

**USA Med. LLC v LABQ Clinical Diagnostics, LLC**

2023 NY Slip Op 30388(U)

February 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 524993/2022

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

-----x  
USA MEDICAL LLC

Plaintiff, Decision and order

- against - Index No. 524993/2022

LABQ CLINICAL DIAGNOSTICS, LLC,  
Defendant, February 3, 2023

-----x  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #2

The defendant has moved seeking to vacate a default judgement entered on the grounds there was no service of process. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing of all the arguments, this court now makes the following determination.

The plaintiff and defendant entered into an agreement whereby the defendant agreed to provide payments for certain COVID-19 sample collection and delivery services (see, Verified Complaint, ¶¶6-8 [NYSCEF Doc. No. 1]). The plaintiff asserts the defendant has failed to pay amounts owed and commenced this action alleging breach of contract and unjust enrichment. A judgment was obtained by default and the defendant now moves seeking to vacate the default on the grounds they were never validly served with process. The plaintiff opposes the motion arguing there are no questions of fact service upon the defendant was proper.

Conclusions of Law

It is well settled that the statutory framework for service of process is to fairly notify the defendant of an impending action and provide the defendant with the mechanisms necessary to adequately respond (Valz v. Sheepshead Bay Bungalow Corporation, 249 NY 122 163 NE 124 [1928]). Moreover, service of process is also an exercise of the court's power and authority over litigants and thus, such service of process infuses the litigation with court sanctioned legitimacy (McDonald v. Ames Supply Co., 22 NY2d 111, 291 NYS2d 328 [1968]). It is for these reasons that simple notice is insufficient to confer jurisdiction over a defendant (Bankers Trust Company of California, N. A. v. Tsoukas, 303 AD2d 343, 756 NYS2d 92 [2d Dept., 2003]). Likewise, the failure to abide by any of the necessary requirements for the lawful service of a summons and complaint will result in the failure to confer jurisdiction (Persaud v. Teanech Nursing Center, Inc., 290 AD2d 350, 736 NYS2d 367 [1<sup>st</sup> Dept., 2002]).

Pursuant to CPLR §311-a service upon a company such as the defendant in this case can only be made "to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant" (id). Generally a process server's affidavit provides prima facie evidence of proper service

(Household Finance Realty Corp., of New York v. Brown, 13 AD3d 340, 785 NYS2d 742 [2d Dept., 2004]). To contend that service was improper and that defendant is entitled to a hearing on the matter, the defendant must allege facts to support the contention (Mortgage Electronic Registration Systems, Inc., v. Schotter, 50 AD3d 983, 857 NYS2d 592 [2d Dept., 2008, Hannover Insurance Company v. Cannon Express Corp., 1 AD3d 358, 766 NYS2d 853 [2d Dept., 2003]).

The affidavit of the process server, Felix Vasquez, states that on September 1, 2022, at the defendant's offices a woman presented herself and stated that she was authorized to accept service but that she refused to accept such service. Whereupon Mr. Vasquez left the summons with this authorized individual and announced service (see, Affidavit of Service [NYSCEF Doc. No. 6]). In a further affidavit dated January 20, 2023 Mr. Vasquez elaborates that he entered the defendant's offices, was greeted by a woman and informed her that he had legal papers to serve. That individual summoned a manager who stated she was authorized to accept service but that she would not accept such service. Mr. Vasquez stated that he left the summons and complaint and departed (see, Affidavit of Felix Vasquez, ¶¶6-8 [NYSCEF Doc. No. 48]).

In opposition to the affidavits of Mr. Vasquez the defendant has introduced the affidavit of Tamar Cruz the receptionist at defendant's office. She states that indeed she met Mr. Vasquez and informed him that she was not authorized to accept service but would call the office manager who could accept service. She further states that Mr. Vasquez informed her that he was too busy and left the summons and complaint there and departed (see, Affidavit of Tamar Cruz, ¶¶3,4 [NYSCEF Doc. No. 25]).

The plaintiff argues that the affidavit of Ms. Cruz does not conflict with the affidavits of Mr. Vasquez and that there is no basis to conduct a hearing regarding service. Specifically, the plaintiff argues that Ms. Cruz did "verify that such a manager was present at LabQ on September 1, 2022 who was authorized to accept service, and that Ms. Cruz identified and sought that individual to come meet a process server" (see, Memorandum of Law in Opposition, page 7 [NYSCEF Doc. No. 44]). First, Ms. Cruz specifically named the manager as Solomon Brown, while Mr. Vasquez stated the manager was a female. More importantly, Ms. Cruz never stated the manager was ever summoned to meet Mr. Vasquez. On the contrary, she specifically stated that Mr. Vasquez never had any conversation with any manager at all. Thus, there are clear contradictory versions of whether any proper service was ever effectuated.

Further, there are surely questions whether Ms. Cruz was authorized to accept service. Ms. Cruz states that she informed Mr. Vasquez that she was not authorized to accept service. Mr. Vasquez did not dispute that *per se* but did admit the first individual he encountered went to summon a manager strongly implying she herself maintained no such authority. Consequently, there are surely questions of fact whether Mr. Vasquez reasonably believed Ms. Cruz was authorized to accept service. In truth, the argument whether Mr. Vasquez reasonably believed Ms. Cruz was authorized to accept service contradicts the argument the summons was left with a manager. To the extent these arguments are presented in the alternative, questions of fact are surely presented.

Further, there are really no questions of fact whether Ms. Cruz "resisted" service of process. An individual not authorized to accept service does not thereby resist service by refusing to accept what the individual cannot accept. Again, this argument conflates Ms. Cruz with a manager. According to Mr. Vasquez he met two individuals that day, the first one, arguably Ms. Cruz, presented sufficient evidence that she was not authorized to accept service.


Therefore, there are questions of fact whether service of process was properly effectuated. Consequently, the parties will

be notified about a hearing on the issue of service. The request to vacate the default must await the outcome of that hearing.

So ordered.

ENTER:

DATED: February 3, 2023  
Brooklyn N.Y.

  
\_\_\_\_\_  
Hon. Leon Ruchelsman  
JSC