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Contractors Compensation Trust v $49.99 Sewer Man, Inc.
2021 NY Slip Op 50787(U)
Decided on August 11, 2021
Supreme Court, Albany County
Platkin, J.
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Decided on August 11, 2021

Supreme Court, Albany County

Contractors Compensation Trust, Plaintiff,

against

$49.99 Sewer Man, Inc., et al., Defendants.

908373-19

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d/b/a Service Master Commercial Cleaning and Warren A. Hookway III

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Richard M. Platkin, J.

Plaintiff Contractors' Compensation Trust ("Trust") is a group self-insured trust ("GSIT") organized pursuant to the Workers' Compensation Law and attendant regulations. Defendants are alleged to be former members of the Trust or individuals associated with such members.

The Trust commenced this commercial collection action on December 3, 2019 through the electronic filing of a summons and verified complaint naming 1,411 defendants. The complaint alleges that defendants failed to make the payments required by a deficit assessment issued by the Trust on December 12, 2013 ("Deficit Assessment") (*see* NYSCEF Doc No. 1 ["Complaint"]).

The Trust now moves for entry of a default judgment against numerous defendants for failing to appear in response to the Complaint.[FN1] The only timely opposition to the motion is as follows: (1) Allen W. Potts d/b/a Allen W. Potts Construction ("Potts") opposes the Trust's motion and separately moves to dismiss the Complaint (*see* NYSCEF Doc Nos. 418, 498);[FN2] (2) Stephanie Doerner, Warren A. Hookway III and Tyteffco Industries, Inc. d/b/a

Service Master Commercial Cleaning ("Tyteffco") oppose the Trust's motion and cross-move for dismissal as to Doerner and Hookway and for the dismissal of certain claims against Tyteffco (*see* NYSCEF Doc No. 544); and (3) Dale B. Stuhlmiller and Joanne DeVivo oppose the Trust's motion.

DISCUSSION

A. The Trust's Proof

"When a defendant has failed to appear, plead or proceed to trial . . . , the plaintiff may seek a default judgment" (CPLR 3215 [a]). The motion must be supported by proof of service of the summons and complaint, proof of the default and proof of the facts constituting the claim (*see* CPLR 3215 [f]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *333 Cherry LLC v Northern Resorts, Inc.*, 66 AD3d 1176, 1178 [3d Dept 2009]).

1. Corporate Defendants (Service)

The Trust supports its motion with an affirmation of counsel averring that each defendant who remains a subject of the default motion failed to timely answer or otherwise appear following service of process (*see* NYSCEF Doc No. 443 ["Higgs Aff."], ¶¶ 14-15; *see also* NYSCEF Doc Nos. 464-466 [affidavits of service]).

As to the corporations and other business entities against whom the motion is directed ("Corporate Defendants"), the Trust submits proof that service upon them was made pursuant to Business Corporation Law ("BCL") § 306 and Limited Liability Company ("LLC") Law § 303 by delivering to the Secretary of State a hard copy of the 23-page summons and a flash drive containing an electronic copy of the 809-page Complaint and 242-page "Schedule A" (NYSCEF Doc Nos. 464-466; *see also* CPLR 311, 311-a).

However, there is nothing in the CPLR, the BCL or the LLC Law that authorizes a plaintiff to serve a complaint as an *initiatory* paper on a non-consenting defendant other than by delivery of a hard copy of the pleading. To be sure, CPLR 2103 does permit papers to be served on an *attorney* by "electronic means" (CPLR 2103 [b] [7], [f] [2]), but this rule "deals

with the [*2]service of interlocutory papers after jurisdiction has been acquired and an action is pending" (*Cooky's Is. Steak Pub v Yorkville Elec. Co.*, 130 Misc 2d 869, 871 [Sup Ct, NY County 1986]; *see Peterkin v City of New York*, 293 AD2d 244, 249 [2d Dept 2002]; *Jackson v State of New York*, 85 AD2d 818, 818 [3d Dept 1981], *lv dismissed and denied* 56 NY2d 501, 568 [1982]; Thomas F. Gleason, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C:2101:7, C:2103:3). And the provisions of the rule governing service on a *party* to the action refer only to the delivery, mailing, transmittal or dispatching of "paper[s]" (CPLR 2103 [b], [c]).[FN3]

CPLR 2103's limited authorization to serve an attorney by electronic means is further qualified by the proviso that electronic service only is permitted "where and in the manner authorized by the chief administrator of the courts by rule and, unless such rule shall provide otherwise, such transmission shall be upon the party's written consent" (*id.*, [b] [7]). In cases like this, commenced by mandatory electronic filing via the New York State Courts Electronic Filing ("NYSCEF") system,[FN4] court rules require that "service of initiating documents . . . shall be made as provided in Article 3 of the [CPLR] . . . , or by *electronic means if the party served agrees to accept such service*" (22 NYCRR 202.5-bb [b] [3] [emphasis added]; *accord* 22 NYCRR 202.5-b [f] [1] ["(i)nitiating documents may be served in *hard copy* pursuant to Article 3 of the CPLR . . . or by electronic means if the party served agrees to accept such service" (emphasis added)]).

Further, under 22 NYCRR 202.5-a, entitled "Filing by Electronic Transmission," a court may allow counsel to communicate with one another by electronic means and may direct counsel to submit documents "by e-mail or by other *electronic means, such as by a computer flash drive*" (22 NYCRR 202.5-a [b] [emphasis added]). But there is nothing in the rule that allows initiatory papers to be served on a party by electronic means. And under the prior version of the rule, which was in effect on the date of commencement, initiatory papers could be delivered to the court clerk electronically, but service of process by electronic means was not authorized.

Thus, neither the governing statutes nor the rules of the Chief Administrative Judge authorize service of initiatory papers by electronic means absent the consent of the defendants, and there is no proof that any of the Corporate Defendants consented to service of the Complaint by delivery of a flash drive.

Moreover, the Trust's proper service of the paper summons alone is insufficient to confer personal jurisdiction over the Corporate Defendants. CPLR 311 (a) (1) and BCL § 306 (a) refer only to delivery of a "summons," but if a summons is served without a complaint, the summons must give notice of the nature of the action and the relief sought (*see* CPLR 304 [a]; 305 [b]; *Parker v Mack*, 61 NY2d 114, 116-118 [1984]; *Micro-Spy, Inc. v Small*, 9 AD3d 122, 126 [2d Dept 2004]). In other words, "[t]o be effective for filing and service purposes . . . , the summons must either be accompanied by a complaint or be inscribed with the 'notice' specified in CPLR 305 (b)" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:1). Here, the Trust commenced its action through the filing of a summons and complaint (*see* NYSCEF Doc No. 1), and the summons does not give notice of the nature of the action or the relief sought by the Trust.

The Court recognizes the enormous burden associated with service of an 809-page Complaint and 242-page schedule upon the 1,411 defendants named in this action. But the law [*3]requires a plaintiff to strictly comply with the legally-prescribed methods of service (*see Cedar Run Homeowners' Assn., Inc. v Adirondack Dev. Group, LLC*, 173 AD3d 1330, 1330 [3d Dept 2019]). "When the requirements for service of process have not been met, it is irrelevant [for jurisdictional purposes] that the defendant(s) may have actually received the documents" (*Pierce v Village of Horseheads Police Dept.*, 107 AD3d 1354, 1355 [3d Dept 2013] [internal quotation marks, brackets and citation omitted]).

And despite plaintiff's creative and well-intentioned attempt to avoid the printing and distribution of almost 1.5 million pages of pleadings (exclusive of any duplicate copies required by the Secretary of State), the Trust's use of an unauthorized method of services carries its own risks and concerns. In this age of increased awareness of cyber-security and daily reminders of the risks posed by malicious computer hackers and international ransomware gangs, a prudent corporation may have good reasons for refusing to allow an unknown flash drive to be inserted into its computer network (*see* Tonya Riley, *USB-Based Malware Is A Growing Concern For Industrial Firms, New Honeywell Findings Show* [2021], available at https://www.cyberscoop.com/usb-malware-honeywell-cyber-risk/ [last accessed Aug. 9, 2021]). These risks can be avoided (or at least mitigated) if electronic service is made via a trusted system like NYSCEF or some other method of electronic transmission agreed upon by the parties.

Moreover, the use of a flash drive was not the only way the Trust could have avoided the burdens attendant to the delivery of paper copies of the 809-page Complaint and 242-page Schedule A to 1,411 defendants. Had the Trust commenced this action through the filing a summons with notice, any defendant who appeared and demanded a complaint through counsel (*see* CPLR 3012 [b]) could have been served with an electronic copy of the Complaint and Schedule A as an *interlocutory* paper via NYSCEF or other electronic means (*see* CPLR 2103; *Dunlop v Saint Leo the Great R.C. Church*, 109 AD3d 1120, 1120-1121 [4th Dept 2013]).

Although none of the Corporate Defendants have opposed the motion for entry of a default judgment based on improper service, the Court observes that the Trust has known of the issue for some time. In particular, defendant A.P. Painting, Inc. previously moved for dismissal on the ground that service of the Complaint on a flash drive was improper, relying on essentially the same statutes and rules discussed above. The Trust discontinued its claims against A.P. Painting before a decision was rendered, but the motion had been fully briefed as of October 29, 2020 (*see* NYSCEF Doc Nos. 348-352, 384-388, 394).[FN5]

The Court therefore concludes that the affidavits submitted by the Trust fail to demonstrate that "service was made . . . in an authorized manner" on the Corporate Defendants (*see* CPLR 306 [a]), which necessitates denial of the Trust's motion as to such defendants (*see Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345, 345 [2d Dept 2006]; *Nemetsky v Banque Dev. De La Republique Du Niger*, 59 AD2d 527, 527 [2d Dept 1977], *affd* 48 NY2d 962 [1979]).

2.Individual Defendants (Service)

The proof of service as to the individual defendants who remain a subject of the Trust's default motion ("Individual Defendants") is not uniform. Some affidavits of service simply attest that certain Individual Defendants were served with a "Summons & Verified Complaint" without detailing whether the Complaint was served as a hard copy or on a flash drive; other affidavits indicate that many of the Individual Defendants were served with a summons and either an "attachment," a "flash drive," or a "complaint on flash drive" (NYSCEF Doc Nos. 3-4, 11, 43, 51, 464-466).[FN6]

Given that many of the Individual Defendants were improperly served by electronic means without their consent and the Court cannot ascertain the particular manner of service employed as to other Individual Defendants, the proper course is to deny the motion for entry of a default judgment against the Individual Defendants without prejudice to renewal upon papers showing proper service of process upon the subject defendants.

B. Opposition and Cross Motions for Dismissal

1. *Potts, DeVivo and Stuhlmiller*

Potts opposes the motion and cross-moves for dismissal of the Complaint, arguing that the Trust's claims "are time-barred by the six-year statute of limitations for a verbal or written contract" (NYSCEF Doc No. 419, ¶ 6).

For the reasons stated previously, the Trust's motion for a default judgment must be denied as against Potts without regard to the sufficiency of his opposition papers (*see* Part A.2, *supra*). The same is true as to defendants DeVivo and Stuhlmiller (*see* NYSCEF Doc Nos. 3, 51), regardless of the fact that their opposition papers were served *ex parte* and are unsupported by proof in admissible form.

As to the cross-motion, the principal claims against Potts, an alleged former Trust member, sound in breach of contract and account stated (*see* Complaint, ¶¶ 935-944, 945-948), which are governed by a six-year statute of limitations (*see* CPLR 213 [2]; *New York State Workers' Compensation Bd. v Any-Time Home Care Inc.*, 156 AD3d 1043, 1045-1046 [3d Dept 2017]).

According to the Trust's verified Complaint and the documents annexed to its motion, the Deficit Assessment was issued on December 12, 2013, and made payable beginning March 3, 2014 (*see* Complaint, ¶ 913; *Iovine v Caldwell*, 215 AD2d 977, 978 [3d Dept 1995] ["verified complaint may serve as an affidavit of merits"]; *see also* CPLR 105 [u]; 3215 [f]). Thus, the Trust's claims accrued no earlier than March 3, 2014, the date on which defendants allegedly breached their obligation to the Trust by failing to make the payment required under the Deficit Assessment (*see State of NY, Workers' Compensation Bd. v A & T Healthcare, LLC*, 85 AD3d 1436, 1438 [3d Dept 2011]; *accord NYAHSA Servs., Inc., Self-Ins. Trust v*

People Care Inc., 156 AD3d 99, 104 [3d Dept 2017]; *21st Century*, 2018 NY Slip Op 50050[U], *6-7).

As this action was commenced within six years of March 3, 2014, the Trust's claims for breach of contract and account stated are timely, and the cross-motion must be denied.

B. Doerner, Hookway and Tyteffco

Doerner, Hookway and Tyteffco oppose the Trust's default motion and cross-move for (1) dismissal of the Complaint as against Doerner and Hookway, and (2) dismissal of certain causes of action against Tyteffco (*see* NYSCEF Doc No. 544).

In response to the cross motion, the Trust's counsel represents that, "[f]ollowing a review of [the cross motion] papers, Plaintiff does not believe that i[t] possesses a good faith basis to continue this action against Doerner or Hookway and hereby withdraws all claims against [them] and discontinues this action as against them in their individual capacities" (NYSCEF Doc No. 562, ¶ 3). Accordingly, the Trust's default motion must be denied as against Doerner and [*4]Hookway, and the Complaint is dismissed as to them with prejudice.

Tyteffco only seeks dismissal of the quantum meruit and BCL § 1005 claims (*see* NYSCEF Doc No. 544, ¶ 2; Doc No. 550, pp. 9-10). According to the Trust's counsel, "[b]ased upon a review of cited authority, Plaintiff does not challenge Defendants' motion with respect to the claims for *quantum meruit* and BCL § 1005 as against Tyteffco," thus conceding that these claims must also be dismissed (NYSCEF Doc No. 562, ¶ 5; *see Weldon v Rivera*, 301 AD2d 934, 935 [3d Dept 2003]).

Finally, the Trust's motion for entry of a default judgment against Tyteffco is denied (*see* Part A.1, *supra*).

CONCLUSION

Accordingly,[FN7] it is

ORDERED that the branch of plaintiff's motion seeking entry of a default judgment against the Corporate Defendants is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking entry of a default judgment against the Individual Defendants is denied without prejudice to renewal upon papers showing proper service of process; and it is further

ORDERED that defendant Allen W. Potts's motion to dismiss is denied; and it is further

ORDERED that the cross motion to dismiss of defendants Stephanie Doerner, Tyteffco Industries, Inc. d/b/a Service Master Commercial Cleaning and Warren A. Hookway III is granted; and it is further

ORDERED that plaintiff's complaint is dismissed as against defendants Stephanie Doerner and Warren A. Hookway III with prejudice; and it is further

ORDERED that plaintiff's causes of action for quantum meruit and violation of BCL § 1005 are dismissed as to defendant Tyteffco Industries, Inc. with prejudice; and finally it is

ORDERED that plaintiff shall advise the Court in writing by **September 10, 2021** as to its intentions regarding the continued prosecution of this action.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, plaintiff's counsel shall promptly serve notice of entry on all other parties entitled thereto.

Dated: August 11, 2021

Albany, New York

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RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:[FN8]

NYSCEF Doc Nos. 418-422, 442-472, 482-484, 498-500, 544-550, 562, 763.

Footnotes

Footnote 1: The Trust's motion, filed on December 2, 2020, initially involved 1,133 defendants (*see* NYSCEF Doc Nos. 442, 443). Since then, the Trust has settled with 227 defendants, withdrew its motion as to 18 defendants, discontinued this action against 42 defendants for inability to effect service, and provided extensions of time to appear to three other defendants (*see* NYSCEF Doc No. 763).

Footnote 2: Because Potts's arguments in support of his motion to dismiss and in opposition to the Trust's motion are essentially the same, the Court will consider them together.

Footnote 3:CPLR 2101 (g) also refers to service by electronic means, but only in the context of establishing requirements for the reproducibility in hard copy of any papers so served. As such, the rule is not an independent source of authority to serve papers by electronic means.

Footnote 4: Electronic filing became mandatory in Supreme Court, Albany County as of November 20, 2019 (*see* AO/245/19), and this action was commenced on December 3, 2019.

Footnote 5: The Court takes notice of the Trust's arguments in opposition to A.P. Painting's motion.

Footnote 6: By way of example, the Complaint was served on a flash drive on the following defendants: Edward Cope, Edward Smith Jr., Edward Smith Sr., H. Sloan Miller Jr., Joseph J. Barile, Joseph Kraus, Kenneth Petersdorf, Lawrence Iacovelli, Michael A. Betz, Michael E. Pavone, Mike Kozanitis, Milton Stathes, Patricia Barile, Shelley Malloy, Thomas D. Mattson, William A. Betz, William Kraus and William R. Falletta. In addition, there is no proof of completed service upon Christopher Negado, who was served pursuant to CPLR 308 (2), but for whom proof of timely mailing is missing (*see Estate of Perlman v Kelley*, 175 AD3d 1249, 1250 [2d Dept 2019]). And the affidavit of service for Negado merely states that he was served with the "Notice of Electronic Filing and Summons with attachment." In this connection, the Court notes that the Trust's moving papers are missing affidavits of service for a number of the Individual Defendants. As a result, the Court endeavored to search the entire NYSCEF docket to determine whether these individuals had been served (*see e.g.* NYSCEF Doc Nos. 3-4, 11, 43, 51).

Footnote 7: To the extent not expressly addressed, the parties' remaining contentions have been considered and found to be without merit and/or unnecessary to entertain given the

disposition reached herein.

Footnote 8: The Court takes judicial notice of the prior filings in this action (*see Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985], *appeal dismissed* 65 NY2d 637 [1985]).

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