STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED

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SUPERIOR COURT
WASHINGTON COUNTY

STATE OF VERMONT, DEPARTMENT OF TAXES,	}	
Plaintiff,	}	
	}	**Washington Superior Court**
v.	}	**Docket No. 792-12-02 Wncv**
	}	
STEVEN A. LABONTE,	}	
Defendant.	}	

Entry Order

In this case, the State, claiming that certain business taxes are overdue and imputable to Defendant Labonte, an out of state resident, seeks a default judgment. Defendant, who has never appeared in this case, is a resident of New York State. This motion is denied at this time for lack of sufficient service on Defendant Labonte.

"Generally, the rules relating to default judgments should be liberally construed in favor of defendants, and of the desirability of resolving litigation on the merits, to the end that fairness and justice are served." Desjarlais v. Gilman, 143 Vt. 154, 158-59 (1983). "The tenor [of Rule 55] is to avoid summary action fraught with due process difficulties." Pizzano Constr. Co. v. Hadwen, 133 Vt. 495, 498 (1975). "[T]he requirement of reasonable notice must be regarded as part of the constitutional due process limitations on the jurisdiction of a state . . . court." 4A Wright and Miller, Federal Practice and Procedure § 1074, at 357-58.

The State initially attempted service under V.R.C.P. 4(l) (waiver of service). Because that attempt was unsuccessful, the State attempted personal service. An affidavit of a deputy sheriff from New York states that the deputy "called" for the defendant three times (consecutive weekdays, all within normal business hours) and did not then locate defendant at the usual "place of business or dwelling place," without specifying which. On the third such day, the deputy affixed the summons and complaint to the door at the subject address and mailed copies to the same address. This appears to be an attempt at service under New York's "nail and mail" rule.

The service effected in this case is permitted under Vermont rules only to the extent that it is permitted under New York rules and not otherwise. That is, Vermont has no "nail and mail" rule. The only similar way to effect service under Vermont rules is as follows: "The court, on motion, upon a showing that service as prescribed above [ordinary personal service] cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode, or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective." V.R.C.P. 4(d)(1). The circumstances in this case are deficient under Rule 4(d)(1)

because there was no court order granting leave, the showing of "due diligence" is questionable at best, and the documents were affixed to the door of a place of business "or" a residence, rather than to the dwelling place, as required. However, under Rule 4(e), service is sufficient under Vermont rules if it is sufficient "in any manner in which service may be effected under the laws of the state in which the person is served." Thus, the issue becomes whether service in this case is sufficient under New York's "nail and mail" rule.

New York rules permit service on a natural person by the so-called "nail and mail" method as follows:

> where service under paragraphs one [personal service] and two [substituted service and mailing] cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating 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, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law.

NY CPLR § 308(4) (emphasis added). Service in this case is deficient under § 308(4).

First, a plaintiff may proceed under NY CPLR § 308(4) only if the plaintiff has with due diligence failed to effect service under § 308(1) and § 308(2). The standard for due diligence is higher in New York than evidenced by the attempted service in this case. In Earle v. Valente, 754 N.Y.S.2d 364, 365 (App. Div. 2003), for example, a comparably more diligent attempt at service was rejected as a matter of law as follows:

> The plaintiffs failed to establish that the "due diligence" requirement of CPLR 308(4) was met. The process server made three attempts to serve the defendant Vincent Valente on weekdays during normal business hours or when it could reasonably have been expected that he was in transit to or from work. The process server made no attempt to determine Valente's business address and to effectuate personal service at that location pursuant to CPLR 308(1) and (2). Accordingly, under these circumstances, the attempted service of the summons and complaint pursuant to CPLR 308(4) was defective as a matter of law.

(citations omitted). At least in Valente the process server appears to have actually appeared at the defendant's residence looking for the defendant. In the current case, the process server purports to have only "called" for the defendant at either defendant's residence or workplace (the affidavit does not specify which). Otherwise, the cases are quite similar. Under Valente, there is no sufficient showing of diligence as a matter of law to support nail and mail service.

Second, the affidavit in this case is silent with regard to the manner of the mailing of the summons. Under CPLR 308(4), the summons must be sent in an "envelope bearing the legend 'personal and confidential' and not indicating 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." No evidence of any kind suggests that this occurred in this case.

Therefore, under either Vermont rules or New York rules, service is insufficient in this case.

Order

For the foregoing reasons, the State's motion is denied at this time.

Dated at Montpelier, Vermont this 2nd day of May, 2003.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge