

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED

MAY -2 P 2: 54

KIRK GALLANT d/b/a KRG
LAND AND TREE SERVICE,
Plaintiff, }

v. }

JRE OF VERMONT d/b/a TODAY'S
HOUSING BY RAY'S HOME CENTER, }
ANDREW YEE, and EDISON YEE, }
Defendants. }

Washington Superior Court
Docket No. 170-3-02 Wncv

SUPERIOR COURT
WASHINGTON COUNTY

Entry Order

In this payment dispute, Plaintiff Gallant seeks a Rule 55 default judgment against Defendants Andrew Yee and Edison Yee. Neither Andrew Yee nor Edison Yee, apparently residents of Massachusetts, has made an appearance in this case. This motion is denied at this time for lack of sufficient service.

“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.

Plaintiff attempted personal service of an Amended Complaint adding Andrew and Edison Yee (brothers) as defendants. An affidavit of a deputy sheriff from Massachusetts states that the deputy sheriff spoke with Andrew Yee on the phone. Andrew apparently agreed to accept service for himself and on behalf of his brother but refused to divulge their location. Andrew agreed to meet the deputy sheriff at a location not specified in the affidavit for the purpose of accepting service. The deputy sheriff went to that location and was met by Joanne Byerly, who identified herself as an employee of Defendants authorized to accept service on their behalf.

Vermont Rule 4(d)(1) permits substituted service on “an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.” Federal Rule 4(e)(2) has the same effect, as does Mass.R.C.P. 4(d)(1). Wright and Miller clarify the meaning of “appointment” as follows:

The cases dealing with agency by appointment indicate that an actual appointment for the specific purpose of receiving process normally is expected. Accordingly, the mere fact that a person acts as the defendant's agent for some purposes does not necessarily mean that the person has authority to receive the summons and complaint. The federal courts look to the circumstances of the agency relationship that has been established between the defendant and the alleged agent. Thus, a financial agent, secretary, manager of the defendant's business, or even the defendant's attorney probably will not be deemed an agent appointed to receive process absent a factual basis for believing that an appointment of that type has taken place.

Consistent with this judicial construction of "appoint," the federal courts have held that claims by an agent of having authority to receive process or the fact that an agent actually accepts process is not enough to bind the defendant to the court's jurisdiction; there must be evidence that the defendant intended to confer that authority upon the agent

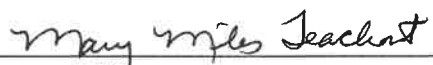
4A Wright and Miller, Federal Practice and Procedure § 1097, at 536-40 (footnotes omitted).

There is no evidence that Joanne Byerly is in fact authorized to accept service for either brother other than her own representation as set out in the affidavit of the deputy sheriff. The affidavit states that Andrew Yee was to meet the deputy sheriff and does not assert that an agent would meet him. This is insufficient evidence of the appointment of an agent for the purpose of accepting process.

Order

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

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



Mary Miles Teachout
Superior Court Judge