

ECRNC LLC v Dawson
2024 NY Slip Op 35408(U)
May 14, 2024
Supreme Court, Albany County
Docket Number: Index No. 909725-23
Judge: Peter A. Lynch
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ECRNC LLC D/B/A EVERGREEN COMMONS
REHABILITATION AND NURSING
CENTER,

Plaintiff,

v.

RICHARD DAWSON,

Defendants.

**DECISION
And ORDER**

Index No.: 909725-23
(Hon. Lynch, J.)

INTRODUCTION

This is a breach of contract action, in which Plaintiff seeks \$9,435.78 in damages.¹

FACTS

Plaintiff is the operator of a residential nursing home care and services facility known as Evergreen Commons in East Greenbush, New York. On May 3, 2023, the parties entered into an Admission Agreement (the “Agreement”) in which Defendant agreed to be a resident at the facility, and Plaintiff agreed to provide services.² Defendant was a resident at the facility from April 21, 2023, to May 9, 2023, and the charge therefore was in the sum of \$9,435.78.³ Defendant failed to pay for same services.⁴

SERVICE/ANSWER/RESPONSIVE PLEADINGS

On October 11, 2023, Plaintiff attempted to serve Defendant by means of substituted service in accord with CPLR § 308 (4), i.e., affix and mail.⁵ The Court notes that the summons

¹ NYSCEF Doc. No. 1 – Verified Complaint.

² NYSCEF Doc. No. 3.

³ NYSCEF Doc. No. 2.

⁴ NYSCEF Doc. No. 1 – Verified Complaint ¶ 18 and 19.

⁵ NYSCEF Doc. No.4.

and complaint were reportedly affixed to the front exterior door of a Senior Living Facility located at 790 Route 9W, Glenmont New York, where Defendant purportedly resides.⁶ Proof of service was timely filed on October 17, 2023, and service was complete on October 27, 2023. In the ordinary course, Defendant's answer or responsive pleadings were due on or before November 27, 2023, in accord with CPLR R 320 (a). To date, Defendant has failed to submit any response to the Complaint.

PERSONAL JURISDICTION

In Bank of Am., N.A. v. Fischer, 220 A.D.3d 722, 724-725 [2d Dept. 2023], the Court recognized the need for due diligence in effecting service via affix and mail, holding,

“Service of process must be made in **strict compliance** with [the] statutory ‘methods for effecting personal service upon a natural person’ pursuant to CPLR 308. Here, the plaintiff purportedly served the defendant by the “affix and mail” method pursuant to CPLR 308 (4). Service pursuant to CPLR 308 (4) may be used only where service pursuant to CPLR 308 (1) or (2) cannot be made with “due diligence”. **“The due diligence requirement of CPLR 308 (4) must be strictly observed**, given the reduced likelihood that a summons served pursuant to that section will be received... Under the **totality of the circumstances**, the plaintiff **failed to demonstrate that the process server acted with due diligence before resorting to affix and mail service** pursuant to CPLR 308 (4).” (Emphasis added; citations omitted)

Here, while the record is incomplete, we can glean from the pleadings that Defendant resided in Plaintiff's residential nursing home care and services facility for a brief period and moved to a Senior Living facility.

The process server claimed:

“On 10/19/23 at 3:50 PM, 10/25/23 at 7:01 PM, 11/1/23 at 6:15 AM, 11/4/23 at 12:35 PM and 11/11/23 at 12:45 PM I attempted to serve Richard Dawson at the address provided which is a **Senior Living Facility**. On each attempt I was **unable to gain access past**

⁶ NYSCEF Doc. No. 4.

the main door of the building. There is an intercom and list of apartment numbers with corresponding tenants. **The staff confirmed Richard Dawson lives in apartment 204** however they will not allow access up to the apartment without the tenants permission. On my final attempt **I posted the documents to the main door of the building.**⁷

A quick google search identified the Senior Living Facility as the Van Allen Senior Apartments, which consists of a two (2) story building with 110 units. Under the totality of the circumstances, given Defendant's status as a nursing home/senior living facility resident, affixing the pleadings to the exterior door of a 110-unit Senior Living Facility does not rise to the level of due diligence to effect service.

MOTION FOR A DEFAULT JUDGMENT

Plaintiff filed a motion for a default judgment, returnable May 14, 2024.⁸ Plaintiff seeks judgment in the sum certain of \$9,435.78. Defendant failed to submit any response to the motion.

CPLR 3215 (g) (3) (i) (ii) provides, inter alia:

(i) When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that **additional notice** has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by **first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential"** and **not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt.** In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence.

⁷ NYSCEF Doc. No. 4.

⁸ NYSCEF Doc. No. 7

(ii) The additional notice may be mailed simultaneously with or after service of the summons on the defendant. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the notice and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant to receive the additional notice shall not preclude the entry of default judgment.

Since this case involves alleged nonpayment of a contractual obligation, additional notice pursuant to CPLR 3215 (g) (3) (i) is required. Plaintiff failed to file an affidavit to evidence compliance with CPLR 3215 (g) (3) (i). In the CPLR 308 (4) mailing affidavit, however, the server simultaneously mailed the summons and complaint at follows:

“Geoffrey Burke being duly sworn, deposes and says: that deponent **completed service** by depositing a copy of the said documents in a postpaid properly addressed envelope, bearing the words **"Personal and Confidential"** by first class mail on 11/14/2023 to RICHARD DAWSON at 790 ROUTE 9W, APT. 204, GLENMONT, NY 12077 in an official depository of the United States Postal Service in the State of New York. The envelope did **not indicate 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.**”⁹ (Emphasis added)

While the markings on the outside of the envelope effectively mirror the requirements of CPLR 3215 (g) (3) (i), and such mailing appears (at first blush) to comport with CPLR 3215 (g) (3) (ii), it does not. In fine, the mailing required to complete service pursuant to CPLR 308 (4) is not a substitute for the additional mailing requirement of CPLR 3215 (g) (3) (i) (See Sulke v. Muller New York County Supreme Court, 2023 N.Y. Misc. LEXIS 7792, where the Court held,

“As this mailing was part of the original service of process under CPLR 308 (4) it cannot constitute an additional mailing pursuant to CPLR 3215 (g) (3) (i). . . .”).

⁹ NYSCEF Doc. No. 4.

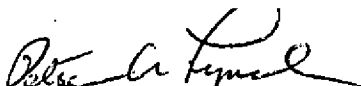
Plaintiff's e-filing of a purported affidavit of mailing does not comport with CPLR 3215 (g) (3) (i).¹⁰ Last, while Plaintiff filed an affidavit indicating service of the subject Motion by first class mail addressed to Defendant's home address on April 16, 2024, that affidavit fails to evidence compliance with CPLR 3215 (g) (3) (i).¹¹ The Court finds that Plaintiff failed to comply with the mailing requirements of CPLR 3215 (g) (3) (i).

CONCLUSION

For the reasons more fully stated above, Plaintiff's motion for a default judgment against defendant is denied.

This memorandum constitutes both the decision and order of the Court.¹²

Dated: Albany, New York
May 14, 2024



PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:
All e-filed pleadings, with exhibits.
NYSCEF Doc. Nos. 1-16.



05/14/2024

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¹⁰ NYSCEF Doc. No. 6 and 13.

¹¹ NYSCEF Doc. No. 15.

¹² Plaintiff is required to comply with the provisions of CPLR 2220.