VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-01886

Heather and Nicholas Nielsen, Plaintiffs v. Knight Industries, Inc., Defendant	DECISION ON MOTIONS FOR SUMMARY JUDGMENT

RULING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Heather and Nicholas Nielsen (the "Nielsens") bring this action to domesticate a New York state default judgment against Defendant Knight Industries, Inc. ("Knight"). The New York case arose out of a contract dispute involving cabinets the Nielsens purchased from Knight. The New York court issued a default judgment in favor of the Nielsens when Knight failed to appear. Knight challenges the default judgment, arguing the foreign court lacked personal jurisdiction over it because it was never properly served with the action. The Nielsens are represented by Chandler W. Matson, Esq. Knight is represented by John L. Franco, Jr., Esq. Both parties have moved for summary judgment pursuant to Rule 56 of the Vermont Rules of Civil Procedure. For the reasons discussed below, the Nielsens' motion for summary judgment is DENIED and Knight's motion for summary judgment is GRANTED.

Factual Background

The following relevant facts are not in dispute. In November 2017, the Nielsens, who live in New York, ordered kitchen cabinetry from Knight, a Vermont corporation that also uses the trade name "Knight Kitchens." Knight is not registered to do business in New York; its office is in North Clarendon, Vermont, and it has no employees in New York. Steve Bankert, a sales designer for Knight, assisted the Nielsens with their order. Bankert was one of three salespersons employed by Knight. He had no subordinates and was supervised by sales manager Eric Ritter. Bankert was employed to assist customers with cabinetry sales. He was the sales representative who worked with the Nielsens to place their order. In this capacity, Bankert filled out Knight's order form for the Nielsens' cabinets and made changes based on their particular specifications, such as dimensions, materials, etc. The price and terms of the contract were pre-set by Knight and determined through its computer program. *See* Pls.' Statement of Undisputed Material Facts ("SUMF"), filed on Nov. 1, 2022, Ex. 3.1 at 9-22 ("Knight Kitchens Order Form").

The Nielsens encountered delays and problems with the cabinetry order, to which Knight employees Karina Ritter and Gabrielle Stampe responded. Ultimately, on September 6, 2018, the Nielsens filed an action against Knight for breach of contract, quantum meruit and unjust enrichment, and consumer fraud in the Supreme Court of New York for Nassau County.[1]

On October 1, 2018, a deputy sheriff in the Rutland County Sheriff's Department served the New York Summons and Complaint upon Steve Bankert at Knight's office in North Clarendon. Although other Knight employees worked in the office, at the time, Bankert was the only person there. The deputy sheriff handed Bankert the package containing the summons and complaint but did not tell Bankert what was in the package. The deputy did not ask Bankert if he was authorized to accept service on behalf of Knight, nor did she ask who at Knight was authorized to accept service. Bankert did not tell the deputy he could accept service or tell her whom to serve. Bankert did not know what was inside the package and does not recall what he did with it after it was handed to him. *See* Def.'s Suppl. SUMF, filed on Nov. 22, 2022, ¶¶ 47-53 & Ex. C (Bankert Decl.).[2] The deputy sheriff noted Bankert's physical characteristics and job title on her return of service form.

On October 5, 2018, Anni Ritter, Knight's Controller, sent the Nielsens an email with the subject line "re: Law suit" in which she wrote "We are in receipt of your complaint and do not understand why you are suing our company." Pls.' SUMF ¶ 40, Ex 3.3. In addition, Knight acknowledges that on or before January 10, 2019, one of its officers or directors, or a general agent, received a copy of the New York summons and complaint, though it is not specified which individual received the copy or how they received it. *Id*. ¶ 45 & Ex 3.

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[1] *See Nielsen v. Knight Kitchens, Inc*., No. 612424/2018 (N.Y. Sup. Ct. 2018). The action was filed against Defendant "Knight Kitchens, Inc." and not "Knight Industries, Inc." Although the parties have made arguments regarding the materiality of using Knight's trade name in the lawsuit, the Court need not reach them in light of its decision on the motions.

[2] The Nielsens contend the Court should not consider Bankert's Declaration because it is "self-serving" and because they have not deposed Bankert. Such complaints are unavailing. An affidavit prepared for summary judgment is not disregarded as "self-serving" simply because it asserts facts favorable to the party propounding it. Rather, courts have held that "*ultimate or conclusory facts* and conclusions of law cannot be utilized on a summary judgment motion." *BellSouth Telecom., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996) (emphasis added; quotation omitted) (noting that such "conclusory statements are insufficient to raise a triable issue of material fact"); *see also In re Shenandoah LLC*, 2011 VT 68, ¶ 17, 190 Vt. 149 (in granting summary judgment against party, court "was not bound by the bald assertions contained" in affidavits where other available documentary evidence was not provided to support the assertions). Bankert's Declaration does not fall into this category. Moreover, the parties had ample time to conduct discovery in this case. If the Nielsens believed that Knight failed to comply with its discovery obligations, whether by failing to appear for a deposition or to properly respond to requests to produce, they could have filed a motion to compel under Rules 26 and 37 or raised the issue by affidavit through Rule 56(d). Finally, because the Nielsens do not object to the declaration as unsworn or otherwise improper under Rule 56(c)(1), the Court will accept it for summary judgment purposes.

Knight did not appear in the New York action. On July 9, 2019, the Nielsens filed notice of a request for default judgment in the New York case and sent a copy to Knight. About a week later, Ritter sent the Nielsens' counsel an email stating she had received the notice of default judgment. On September 5, 2019, the Nielsens' motion for default judgment was granted, and on June 25, 2020, the New York court entered default judgment in favor of the Nielsens. In issuing the judgment, the New York court relied on the Rutland County Sheriff Department's affidavit of personal service, as well as an affidavit submitted by the Nielsens' counsel concerning the deputy sheriff's delivery of documents to Knight on October 1, 2018, but the court did not make any findings regarding service.

On October 25, 2021, the Nielsens filed the instant petition to domesticate the New York judgment in the Vermont Superior Court.

Discussion

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record." V.R.C.P. 56(c)(5). "In determining whether there is a genuine issue as to any material fact, [the court] will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). "In an instance when both parties seek summary judgment, each party must be given the benefit of all reasonable doubts and inferences when the opposing party's motion is being evaluated." *Down Under Masonry, Inc. v. Peerless Ins. Co.*, 2008 VT 46, ¶ 5, 183 Vt. 619 (mem.) (quotation omitted). Affidavits submitted in support of a party's motion for summary judgment or opposition to such a motion "must be made on personal knowledge and set forth facts that would be admissible in evidence." *Robertson*, 2004 VT 15, ¶ 15.

"A sister-state judgment is normally entitled to full faith and credit in the absence of a showing that the court lacked jurisdiction or acted to deprive defendant of a reasonable opportunity to be heard." *Lakeside Equip. Corp. v. Town of Chester*, 173 Vt. 317, 321, 795 A.2d 1174, 1178 (2002) (quotation omitted). A "defendant has the heavy burden of undermining" the other state's judgment, which is presumptively valid. *Hall v. McCormick*, 154 Vt. 592, 595, 580 A.2d 968, 970 (1990). Knight asserts that the New York court lacked jurisdiction over it because the Nielsens' original service of the Summons and Complaint was defective under New York Civil Practice Law & Rules ("CPLR") 311(a)(1), rendering the default judgment void. "When a defendant fails to appear after having been served with a complaint in a state and a default judgment is entered, the defendant may defeat enforcement of that judgment in another forum by showing that the judgment was issued by a court lacking personal jurisdiction." *Lakeside Equip.*, 173 Vt. at 321, 795 A.2d at 1178.[3] "In determining jurisdiction, the foreign State's law, as limited by due process, controls." *Id*. at 322, 795 A.2d at 1179 (quotation omitted).

[3] To the extent the Nielsens argue that Knight may only contest jurisdiction for improper service in the original case, Pls.' Reply to Def.'s Opp., filed on Jan. 31, 2023, at 11, they cite no authority to support this argument, which is incorrect as a matter of law.

I. Compliance With New York's Procedure for Obtaining a Default Judgment.

As an initial matter, the Court rejects Knight's argument that the New York judgment is invalid because the Nielsens' motion for default judgment failed to make a prima facie showing, and the New York Supreme Court did not find, that the summons and complaint were properly served. *See* N.Y. CPLR 3215(f) (McKinney 2022) ("On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due . . . by affidavit made by the party."). Unlike the due process principles that require valid personal service, the procedural requirements stating what must be filed in support of a motion for default judgment in New York are not jurisdictional. Accordingly, technical noncompliance with CPLR 3215(f) cannot provide grounds to overturn the New York judgment. *See, e.g.*, *Lakeside Equip.*, 173 Vt. at 322, 795 A.2d at 1179 ("If the defendant in the action to domesticate the foreign default judgment ultimately fails to meet its burden of demonstrating that the judgment is jurisdictionally defective, any challenge on the merits of the lawsuit is foreclosed.").[4]

II. Was Service on Knight Effective According to New York Law?

Under New York law, "[p]ersonal service upon a [domestic or foreign] corporation . . . shall be made by delivering the summons . . . 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." N.Y. CPLR 311(a)(1) (McKinney 2023). As the practice commentary notes, "the general rule under CPLR 311(a)(1) is that the process server must tender process directly to an authorized corporate representative. Delivery to an unauthorized person who later hands the process to an officer, managing agent, or some other qualified representative is ineffective." *Id*., Vincent C. Alexander, Practice Commentary, McKinney's Cons. Laws of N.Y., 1999 Electronic Update, Civil Practice Law and Rules 311:1 ("CPLR Commentary") (citing *McDonald v. Ames Supply Co.*, 238 N.E.2d 726, 728-29 (N.Y. 1968) (holding that delivery to building receptionist who was not corporation's employee did not confer jurisdiction even though receptionist later redelivered process to managing agent)).[5] New York courts interpret

[4] Plaintiffs' reliance on *H&E Equipment Services, Inc. v. Cassani Electric, Inc.*, 2017 VT 17, 204 Vt. 559, however, is misplaced. Unlike here, the foreign court in that case made an "express finding . . . that [defendant] was properly served," and "defendant failed to put forth sufficient evidence to rebut the presumptively valid foreign judgment." *Id.* ¶ 21. In the instant action, the New York Supreme Court made no finding that service was proper, and Knight does not simply make conclusory assertions, but rather puts forth a declaration that the Court may rely on describing the details of the deputy sheriff's actions in attempting to make service. *See id.* ¶ 20 (noting that, while "under other circumstances, a party's affidavit might suffice to create a dispute of material fact sufficient to defeat summary judgment," in the case at bar defendant's "bald assertion concerning lack of service was insufficient to create a genuine factual dispute regarding service").

[5] Exceptions exist under circumstances not applicable here, such as when the authorized representative resists service, *Pers. Sys, Int'l., Inc. v. Clifford R. Gray, Inc.*, 536 N.Y.S.2d 237, 238-39 (App. Div. 3d Dep't 1989), and when delivery of service was made to an unauthorized person in the presence of a corporate officer to whom re-delivery immediately occurred, *Conroy*

CPLR 311(a)(1) to require more than actual or constructive notice of a lawsuit for service to be effective. *See, e.g.*, *Macchia v. Russo*, 496 N.E.2d 680, 682 (N.Y. 1986) ("Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court."); *David v. Total Identity Corp.*, 857 N.Y.S.2d 380, 382 (App. Div. 4th Dep't 2008) ("Any actual notice received by TIC and Matthew Dwyer, as TIC's officer, is insufficient to subject TIC to personal jurisdiction when the statutory requirements for service of process have not been met."); *DeZego v. Bruhn*, 472 N.Y.S.2d 414, 416 (App. Div. 2d Dep't 1984) ("Although appellant clearly received actual notice of the suit, such notice does not cure defective service since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court." (quotation omitted)), *aff'd*, 492 N.E.2d 1217 (N.Y. 1986).

Knight argues the undisputed facts show it was not served in compliance with CPLR 311(a)(1) because the summons and complaint were delivered to Steve Bankert, Knight's salesperson, rather than to Knight's executives or agents, and Bankert was not authorized to receive service. The Nielsens counter that Bankert was Knight's "managing or general agent" such that service upon him was effective as to Knight. Alternatively, they argue service was also effective on Knight by transmission to Anni Ritter, Knight's controller. In addition, the Nielsens contend Bankert was an "agent authorized by appointment . . . to receive process." The Court addresses each contention in turn.

A. Service on a managing or general agent.

CPLR 311(a)(1) provides a list of appropriate corporate representatives for service who, "by virtue of their position in the corporation, [are] likely to have the necessary judgment and discretion to ensure that process is ultimately received by those officials within the corporation who will protect the company's interests." CPLR Commentary 311:1. Although Bankert's job title was "sales designer," the "precise title of the person served is of small moment so long as his position in corporate hierarchy is such as to warrant conclusion that notice of action given to him will result in notice to corporation." *DeCandia v. Hudson Waterways, Inc.*, 452 N.Y.S.2d 196, 197 (App. Div. 2d Dep't 1982).

Under New York law:

> A managing agent or general agent is one who is empowered with supervisory authority and possesses judgment and discretion to take action on behalf of the corporation. Over a century ago, the Court of Appeals described a managing agent as "some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of exercising it."

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v. Int'l. Terminal Operating Co., 449 N.Y.S.2d 294, 294 (App. Div. 2d Dep't 1982) ("Where the delivery is so close both in time and space that it can be classified as part of the same act service is effected." (quotation omitted)).

CPLR Commentary 311:1 (quoting *Taylor v. Granite State Provident Ass'n*, 32 N.E. 992, 993 (N.Y. 1893)). As one New York federal district court has more recently remarked, "the phrase 'managing or general agent' does not refer to any agent of the corporation, but one who operates at its highest levels, or at least has overall authority to make high-level decisions on the part of the enterprise." *Cooney v. Barry Sch. of Law*, 994 F. Supp. 2d 268, 270 (E.D.N.Y. 2014) (emphasizing that "'[m]anaging or general agent' is a term of art with a narrower meaning than just 'agent'"); *see also Fernandez v. Town of Babylon*, 961 N.Y.S.2d 223, 224 (App. Div. 2d Dep't 2013) (service on "project manager" was insufficient to confer jurisdiction on defendant corporation); *Popkin v. Xerox Corp.*, 612 N.Y.S.2d 250, 251 (App. Div. 2d Dep't 1994) (holding that financial control manager of defendant's district office was not a "managing agent" despite fact that she supervised "eight or nine employees in the office"). Thus, a "managing agent" must be someone who is invested with "senior corporate authority" on a level "consistent with the other listed categories of authorized persons to receive service, such as officers and directors." *Cooney*, 994 F. Supp. 2d at 270-71; *see also Wilson v. WalMart Store, Inc.*, No. CV 15-4283, 2016 WL 11481723, at *3 (E.D.N.Y. Aug. 22, 2016) (holding that "store manager does not qualify as a 'managing agent or general agent'" under CPLR 311), *R&R adopted sub nom. Wilson v. Walmart Stores, Inc.*, No. 15-CV-4283, 2016 WL 5338543 (E.D.N.Y. Sept. 23, 2016).

In light of the above considerations, the Court concludes that Mr. Bankert was not a managing or general agent of Knight for purposes of CPLR 311(a)(1). Bankert lacked the high level of discretion required of a "managing agent." He did not exercise general authority or judgment for Knight or have responsibilities beyond those of a salesperson. Def.'s Supp. SUMF ¶¶ 64-66. While the undisputed facts show that Bankert handled the Nielsens' kitchen cabinet order for Knight, his discretion in this endeavor was limited. Contrary to Plaintiffs' conclusory assertion that Bankert "drafted" the contract, the record evidence, including the Bankert Declaration and the order form itself, estblishes that the parties' contract was "a standard contract form with standard terms, conditions, and prices." *Id.* ¶ 73; *see also* Pls.' SUMF, Ex. 3.1 at 9-22 (listing item and catalog numbers, quantity, and item price). The contract prices were determined according to Knight's computer program. Further, Bankert did not have any supervisory authority. It is undisputed that Bankert was one of three salespersons working for Knight under the supervision of sales manager Eric Ritter, and Bankert had no subordinates.

Indeed, the Court finds Bankert's position is most akin to that of the fire insurance agent in *Grace v. Agricultural Insurance Co.*, 294 N.Y.S. 920 (Sup. Ct. 1937). In that case, service was made on a local sales agent who was authorized to issue insurance policies, collect premiums, and temporarily bind the company by signing contracts, but had no subordinates nor authority over business other than that "written by himself." *Id.* at 921. The New York Supreme Court held such facts were insufficient to demonstrate that the salesperson was a "managing agent" under the rule, noting that he did not have "entire charge of the defendant's business" and could not "subject the company to liabilities limited only by the extent of its capital." *Id.* Similarly, Bankert had certain discretion to enter into a contract with the Nielsens, but he did not supervise Knight's business ventures or other employees and lacked high-level authority over Knight's corporate activities. As such, he is not a "managing agent" for purposes of CPLR 311(a)(1). *See d'Amico Dry d.a.c. v. McInnis Cement Inc.*, 469 F. Supp. 3d 185, 190-91 (S.D.N.Y. 2020) (holding that parent company could not be served through its wholly owned

subsidiary that did "not possess sufficient authority to act on [parent company's] behalf to qualify as its managing or general agent"; while the subsidiary "helped negotiate the charter party as [parent company's] agent, the record does not show that it had significant discretion during the negotiation").

The Nielsens further suggest that Bankert was Knight's "local agent" in New York and so was authorized to accept service under *Shaheen Sports, Inc. v. Asia Insurance Co.*, 89 F. Supp. 2d 500 (S.D.N.Y. 2000). However, the *Shaheen* case is inapposite. There, the federal district court held that service was proper on a Pakistani corporation when made in New York on the director of the New York business the foreign corporation had hired as its claims settling agent "to handle all claims in North, Central and South America." *Id*. at 503-04. Further, the New York business was "invested with full authority to adjust and settle claims" and the foreign corporation had "expressly designated" the New York business as its "agent." *Id*. at 503. Leaving aside that in the instant case, service was attempted on Knight itself at its Vermont headquarters, Knight had not granted Bankert such broad authority for its business activities nor designated him as its agent. Thus, service on Bankert was not valid under the "local agent" theory. *Cf. Bomze v. Nardis Sportswear*, 165 F.2d 33, 37 (2d Cir. 1948) (person "in charge of the local business" when the president was not in state was properly considered the "managing agent" for purposes of service made in New York at the New York office).

Lastly, the Nielsens assert that Anni Ritter, Knight's controller, received the summons and complaint, which constitutes effective service on Knight. As controller, Ritter would likely qualify as a "cashier" under CPLR 311(a)(1). *See* CPLR Commentary 311:1 (explaining that "'cashier or assistant cashier' refers to 'a financial official within the ranks of the managerial hierarchy, not a check-out clerk at the counter of a retail store'"). However, it is undisputed that Ritter was not served with the summons and complaint by the Rutland County deputy sheriff. Thus, even if Ritter did receive the paperwork from someone else at Knight, such redelivery is insufficient. *See, e.g.*, *McDonald*, 238 N.E.2d at 728-29; CPLR Commentary 311:1. Moreover, at its core, Plaintiffs' argument seems to be that Ritter had actual notice of the lawsuit, which likewise is not effective process under CPLR 311(a)(1). *See Macchia*, 496 N.E.2d at 682 ("Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court."); Pls.' Mot. for Sum. J., filed Nov. 1, 2022, at 11 (asserting that Ritter "was notified about the complaint and lawsuit within five days after the summons and complaint were served on Knight's business").

In short, the Court finds no disputed issues of material fact that the Nielsens did not serve Knight with the New York action via an officer, director, managing or general agent, or cashier or assistant cashier under CPLR 311(a)(1).

B. Service on another agent authorized by appointment to receive process.

The Nielsens contend that if Bankert was not Knight's managing agent, he was its "agent authorized by appointment" to receive service under CPLR 311(a)(1). A corporation may formally designate a person or agent as approved to be served on its behalf, but appointment "can also occur by informal means." CPLR Commentary 311:2. The leading case discussing this topic is *Fashion Page, Ltd. v. Zurich Insurance Co.*, 406 N.E.2d 747 (N.Y. 1980). There,

the New York Court of Appeals held that the executive secretary for the director and vice-president of the corporation who had accepted service in the past and who was identified to the process server as a person authorized to accept service for the corporation was properly an authorized agent for purposes of service under CPLR 311(a)(1). *Id*. at 751-52. The court stated that the CPLR "should be liberally construed." *Id*. at 750. Thus, "cases have upheld service on low-level employees who, upon inquiry at the corporation's office, identify themselves or others in the office as having the authority to accept process." CPLR Commentary § 311:2; *see also Fashion Page*, 406 N.E.2d at 751 ("Reliance may be based on the corporate employees to identify the proper person to accept service. In such circumstances, if service is made in a manner which, objectively viewed, is calculated to give the corporation fair notice, the service should be sustained.").

However, in applying *Fashion Page*, "[c]ourts focus on the process server's diligence in seeking to ascertain a proper recipient and the reasonableness of his or her reliance on the representations of the corporation's employees." CPLR Commentary § 311:2. Service will be deemed insufficient where the process server makes no inquiry of the person to whom the court papers are personally delivered or there is no representation to the process server that the recipient has authority to accept service on behalf of the corporation. *See, e.g.*, *Glob. Connect Strategic Voice of Broad., Corp. v. Oxford Collection Agency, Inc.*, 856 N.Y.S.2d 635, 636 (App. Div. 2d Dep't 2008) (holding that CPLR 311(a)(1) was not satisfied where process server "made no inquiry of the person to whom the summons and complaint were personally delivered regarding the authority of that person to accept process . . ., nor was there any indication that the recipient . . . made any representation to the process server of having authority to receive service on behalf of the defendant corporation"); *Todaro v. Wales Chem. Co.*, 570 N.Y.S.2d 595, 596 (App. Div. 2d Dep't 1991) (service on manufacturing clerk was insufficient to confer jurisdiction where the record contained no evidence to support "a reasonable belief" by the process server that the clerk "was authorized to accept process on behalf of the [company]" or that she "had ever accepted service of process" in the past).

In this case, there is no dispute that the deputy sheriff served the New York summons and complaint on Mr. Bankert. According to Bankert, the deputy did not tell him what was in the packing she was delivering and did not ask if he had the authority to receive service on behalf of Knight. Nor did Bankert or anyone at Knight tell the deputy that he had such authority. *See* Def.'s Supp. SUMF ¶ ¶ 49-53. While the Nielsens contend this account is not credible, and assert that the deputy sheriff would have followed a different procedure, they have produced no admissible evidence to rebut Knight's version of events.[6] Nor does the fact that Bankert was the

[6] Plaintiffs attempt to create a dispute on this issue using the "Affidavit" of Michael Seaberg (although called an affidavit, the document is not sworn before a notary), which describes general practices of the Rutland County Sheriff's Department. *See* Pls.' Statement of Additional Material Facts, filed on Jan. 31, 2023, ¶ 7. However, Mr. Seaberg's submission contains only inadmissible hearsay, which cannot be used to support or oppose a motion for summary judgment. *See* V.R.C.P. 56(c)(6) (providing that affidavits used to support or oppose a summary judgment motion "must be made on personal knowledge" and must "set of facts that would be admissible in evidence"). Accordingly, the Court does not consider the Seaberg statement in deciding the parties' motions for summary judgment.

only employee in Knight's office at the time reduce the diligence required of the process server. Therefore, even giving the Nielsens the benefit of all reasonable doubts and inferences, the Court cannot find that the process server made a diligent inquiry or reasonably relied on employees' representations in serving Bankert, or that the requirements of *Fashion Page* were otherwise met.

Accordingly, the Court concludes that Bankert was not an "agent authorized by appointment . . . to receive process" for purposes of service under CPLR 311(a)(1). Thus, the undisputed facts show that the Nielsens' service of the New York summons and complaint on Knight was not effective or valid under New York law.

II. CPLR 306(e) – Writing Admitting Service.

Finally, the Nielsens contend that, even absent facts establishing proper personal service, Knight has admitted service in writing, which is deemed "adequate proof of service" by the CPLR. *See* N.Y. CPLR 306(e) (McKinney 2023). Under CPLR 306, proof of service must "specify the papers served, the person who was served and the date, time, address, or, in the event there is no address, place and manner of service, and set forth facts showing that the service was made by an authorized person and in an authorized manner." CPLR 306(a). This is true no matter which of the "four forms of documentary proof that service has been made," described in CPLR 306(d) and (e), a party relies on. *See* CPLR Commentary § 306:1 ("The required contents of the proof of service are specified in subdivisions (a)-(c)."). "In all cases, the proof must contain facts showing the papers were served by an authorized person in an authorized manner and identify the papers served, who was served, and the date, time and place of service." *Id*.

The Nielsens assert that both the October 5, 2018 Ritter email and Knight's responses to Requests for Admission served in this action admit "that an appropriate corporate officer had *received* the summons and complaint prior to the New York State statutory deadline for service of process," and therefore "satisfy the proof of service required under New York law." Pls.' Mot. for Summ. J., filed on Nov. 1, 2022, at 10-11 (emphasis added). This argument misses the mark. As discussed above, simply *receiving* the complaint, or even the summons and complaint, does not constitute valid service under New York law. For example, Ritter's email, sent with the subject line "re: Law suit," states: "We are in receipt of your complaint and do not understand why you are suing our company." Pls.' SUMF ¶ 40, Ex. 3.3. At best, the email shows that Ritter had actual notice of the Nielsens' complaint and lawsuit, which is insufficient to constitute service under CPLR 311.[7] *See Macchia*, 496 N.E.2d at 682. Likewise, in response to Plaintiffs' Requests for Admission, Knight answered "Admitted" to the statement "A copy of the New York Summons and Complaint was received by an officer, director, or general agent of Knight on or before January 10, 2019." Pls.' SUMF ¶ 40, Ex. 3.3. Yet admitting possession of paperwork used to commence an action within 120 days of filing does not establish that service was proper. *Cf. Sullivan v. Murray*, 535 N.Y.S.2d 811, 812 (App. Div. 3d Dep't 1988) (holding

[7] In her deposition, Ritter disputed that the email's use of the word "complaint" referred to the written complaint filed in the New York case, as Plaintiffs suggest. *See* Def.'s Resp. to Pls.' SUMF, filed on Nov. 18, 2022, ¶ 40. This dispute is not material, however, because the Court finds the email is insufficient under CPLR 306(e) in any event.

that, where defendant admitted in writing "that she received the substitute *service* of the summons and complaint," such "written admissions of receipt of *service* . . . constitute adequate proof of service" under CPLR 306(e) (emphasis added)).

Moreover, the Nielsens' examples are a far cry from the type of "admission of service" contemplated by CPLR 306(e). For example, § 2:78 of McKinney's CPLR Forms provides a form entitled "Admission by defendant of personal service of summons." *See* West's McKinney's Forms, CPLR § 2:78 (March 2023 Update). The text of the form provides:

> I, *[name of defendant]*, Defendant in this action, hereby admit that personal service of the *[name of paper served]* in this action was duly made upon me on *[date paper served]*, at *[name of street]*, County of *[name of county]*, State of New York, by *[statement of facts showing manner of service]*.

Id. As the discussion section explains, "[t]he single most important point on proof of service is this: the proof of service must demonstrate that the process server has complied with every requirement for the particular method of service used." *Id*. § 2:64. Nowhere in the Ritter email or Knight's Request for Admission response are there any details that would show "the papers were served by an authorized person in an authorized manner" or that "identify the papers served, who was served, and the date, time and place of service." Thus, they cannot serve as admissions of service under CPLR 306(e).

In short, the Court concludes that Knight has met its "heavy burden" to show that the New York Superior Court lacked jurisdiction over it due to defects in the service of process. The undisputed facts in the record establish that the Nielsens did not serve Knight as required by CPLR 311(a)(1), nor did Knight execute a written admission of service under CPLR 306(e). Accordingly, the default judgment issued by the New York court is void, and this action must be dismissed.

Order

For the foregoing reasons, Plaintiffs' motion for summary judgment is DENIED and Defendant's motion for summary judgment is GRANTED. Knight shall file a proposed Judgment Order within seven days.

Electronically signed on May 31, 2023 at 3:49 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge