant to CPLR § 3211 (a)(8), for lack of jurisdiction, because they were not properly served with the summons and complaint. This Court determines that this motion is timely made pursuant to

CPLR § 3211 (e) since the defense was asserted in the defendants' answer and this motion is made within sixty (60) days of service of the answer (*see also* ***General Construction Law § 25-a***).

It is apparently undisputed, and demonstrated by New York's Secretary of State records maintained on dos.ny.gov, that Public Storage, Inc. (Inc.), was a California corporation whose current entity status with New York is listed as "Inactive – Termination (June 20, 2008)," which is more than seven years prior to the incident giving rise to this action.[1] Thus, the named defendant, Inc., is apparently improperly sued herein, as further evidenced by plaintiff's cross-motion to amend the complaint to add a different entity, "Public Storage," as a defendant in this action (Motion Sequence 003).

The affidavits of service annexed to Connecticut Storage Fund (CSF) and Inc.'s papers indicate that service on both entities was made pursuant to BCL § 307, which as noted in connection with Motion Sequence 004, applies to service of process on unauthorized foreign corporations. CSF is not an unauthorized corporation as evidenced by the New York State Department of State's records. CSF is registered with New York State as an active, foreign limited partnership, with a process address and registered agent as follows: C T Corporation System, 28 Liberty St., New York, New York 10005. Inc. may be considered an unauthorized corporation due to its present inactive status as reflected in New York's Department of State records.

In any event, there is no proof that plaintiff strictly complied with the mandates of BCL § 307 service outlined above. The affidavits of service annexed to the moving papers each demonstrate that the mailing was made by registered mail, not by return receipt requested mail; there is no proof of delivery filed with respect to these affidavits of service, and there are no affidavits of compliance on file.

The fact that CSF and Inc. establish in their moving papers that the registered agent for process never received the summons and complaint is entirely consistent with the process server having improperly served these two entities pursuant to BCL § 307. Pursuant to that very statute, New York's Secretary of State has no obligation to mail the summons and complaint to the business entity (*see* ***Demitro v. Garsan Reality, Inc.***, 24 Misc3d 1205 [A] [Sup Ct Bronx County 2009]). Since an unauthorized corporation is one that is not registered, there is no address on file to which the Secretary of State can send the initiatory documents; rather, the mailing obligation rests squarely upon plaintiff's shoulders, and the mailing must be made in precise compliance with BCL § 307 (c)(2). In this case, the mailing was not made in compliance with the statute.

The moving defendants also raise in their papers the fact that their counsel requested from plaintiff's counsel the receipts from the New York State Department of State concerning service of the summons and complaint, but never received copies thereof. Nowhere in his opposition and cross-motion, does plaintiff address this issue, nor does plaintiff provide the

[1] Defendants have provided printouts of the information contained on dos.ny.gov. as part of Exhibit D.

requested receipts for service of process (*see* ***Demitro***, ***supra***).

Since CSF is a foreign limited partnership duly authorized to conduct business in New York, and who has as its registered agent C T Corporation for service of process, CSF could have been properly served pursuant to CPLR § 310-a and RLPA § 121-109 (a); however, according to plaintiff's own affidavit of service, CSF was not served in this manner; instead, service was erroneously and insufficiently attempted pursuant to BCL §307.

CPLR § 310-a governs service of process upon limited partnerships. In addition to personal service made by delivery of a copy of the summons and complaint to any managing or general agent or general partner, the statute provides that "[p]ersonal service upon a limited partnership subject to the provisions of article eight-A of the partnership law may also be made pursuant to section 121-109 of such law." In pertinent part, the Revised Limited Partnership Act (RLPA) § 121-109 permits service on the Secretary of State as agent of a domestic or authorized foreign limited partnership by delivering the summons and complaint to the Secretary of State, who is required to mail one copy of process to the limited partnership entity via certified mail, return receipt requested. The statute also provides that service on the limited partnership is complete when the Secretary of State is served (***RLPA § 121-109 [a]***).

The requested receipt from New York's Secretary of State would indicate if the Secretary of State mailed a copy of the summons and complaint by certified mail, return receipt requested, to the limited partnership at the post office address on file in the Department of State, as required by RLPA § 121-109 (a)(3); however, since no receipt was produced, there is no proof that CSF was properly served pursuant to CPLR § 310-a. The Court also notes that, had service been properly and actually made pursuant to CPLR § 310-a and RPA § 121-109 (a), there would have been no need for plaintiff's process server to make the additional registered mailing attested to on the affidavit of service.

Plaintiff's conclusory argument made in opposition, that "[d]efendants were properly served via the Secretary of State pursuant to CPLR § 306 (b). . . [a]s such, the defendants' motion to dismiss for the failure to serve process should be denied in its entirety" (Affirmation, ¶ 13), is utterly unavailing. CPLR § 306 (b) is entitled "Proof of service." Subdivision (b) thereunder provides as follows: "Personal service. Whenever service is made pursuant to this article by delivery of the summons to an individual, proof of service shall also include, in addition to any other requirement, a description of the person to whom it was so delivered. . ." Accordingly, this section of the CPLR cited by plaintiff is completely inapposite since personal service on either of the two entities was undisputedly never made.

Even if plaintiff meant to refer to BCL Article 3- Corporate Name and Service of Process, § 306 (b)(1) instead of CPLR § 306 (b), his argument fails. Neither of the affidavits of service state that service was made pursuant to BCL § 306, and CSF is not a corporation. Also, plaintiff has not produced a receipt from New York's Secretary of State controverting the affidavit of service establishing that service was erroneously attempted pursuant to BCL § 307. If process had actually been served pursuant to BCL 306, the receipt would indicate that the

Secretary of State sent a copy of process to the defendants by certified mail, return receipt requested. There is no such proof here.

Paragraph 14 of the Affirmation in Opposition citing to CPLR § 304 (a) is also inapposite. That statute does not refer in any way to service of process upon the Secretary of State but is entitled "Method of commencing action or special proceeding." Likewise, CPLR § 311 (1) cited in paragraph 16 of the Affirmation in Opposition refers to personal service upon a corporation or a governmental subdivision. As noted, CSF is neither a corporation nor a governmental subdivision, and, as noted, neither Inc. nor CSF were personally served.

Accordingly, it is this Court's determination that the complaint and all cross-claims should be dismissed as to Inc. and Connecticut Storage Fund (CSF) because this Court lacks personal jurisdiction over those entities based upon improper service of the summons and complaint as outlined herein.

Plaintiff's Cross-Motion to Amend the Complaint (Motion Sequence 003)

Plaintiff seeks leave to amend the complaint to include Public Storage as a defendant in the within action. According to counsel's affirmation, Public Storage owned, operated, and/or maintained the facility where the incident occurred. Plaintiff has annexed the proposed Supplemental Summons and Amended Verified Complaint to his papers as Exhibit E. The proposed amended pleading is verified only by counsel, not by the plaintiff.

It is undisputed in this case that plaintiff's personal injury action is subject to a three-year statute of limitations period (CPLR § 241 [5]) that expired on or about September 10, 2018.

Plaintiff argues that CPLR § 203 (b), known as the "relation back doctrine," permits him to amend the complaint to add Public Storage as a defendant. Citing ***Buran v. Coupal*** (87 NY2d 173, 177 [1995]), plaintiff maintains that a claim asserted against a defendant in an amended filing can relate back to claims previously asserted against a codefendant for statute of limitations purposes when the two defendants are united in interest. Plaintiff specifically asserts that "Public Storage is an entity united in interest with the properly served defendants. As such, the proposed amended complaint should be held to relate back to the date of service upon the affiliated defendants [Inc. and CSF]" (Affirmation in Support of Cross-Motion, ¶ 37).

Inc. and CSF oppose this motion on several bases, including that plaintiff has not shown that the "relation back" doctrine is applicable here since neither Inc. nor CSF were properly served with the summons and complaint.

Before engaging in an analysis as to whether defendants are united in interest for the purposes of applying CPLR § 203, there exists the threshold matter as to whether there are any defendants left in the case with whom Public Storage can claim to be united in interest.

Article 2 of the CPLR concerns limitations of time, whereas Article 3 of the CPLR deals

with jurisdiction and its acquisition. In order for the provisions of CPLR § 203 (b) to be considered, let alone applied, there must first be a co-defendant who was timely and properly served, and who, accordingly, is already a party to the action (***McCormack v. Gomez***, 137 AD2d 504, 506 [2d Dept 1988] [if properly served, husband will be able to raise statute of limitations defense and resolve whether he is united in interest with his wife, who is already a defendant because she was timely and properly served]; *cf.* ***Todd Equipment Leasing, Co. v. Logistic Distro Date, Inc.***, 90 AD2d 793 [2d Dept 1982] [statute of limitations not a bar because date of claim interposition upon Bright relates back to the date upon which Smith was served). "The basic effect of [CPLR 203 (b)] is that *timely service* upon any one of two or more defendants who are 'united in interest as to a claim, permanently deprives all codefendants of the defense of the Statute of Limitations" (emphasis added) (***Morrison v. Foster***, 80 AD2d 887, 888 [2d Dept 1981]); however, there must be at least one defendant, potentially united in interest with a prospective co-defendant, who has been properly served and exists as a party in the action.

Had this Court determined that either Inc. or CSF, or both entities, were properly served, then a "relation back" analysis would be appropriate. Considering, however, the Court's determination that it has not obtained jurisdiction over Inc. or CSF, resulting in dismissal of the compliant against those two entities, there is no other defendant with whom Public Storage could, or does claim to share a united interest. Thus, plaintiff's motion to amend the complaint must be denied on this basis.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 11, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]