

**New York State Workers' Comp. Bd. v A.A.A.
Ambulette Serv. Inc.**

2013 NY Slip Op 32036(U)

September 3, 2013

Supreme Court, Albany County

Docket Number: 6504-12

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

NEW YORK STATE WORKERS' COMPENSATION BOARD,
in its capacity as the governmental agency charged with the
administration of the Workers' Compensation Law and attendant
regulations, and its capacity as successor in interest to The
HEALTHCARE INDUSTRY TRUST NEW YORK Workers'
Compensation Self-Insurance Trust a/k/a New York Healthcare
Industry Workers' Compensation Self-Insurance Trust,

Plaintiff,

DECISION and ORDER
INDEX NO. 6504-12
RJI NO. 01-13-110346

-against-

A.A.A. AMBULETTE SERVICE, INC., MARTIN JAY AMSEL,
Individually and d/b/a GARDEN OF EDENT HOME FOR ADULTS,
CHARLES BENSON, BRUNSWICK HOSPITAL CENTER
FOUNDATION, INC., BELL HARBOR HOME of the SAGES,
CARLTON NURSING HOME, INC., BELLVUE WOMAN'S MEDICAL
CENTER, INC. n/k/a BELLVUE WOMAN'S CARE CENTER A SERVICE
OF ELLIS HOSPITAL, THE CENTER FOR REHABILITATION AND
HEALTHCARE AT DUTCHESS LLC, TIMOTHY STEFFENS, DORIS STEFFENS,
TIMOTHY STEFFENS II, KEVIN STEFFENS, DAWN O'MAHONY, APRIL MARILYN
FAUSER, individually and d/b/a BIRCHWOOD NURSING HOME PARTNERSHIP,
BIRCHWOOD RECEIVERSHIP, LLC, THE CENTER FOR NURSING &
REHABILITATION AT BIRCHWOOD, LLC, CHAD HOLDING
COMPANY, INC., CLEARVIEW OPERATING CO., LLC d/b/a QUEENS
CENTER FOR REHABILITATION & RESIDENTIAL CARE, LAKEVIEW
ASSOCIATES LTD., MELISSA COLLINS, d/b/a SEVENTH HEAVEN,
CORTLAND COMMUNITY REENTRY PROGRAM, INC., CRP LITTLE
NECK LESSER, L.P., d/b/a SAVOY LITTLE NECK, PAUL KATZ and
HARRY KATZ individually and d/b/a ECHO ARMS ADULT HOME,
EDWARD JOHN NOBLE HOSPITAL OF GOUVENER, NEW YORK,
ES RECEIVERSHIP, LLC d/b/a SHALOM NURSING HOME,
FAIRLAWN ADULT HOME INC., RITA SPIELMAN and ELIAS
SPIELMAN individually and d/b/a FAIRLAWN ADULT HOME, ARON
FEUEREISEN, LAZLO SZANTO, JOSEPH ROTH, CHAIM PRIZANT, GERSHON
KIRSCHBAUM, EMIL ISRAEL, LESTER RUTZER, ANN WOLCOWITZ,
individually and d/b/a FAR ROCKAWAY NURSING HOME, FORT
TRYON CENTER FOR REHABILITATION & NURSING, INC.,
THE FOUNTAINVIEW, LLC, FRANKLIN CENTER FOR REHABILITATION
AND NURSING INC., FUTURE HEALTH CARE SERVICES INC., GISSIM

CORPORATION t/a KING DAVID MANOR a/t/a SURF MANOR HOME FOR ADULTS, GLORIA'S MANOR, LLC, GREATER ADIRONDACK HOME AIDES INC., HARRY'S NURSES REGISTRY, INC., HERITAGE RANSOMVILLE MANAGEMENT, LLC, d/b/a RANSOMVILLE MANOR, HERMAN MENCHE AND LEO ROSENSON d/b/a SCHAROME MANOR HOME FOR ADULTS, HUDSON VIEW MANAGEMENT CORP. d/b/a PALISADES GARDENS HOMES HOME FOR ADULTS and d/b/a HUDSON VIEW MANOR, HYLAN MANOR CENTER, INC., IROP, LLC, d/b/a INDIAN RIVER REHABILITATION & HEALTH CARE CENTER, INC., INWOOD COMMUNITY SERVICES, INC., J&G KING DAVID HOTEL CORP., d/b/a KING DAVID MANOR, J.B. ENTERPRISES, INC., ROSE KATZ, d/b/a/ SCHARF MANOR QUEENS, JOS-EL CARE AGENCY, INC., LEROY MANOR, LLC, METRO HOME MANAGEMENT, LLC, d/b/a KING SOLOMON MANOR, JACOB RUBIN individually and d/b/a LEBEN HOME FOR ADULTS, SHOSHANA LEFKOWITZ and ISRAEL LEFKOWITZ, individually and d/b/a PALM BEACH HOME FOR ADULTS PALM BEACH HOME FOR ADULTS, LLC, SIEGER CHAIM, individually and d/b/a LYDEN NURSING HOME, MARANTHA HUMAN SERVICES, INC., MARY AGNES MANOR, LLC, THE MENTAL HEALTH ASSOCIATION IN DUTCHESS COUNTY, INC., MENTAL HEALTH MANAGEMENT ASSOCIATION IN DUTCHESS COUNTY, LLC., MARY AGNES MANOR, LLC, MARYVILLE ADULT HOME, INC., ADORACION ELEVADO individually and d/b/a McCLELLANDS HOME FOR ADULTS NORTHERN DUTCHESS PARAMEDICS, INC., NARROWSBURG HOME INC., d/b/a KELLYS HOME FOR ADULTS, NORTHERN SERVICES GROUP, INC., THE NURSING CARE CENTER AT MEDFORD, INC., OCEAN HOUSE CENTER, INC., ISRAEL ORZEL individually and d/b/a NEW ROCHELLE HOME FOR ADULTS, NEW MONSEY PARK HOME FOR ADULTS, MOHEGAN PARK HOME FOR ADULTS, ORNH, INC., PALISADES GARDENS GROUP, LLC, PALM BEACH HOME FOR ADULTS, LLC, PALM GARDENS RECEIVERSHIP, LLC, PALM TREE RECEIVERSHIP, LLC, PROSPECT PARK NURSING HOME, INC., REGIONAL OCCUPATIONAL AND PHYSICAL THERAPY, SPEECH-LANGUAGE PATHOLOGY, PLLC, MOSES SCHARF AND RIVKIE SCHARF, individually and d/b/a QUEENS MANOR HOME FOR ADULTS, RENAISSANCE PLAZA LTD, SANDOR OBERLANDER, Individually and d/b/a DITMAS PARK CARE CENTER and a/k/a FAIR MANAGEMENT CONSULTING COMPANY, LLC, SS. COSMAS AND DAMIAN HUMAN SERVICES CENTER, INC., HOLY FAMILY HOME, SISTERS OF ST. FRANCIS OF THE NEUMANN COMMUNITIES f/k/a ST. MARY OF THE ANGELS COVENANT OF PERPETUAL ADORATION, WILLIAMSVILLE, N.Y, SHOLOIME S. RUBIN, d/b/a NEW FORDHAM ARMS HOME FOR ADULTS, HERODOTOS DAMIANOS, individually SOUTH COUNTRY ADULT HOME, SOUTH COUNTRY A.H., LLC, ST. MARK'S PLACE INSTITUTE FOR MENTAL HEALTH, INC., UNIVERSITY NURSING HOME, LLC, VASSAR-WARNER HOME, WHNH, INC., WHITE HOUSE ADULT HOME, INC, WOODLAND VILLAGE LLC,

Defendants.

Supreme Court Albany County All Purpose Term, August 16, 2013

Assigned to Justice Joseph C. Teresi

APPEARANCES:

NYS Workers Compensation Board
Office of General Counsel - Litigation Unit
Alison Pesca, Esq.
Attorneys for Plaintiff
328 State Street
Schenectady, New York 12305

Whiteman Osterman & Hanna, LLP
Christopher Buckey, Esq.
*Attorneys for Defendant Sandor Oberlander
individually and d/b/a Ditmas Park Care Center*
One Commerce Plaza
Albany, New York 12260

TERESI, J.:

Plaintiff commenced this action, by summons with notice, seeking to recover the New York Healthcare Industry Workers' Compensation Trust's (hereinafter "HITNY") \$134.8 million dollar deficit. Defendant Sandor Oberlander, individually and d/b/a Ditmas Park Care Center (hereinafter "Oberlander"), previously demanded and received Plaintiff's complaint. Prior to answering, he now moves to dismiss claiming that Plaintiff failed to obtain personal jurisdiction over him. (CPLR §3211[a][8]). Plaintiff opposes the motion. Because Oberlander demonstrated his entitlement to a hearing, this motion is stayed pending the Traverse hearing scheduled herein.

CPLR §3211(a)(8) authorizes a motion to dismiss where "the court has not jurisdiction of the person of defendant." In determining this jurisdictional issue, it is well recognized that "Plaintiff[s] affidavit of service constitute[s] prima facie evidence of proper service." (Dunn v Pallett, 42 AD3d 807, 808 [3d Dept 2007], quoting U.S. Bank Natl. Assn. v Vanvliet, 24 AD3d 906 [3d Dept 2005]). In contesting jurisdiction, the defendant is required to rebut the affidavit of

service with “detailed and specific contradiction[s] of the allegations in the process server’s affidavit.” (Dunn v Pallett, supra at 809; Bankers Trust Co. of Cal. v Tsoukas, 303 AD2d 343 [2d Dept 2003]). Where the defendant properly rebuts the process server’s affidavit “[t]he conflicting affidavits raise questions of fact regarding service of process which must be resolved at a hearing.” (Dunn v Pallett, supra at 809; Zion v Peters, 50 AD3d 894 [2d Dept 2008]).

Here, Plaintiff’s affidavit of service constitutes prima facie evidence of proper service pursuant to CPLR §308(4). Such affidavit of service alleges that service occurred on April 1, 2013. It alleges that the process server affixed the summons with notice to the door of Oberlander’s purported “dwelling house (place of abode),” located at “244 Hewes Street Apt 3A, Brooklyn, NY 11211.” The affidavit of service continues by alleging that the summons with notice was mailed to the same Hewes Street address on April 1, 2013. It also alleged two prior attempts at service at the Hewes Street address, including one in which “the person identified themselves as the debtor.” With this affidavit, Plaintiff established its requisite “‘due diligence’ [and] made a prima facie showing of proper ‘nail and mail’ service upon defendant.” (State of N.Y. Higher Educ. Services Corp. v Upshur, 252 AD2d 333, 337 [3d Dept 1999]; State Higher Educ. Services Corp. v Sparozic, 35 AD3d 1069 [3d Dept 2006]).

Oberlander, however, sufficiently rebutted Plaintiff’s process server’s affidavit. He specifically states that he does “not currently reside at 244 Hewes Street, Apt 3A, Brooklyn, New York 11211, nor did I reside there on April 1, 2013... I have not lived at that address since 2002.” Such allegations constitute a specific contradiction of the process server’s allegations, and require a hearing on the issue of whether Plaintiff effectuated proper service on Oberlander. (Sileo v Victor, 104 AD3d 669 [2d Dept 2013]; Engel v Boymelgreen, 80 AD3d 653 [2d Dept

2011]; Dunn v Pallett, supra; Zion v Peters, supra). Despite Plaintiff's process server's additional affidavit, which recounts his speaking with Oberlander at the Hewes Street address, his supplemental allegations do not resolve all issues of material fact relative to Oberlander's "dwelling place or usual place of abode." A hearing must be held.

To the extent Oberlander's reply papers belatedly argue that service is defective pursuant to General Business Law §13, such position is not considered because it impermissibly introduces an entirely new legal theory upon which he seeks relief. (Schissler v Athens Assoc., 19 AD3d 979 [3d Dept 2005]; Crawmer v Mills, 239 AD2d 844 [3d Dept 1997]; Albany County Dept. of Social Services v Rossi, 62 AD3d 1049 [3d Dept 2009]; E.W. Tompkins Co., Inc. v State University of New York, 61 AD3d 1248 [3d Dept 2009]). Moreover, even if Oberlander's new theory were considered, General Business Law §13's language explicitly applies only to service on Saturday (not holidays). The "nail and mail" service here, however, occurred on Monday. Nor did Oberlander make any showing of maliciousness. (Matter of Kushner, 200 AD2d 1 [1st Dept 1994]; Chase Manhattan Bank, N. A. v Powell, 111 Misc 2d 1011 [Sup Ct, Nassau Co 1981]; Martin v Goldstein, 20 AD 203 [4th Dept 1897]). The process server recounted his meeting Oberlander on Saturday (March 30, 2013), being advised by Oberlander that such day was a Jewish holiday, and his not serving Oberlander with process on that day. Such non service establishes that the process server never intended to "annoy and vex" Oberlander, but rather to respect his religious observance. (Martin v Goldstein, supra at 208).

Accordingly, this Court will hold a Traverse hearing on Plaintiff's service of process on October 3, 2013, at 9:00 am/pm at the Albany County Courthouse, Room 429, 16 Eagle Street, Albany, New York. Oberlander's motion is otherwise stayed pending the Traverse

hearing.

This Decision and Order is being returned to the attorney for the Oberlander. All other original papers submitted on this motion are being held by this Court pending the above Traverse hearing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
September 3, 2013



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 5, 2013; Affidavit of Christopher Buckey, dated June 5, 2013, with attached Exhibits A-D; Affidavit of Sandor Oberlander, dated June 5, 2013.
2. Affidavit of Alison Pesca, dated July 2, 2013, with attached Exhibits A-G; Affidavit of Bruce Eastwood, dated June 28, 2013, with attached Exhibit A.
3. Affidavit of Christopher Buckey, dated August 14, 2013, with attached Exhibit A.