

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.

Catch Me If You Can

The importance of an up-to-date address for Service of Process.

The defendant corporation was served with the Summons and Complaint through the New York Secretary of State, as reflected in the affidavit of service. As reflected in the certificate of service from the NYS Secretary of State, the defendant was served by certified mail at its designated address for service of process. A letter with copies of the Summons and Complaint was mailed to the defendant's address. Thereafter, the motion for a default judgment was filed with the court and a copy thereof was served upon the defendant. None of the letters were returned. Based upon the defendant's default, the court entered the Default Judgment.

Motion to vacate Default Judgment

The defendant corporation brought an Order to Show Cause seeking to vacate its default in answering the Summons and Complaint. The motion, brought pursuant to CPLR 5015(a), claimed that the defendant had both a reasonable excuse for the defendant's failure in defaulting in answering the action and a meritorious defense. Attached to the motion was the affidavit of the corporation's principal, who stated his reasons why the defendant did not respond to the action; namely, he claimed that he never received the Summons and Complaint or any of the mailings sent by the attorney's office. The plaintiff's attorney retained **Richard A. Klass, Esq.**, *Your Court Street Lawyer*, to oppose the Order to Show Cause and request that the Default Judgment remain intact and enforceable.

Service of process under Business Corporation Law Section 306

CPLR 311(a)(1) delineates the methods of service of process upon a corporation as follows: "upon any domestic or foreign



corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. *A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law....*"

The plaintiff used the method of service duly authorized by Business Corporation Law §306,¹ by having the Summons and Complaint served upon the NYS Secretary of State. The defendant could not challenge that service was made upon the NYS Secretary of State since the plaintiff was entitled to the

¹ (b)(1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to

receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of

well-established presumption of due service. See, *Deutsche Bank Nat. Tr. Co. v. Quinones*, 114 AD3d 719, 719 [2d Dept 2014] (“A process server’s affidavit of service constitutes prima facie evidence of proper service (see *Emigrant Mtge. Co., Inc. v. Westervelt*, 105 A.D.3d 896, 897, 964 N.Y.S.2d 543; *Wells Fargo Bank, NA v. Chaplin*, 65 A.D.3d 588, 589, 884 N.Y.S.2d 254; *Countrywide Home Loans Servicing, LP v. Albert*, 78 A.D.3d 983, 984, 912 N.Y.S.2d 96).”)

The Second Department, in *Wassertheil v. Elburg, LLC*, 94 AD3d 753, 753-54 [2d Dept 2012], enunciated the standard required to vacate a default based upon service of process upon the NYS Secretary of State:

To successfully oppose a motion for leave to enter a default judgment based on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for its delay and the existence of a potentially meritorious defense (see CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116; *2261 Palmer Ave. Corp. v. Malick*, 91 A.D.3d 853, 936 N.Y.S.2d 672; *Kouzios v. Dery*, 57 A.D.3d 949, 871 N.Y.S.2d 303; *Baldwin v. Mateogarcia*, 57 A.D.3d 594, 869 N.Y.S.2d 217). Here, the mere denial by Encore’s shareholder of service of the summons and the complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service (see Business Corporation Law § 306 [b] [1]; *Matter of Rockland Bakery, Inc. v. B.M. Baking Co., Inc.*, 83 A.D.3d 1080, 1081–1082, 923 N.Y.S.2d 572; *Thas v. Dayrich Trading, Inc.*, 78 A.D.3d 1163, 1164, 913 N.Y.S.2d

269; *May v. Hartsdale Manor Owners Corp.*, 73 A.D.3d 713, 900 N.Y.S.2d 359).

Based upon case law, a defendant’s mere denial of receipt of mail is insufficient. In his affidavit, the defendant’s principal surmised that he may not have received any notification from the Secretary of State as a result of the Governor’s Executive Orders concerning the pandemic pausing government services, and there could be a backlog. This was mere conjecture, and it was urged that the ‘pandemic excuse’ should be of no assistance to him. In addition to the failure to rebut the presumption of due service via the Secretary of State, there was no evidence to rebut the presumption of mailing from both the Secretary of State and the attorney’s office. See, *Vita v. Heller*, 97 AD2d 464, 464 [2d Dept 1983] (“Service of papers by mail is deemed complete upon deposit of such papers in the mail and such manner of service creates a presumption of proper mailing to the addressee (CPLR 2103, subd. [b], par. 2; *A & B Serv. Sta. v. State of New York*, 50 A.D.2d 973, 376 N.Y.S.2d 656, mot. for lv. to app. den. 39 N.Y.2d 709, 386 N.Y.S.2d 1027, 352 N.E.2d 597). The burden then falls upon the addressee to present evidence sufficient to overcome the presumption and establish nonreceipt.”). Further, the denial of receipt of the Summons and Complaint from the Secretary of State was belied by the certificate of service.

Corporation must update its address with the Department of State

The defendant also stated that he had not lived at the mailing address of 1501 55th Street, Brooklyn NY (one of the mailing addresses designated by the corporation and to which additional mailings were made in this action) since 2008.

state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose. If a domestic or authorized foreign corporation has no such address on file in the department of state, the secretary of state shall so mail such copy, in the case of a

domestic corporation, in care of any director named in its certificate of incorporation at the director’s address stated therein or, in the case of an authorized foreign corporation, to such corporation at the address of its office within this state on file in the department.



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However, the last two Biennial Statements filed by the corporation for the filing periods for 2009-2011 and 2011-2013 state the “Service of Process Address” at “1501 55th Street, Brooklyn NY 11228.” It was argued that the Court should also note that the 2013 Biennial Statement for the corporation is the LAST one filed with the Secretary of State’s office and its statement status is listed as “Past Due.”

In *Cedeno v Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 [1st Dept 1994], the court rejected the defendant’s claim that he vacated the address for service of process designated eight years earlier, holding:

Service was effected in person at the office of the Secretary of State, and by mail directed to defendant's designated agent at an office location that counsel says he vacated eight years earlier. Defendant maintains that minimal diligence on plaintiff's part would have led him to counsel's correct address. But it is a corporation's obligation to keep on file with the Secretary of State the current address of an agent to receive service of process (*Cristo Bros. v. M. Cristo, Inc.*, 91 A.D.2d 807, 458 N.Y.S.2d 50), and failure to meet that obligation will not constitute reasonable excuse to vacate a default judgment (*Conte Cadillac v. C.A.R.S. Purch. Serv.*, 126 A.D.2d 621, 622, 511 N.Y.S.2d 58). It is for this reason that service of process on a corporation is deemed complete when the Secretary of State is served, regardless of whether such process ultimately reaches the corporate defendant (*Associated Imports v. Leon Amiel Publ.*, 168 A.D.2d 354, 562 N.Y.S.2d 678, *lv. dismissed* 77 N.Y.2d 873, 568 N.Y.S.2d 915, 571 N.E.2d 85).

In *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9-10 [1st Dept 2002], the court held, “The failure of a corporate defendant to receive service of process due to breach of the obligation to keep a current address on file with the Secretary of State (*see*, Business Corporation Law § 306) does not constitute a reasonable excuse. (*Lawrence v. Esplanade Gardens*, 213 A.D.2d 216, 623 N.Y.S.2d 586; *Cedeno v. Wimbledon Bldg. Corp.*, *supra* at 298, 615 N.Y.S.2d 40.)”

No need to address the Defendant’s purported meritorious defense

Regardless of whether the defendant would have had any defense to the action, it was argued that it could not present one now since there was no excuse for its default. In *Mellon v Izmiriligil*, 88 AD3d 930, 931-32 [2d Dept 2011], the court held:

Since the defendant failed to demonstrate a reasonable excuse for his default, it is unnecessary to determine

whether he demonstrated the existence of a potentially meritorious defense (*see Wells Fargo Bank, N.A. v. Cervini*, 84 A.D.3d at 790, 921 N.Y.S.2d 643; *HSBC Bank USA, N.A. v. Roldan*, 80 A.D.3d 566, 567, 914 N.Y.S.2d 647; *Maspeth Fed. Sav. & Loan Assn. v. McGown*, 77 A.D.3d at 890; *Star Indus., Inc. v. Innovative Beverages, Inc.*, 55 A.D.3d at 905, 866 N.Y.S.2d 357).

Based upon the arguments put forth in opposition, the court denied the Order to Show Cause and the Default Judgment was upheld.

— Richard A. Klass, Esq.

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Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718) COURT®ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.

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