

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AYR MOTOR EXPRESS, INC. : CIVIL ACTION
:
v. :
:
KEYSTONE TRANSPORTATION SERVICES, INC. : NO. 97-3763

MEMORANDUM AND ORDER

HUTTON, J.

March 4, 1998

Presently before this Court is the Motion by Plaintiff Ayr Motor Express to Reinstate Complaint (Docket No. 3) and the Motion by Plaintiff Ayr Motor Express for Substituted Service of Complaint in the Manner Prescribed by State Law (Docket No. 4). For the reasons stated below, the plaintiff's Motions are **GRANTED in part and DENIED in part.**

I. BACKGROUND

This action arising out of an alleged breach of agreement for transportational services was commenced on May 30, 1997, when the plaintiff filed its complaint. On December 11, 1997, the Court dismissed this action without prejudice for failure to serve the defendant within the time prescribed by Federal Rule of Civil Procedure 4(m). The plaintiff states that it has been unable to serve the defendant at the defendant's last known address. Accordingly, the plaintiff now moves to reinstate the complaint and for leave to serve notice via "Certified Mail,

Return Receipt Requested . . . as well as by First Class Mail and by posting the premises."

II. DISCUSSION

Federal Rule of Civil Procedure 4(e) allows service upon an individual "pursuant to the law of the state in which the district court is located." In Pennsylvania, service must be made by a sheriff, or, in certain actions and in Philadelphia County, by a competent adult who is not a party to the action. Pa. R. Civ. P. 400 & 400.1.

Rule 430(a) of the Pennsylvania Rules of Civil Procedure provides that:

If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

"A sheriff's return of 'not found' or the fact that a defendant has moved without leaving a new forwarding address is insufficient evidence of concealment." Pa. R. Civ. P. 403(a) Note (citing Gonzales v. Polis, 357 A.2d 580 (Pa. Super. Ct. 1976)). Instead, Rule 430(a) requires that the plaintiff make a "good faith effort" to locate a defendant's correct address. Id. (citing Adoption of Walker, 360 A.2d 603 (Pa. 1976)).

The Note to Rule 403(a) provides examples of a "good faith effort:"

An illustration of a good faith effort to locate the defendant includes (1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act, 39 C.F.R. Part 265, (2) inquiries of relatives, neighbors, friends, and employers of the defendant, and (3) examinations of local telephone directories, voter registration records, local tax records, and motor vehicle records.

"While by no means exhaustive, this Note is at least indicative of the types of procedures contemplated by the legislature when enacting Rule 430." Deer Park Lumber, Inc. v. Major, 559 A.2d 941, 946 (Pa. Super. Ct. 1989). Under Rule 430, "more than a mere paper search is required." Id.

Accordingly, a successful Motion for Alternative Service requires three elements: 1) an unsuccessful attempt to properly serve the defendant; 2) a good faith effort to locate the defendant; and 3) a method of alternative service that is "reasonably calculated" to give actual notice to the defendant. Clayman v. Jung, 173 F.R.D. 138, 140 (E.D. Pa. 1997). In the instant matter, the plaintiff has not met the second requirement.

Rule 430(a) requires that the plaintiff attempt to make service "under the applicable rule." Pa. R. Civ. P. 430(a). Service within Philadelphia County may be made by the sheriff or by a competent adult who is not a party to the action. Pa. R. Civ. P. 400.1(a)(1) & (b). In November, 1997, plaintiff

"forwarded the complaint to Best Legal Services, Inc. with instructions to complete personal service on defendant by November 20, 1997" at the defendant's office at 6914 State Road. Aff. Att. Serv. ¶ 4. Best Legal Services "verified defendant's business hours and attempted service multiple times during those hours, but there was no person at defendant's business address to accept service of the complaint." Id. ¶ 5. Service was attempted "six times before November 20, 1997, and three times after said date." Id. ¶ 6. Thus, the plaintiff made several unsuccessful attempts to properly serve the defendant

The plaintiff, though, has not made a good faith effort to locate the defendant. The plaintiff did consult the "Bell Atlantic Phone Directory, Philadelphia, 1997-1998, [which] lists the address for Keystone Transportation Services, Inc. as 6914 State Road." Pl.'s Mot. ¶ 8(a). Moreover, an operator at Directory Assistance verified the defendant's address. Id. ¶ 8(c). However, the "Pennsylvania Corporation Bureau lists" a different address for the defendant in Ivyland, Pennsylvania. Id. ¶ 8(c). The plaintiff does not claim to have attempted service at that location. Moreover, while the plaintiff unsuccessfully attempted to personally serve the defendant at its State Road location several times within a two week period in November, 1997, the plaintiff attempted service only three times in the following three and a half months. Further, the plaintiff

fails to provide details concerning its subsequent attempts. Thus, the plaintiff may still be able to successfully serve the defendant at the State Road address. Consequently, the plaintiff has failed to meet the requirements for alternative service.

An appropriate Order follows.

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O R D E R

AND NOW, this 4th day of March, 1998, upon consideration of the Motion by Plaintiff Ayr Motor Express to Reinstate Complaint (Docket No. 3) and the Motion by Plaintiff Ayr Motor Express for Substituted Service of Complaint in the Manner Prescribed by State Law (Docket No. 4), IT IS HEREBY ORDERED that:

(1) the Plaintiff's Motion for Substituted Service of Complaint in the Manner Prescribed by State Law is **DENIED**;

(2) the Plaintiff's Motion to Reinstate Complaint is **GRANTED**; and

(3) the Plaintiff **SHALL** serve the Defendant on or before April 20, 1998.

BY THE COURT:

HERBERT J. HUTTON, J.