NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 3, 2020

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Counsel for Plaintiffs

Home Health Connection, Inc.
Commercial Registered Agent LLC R/A
4445 Corporation Lane
Virginia Beach, Virginia 23462
Defendant, No Appearance

Re: ***Tarek El Bourini and Rasha Ahmed El Deeb, Co-Administrators and Personal Representatives of the Estate of*** [redacted] ***v. Home Health Connection, Inc.,*** **et al.**
Case No. CL–2019–2535

Dear Counsel and Home Health Connection, Inc.:

The general issue before the Court is whether otherwise valid statutory service of process fails on due process grounds if a court doubts the service effectuated actual notice.[1] The Court holds it may insist on notice of a lawsuit above that required by statute where it has reasonable grounds to doubt actual notice. In this case, the Virginia State Corporation Commission ("SCC") revoked/inactivated the Defendant foreign corporation's license to do business in this Commonwealth for failure to pay state fees. Plaintiff served the listed registered agent for the

[1] This is the substantive issue. Technically, the issue before the Court is whether to award damages and, if so, in what amount. However, since the Court will not award damages if not comfortable that Defendant was adequately served with the Complaint, it must necessarily revisit the prior decision awarding default judgment.

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revoked status corporation, leaving the Court concerned Defendant is unaware of the lawsuit. However, on the record of this case, the Court's doubts do not rise to the level requiring service supplementation beyond the statutory requirements. The Court awards judgment in favor of Plaintiffs in the amount of $1 million.

I. PROCEDURAL HISTORY AND FACTUAL OVERVIEW.

On February 22, 2019, Plaintiffs Tarek El Bourini and Rasha Ahmed El Deeb, as Co-Administrators and Personal Representatives of the Estate of their son, [redacted] ("[redacted]" or "son"), filed a Complaint alleging wrongful death of their son. On February 26, 2017, [redacted]—who was dependent on a ventilator to provide him oxygen—died after his endotracheal tube dislodged and his in-home nurse allegedly failed to replace it. (*See, e.g.,* Compl. ¶¶ 8-24.) The Complaint named the in-home nurse, Aina D. Falade (a/k/a Debora Falade) ("Falade" or "the nurse") and her employer, Home Health Connection, Inc.'s ("Home Health Connection" or "Defendant") as defendants under theories of *respondeat superior* and negligence in their own right. Plaintiffs prayed for $5 million, with prejudgment interest from the date of death, and costs incurred.

Home Health Connection is a Maryland corporation that was licensed to conduct business in this Commonwealth. (Compl. ¶ 3.) Home Health Connection maintained an office in Reston, Virginia. (Compl. ¶ 4.)

On June 28, 2019, Plaintiffs served "Home Health Connection, Inc. CO: Commercial Registered Agent, LLC R/A" ("CRA") and, specifically, "Lindsey Herrera, 4445 Corporation Lane, Virginia Beach, VA 23462-3161." (Pls. Ex. 1 (Hagood Aff., Oct. 2, 2019); Serv. Aff., July 3, 2019.) Plaintiffs' affidavits attest that Ms. Herrera is intake manager and authorized to accept service (Pls. Ex. 1; Serv. Aff., July 3, 2019.)

On August 9, 2019, Plaintiffs moved for Default Judgment against Home Health Connection. The Honorable Richard E. Gardiner of this Court found that Home Health Connection was served with process on June 28, 2019, via its registered agent, CRA. Home Health Connection had until July 19, 2019, to file a responsive pleading. *See* VA. SUP. CT. R. 3:8(a). Home Health Connection failed to do so. Thus, the Court found Home Health Connection in default pursuant to Rule 3:19(a). The Court set an *ex parte* damages hearing for September 13, 2019. *See* VA. SUP. CT. R. 3:19(c)(2). Plaintiffs told the Court they intend to nonsuit the nurse, sued in her individual capacity. Plaintiffs never served process on her. To date, neither defendant has appeared.

The undersigned judge presided over the damages hearing and took evidence in the form of a proffer. Since the Court did not know how Plaintiffs knew CRA was the registered agent of Home Health Connection, it revisited the August 9 Default Judgment Order and entered an Order on September 25, 2019, requesting this information about the service of process. Plaintiffs

promptly replied with screenshots of the SCC website,[2] listing CRA as Home Health Connection's registered agent (Pls. Ex. 2, Ex. 3) and an affidavit from the principal of the private process server company swearing to the same (Pls. Ex. 1.) However, the screenshots also listed Home Health Connection's SCC status as "revoked"/"inactive." (Pls. Ex. 2, Ex. 3.)

There is no dispute Plaintiffs are statutory beneficiaries under the wrongful death statute (VA. CODE ANN. § 8.01-50 *et seq.*). The sole issue addressed in this Opinion Letter is whether this Court has a due process duty to deny the award of damages[3] when it suspects a defendant did not receive actual notice of the lawsuit because process was served on its registered agent while defendant-company was in a revoked/inactive status. In other words, if a plaintiff follows the service of process statute and properly serves a registered agent, but there are facts leading a court to suspect notice failed in a practical sense, such as the registered agent status is subject to question, does this warrant denying default judgment and a damages award? On the present record, the answer is no.

II. DUE PROCESS EMPOWERS A COURT TO REQUIRE MORE NOTICE OF A LAWSUIT THAN THAT REQUIRED BY THE SERVICE OF PROCESS STATUTES.

Virginia law explicitly identifies ways to inform a defendant of a lawsuit in order to defend it on the merits. Such statutory procedures, however, are not the ceiling. Due process mandates that a defendant have reasonable notice of a lawsuit against it. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). "If, however, all of the requirements of [§ 8.01's service statutes] are met, service is complete and conclusive regardless of whether the defendant receives actual notice of the litigation." *Basile v. American Filter Service, Inc.*, 231 Va. 34, 38 (1986).

So, a court must first determine whether service of process meets the statutory protocols. Then, if the court has specific reason to believe such service nonetheless failed to reasonably give the defendant notice, through no fault on the part of defendant, it must insist on extra efforts to provide notice. Here, the Court knows Home Health Connection's status was revoked/inactivated by the SCC. Therefore, due process requires it to see whether its suspicion that Defendant does not know of the lawsuit is reasonable, and, if so, whether it need require

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[2] At the time of service, the SCC online system was called Business Entity Search; presently, it is called the Clerk's Information System.

[3] Naturally, to deny damages would require the Court to vacate its Default Judgment Order. It has authority to do this. Rule 1:1 (and the "21-day Rule") only applies to final orders, not interlocutory ones. *See* VA. SUP. CT. R. 1:1. Here, the Default Judgment is not "deemed final" because damages were still to be assessed. *See* VA. SUP. CT. R. 1:1(b). Thus, the Order "remain[ed] under the [Court's] control . . . and subject to be modified, vacated, or suspended . . . ." *See* VA. SUP. CT. R. 1:1(a).

Plaintiffs to take actions beyond the minimum to notify Defendant of the lawsuit. For the reasons explained herein, the Court need not require Plaintiffs to take further action.

A. Serving a Registered Agent is Service on a Foreign Corporation.

Rule 3:19(c)(1) states that, upon default, the court "shall" enter judgment for the relief appearing to the court to be due. VA. SUP. CT. R. 3:19(c)(1). A necessary precursor, however, is proper service of process on the defendant.

Virginia requires that every corporation have a registered agent whose duty is to accept service of process, notices, and demands, and forward such papers to the corporation. *See* VA. CODE ANN. §§ 13.1-634, -637.

Pursuant to Virginia Code § 8.01-301, service of process on a foreign corporation may be effected in the following manner:

> 1. By personal service on any officer, director or on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth, *and by personal service on any agent of a foreign corporation transacting business in the Commonwealth without such authorization*, wherever any such officer, director, or agents be found within the Commonwealth;
> 2. By substituted service on a foreign corporation in accordance with §§ 13.1-766 and 13.1-928, if such corporation is authorized to transact business or affairs within the Commonwealth;
> 3. By substituted service on a foreign corporation in accordance with § 8.01-329 or by service in accordance with § 8.01-320, where jurisdiction is authorized under § 8.01-328.1, regardless of whether such foreign corporation is authorized to transact business within the Commonwealth; or
> 4. By order of publication in accordance with §§ 8.01-316 and 8.01-317 where jurisdiction in rem or quasi in rem is authorized, regardless of whether the foreign corporation so served is authorized to transact business within the Commonwealth.
> This section does not prescribe the only means, or necessarily the required means, of serving a foreign corporation.

VA. CODE ANN. § 8.01-301 (emphasis added).

These provisions protect both parties. They protect the corporation in that only persons in key positions (officers and directors) and the person specifically designated for such purpose (the registered agent) accept important litigation papers on behalf of the corporation. The provisions also lift a burden from parties attempting to sue a corporation by mandating that someone is always designated, and specifically listed in a centrally located directory, as an agent for service of process on the corporation. It prevents a game of catch-me-if-you-can.

In the present case, the service affidavit shows both that Plaintiff's private process server personally served Home Health Connection's registered agent, CRA, at the office of the

registered agent, and that the registered agent was authorized to accept service. (Pls. Ex. 1; Serv. Aff., July 3, 2019.)

Additionally, Plaintiffs provided evidence from the SCC website showing CRA is presently—and was at the time of service—Home Health Connection's registered agent. (Pls. Ex. 2, Ex. 3.) The listed registered agent matches the registered agent whom Plaintiffs served.

Plaintiffs' evidence also shows Home Health Connection's entity "Status" as inactive and "automatically revoked" for failure to file an annual report and/or pay state fees ($737), but that it can reinstate. (Pls. Ex. 2, Ex. 3.) As discussed *infra* Section B, however, revoked or inactive status does not terminate the registered agent's authority to accept service.

B. Revoking a Company's Active Status Does Not Mandate Special Service.

Home Health Connection's entity status—in other words, authority to do business in the Commonwealth—was revoked on or about August 31, 2017, approximately six months after [redacted]'s death. (Pls. Ex. 2.). Does this implicitly revoke the registered agent, necessitating Plaintiffs to provide alternate service? The answer is no.

The statue for service on foreign corporations (VA. CODE ANN. § 8.01-301) states that if a foreign corporation is not authorized to do business in Virginia, one may make personal service on any agent transacting business inside Virginia wherever such person be found in Virginia. Reading the Virginia Stock Corporations Act ("VSCA") as a whole, it appears that service is an either-or situation: the plaintiff/serving party has additional options of whom to serve. For example:

> *Consequences of transacting business without authority*. Suits, actions, and proceedings may be begun against a foreign corporation that transacts business in the Commonwealth without a certificate of authority by serving process on any director, officer, or agent of the corporation doing such business, or, if none can be found, on the clerk of the Commission or on the corporation in any other manner permitted by law. If any foreign corporation transacts business in the Commonwealth without a certificate of authority, it shall by transacting such business be deemed to have thereby appointed the clerk of the Commission as an agent for service of process upon the foreign corporation. Service upon the clerk shall be made in accordance with § 12.1-19.

VA. CODE ANN. § 13.1-758(F).

> The automatic revocation of a foreign corporation's certificate of authority pursuant to this section constitutes the appointment of the clerk of the Commission *an agent* for service of process upon the foreign corporation in any proceeding based on a cause of action arising during the time the foreign corporation was authorized to transact business in the Commonwealth. Service of process on the clerk of the Commission under this subsection is service on the foreign corporation and shall be made on the clerk in accordance with § 12.1-19.1. *Revocation of a foreign corporation's certificate of authority pursuant to this section does not terminate the authority of the registered agent of the corporation.*

VA. CODE ANN. § 13.1-768(D)–(E) (emphases added).

In July 2019, the General Assembly changed the language from "as *the* foreign corporation's agent" to simply "*an* agent." *Compare* VA. CODE ANN. § 13.1-768(D)–(E) effective July 1, 2019, *with* VA. CODE ANN. § 13.1-768 2010 version (emphases added). The change from "the" to "an" seems like a deliberate attempt to give the serving party an extra option. In other words, the service rule is not a way of protecting the foreign corporation who violated the VSCA, but instead, a way to give a plaintiff an extra option of whom to serve. If the General Assembly intended it to be a package deal, it would have used words like "both" or "serve registered agent *and* the SCC." *Compare* VA. CODE ANN. § 8.01-308, another service statute, which does not use an indefinite article or conjunction with respect to the statutory agent to be served (Service on Commissioner of the Department of Motor Vehicles as agent for nonresident motor vehicle operator).

A canceled company maintains some form of legal existence post-dissolution under Virginia law. *C.f., Farmville Group, LLC v. Shapiro Brown & Alt, LLP*, 101 Va. Cir. 81, 2019 WL 3891849, *2-3 (Fairfax Cir. 2019) (citing VA. CODE ANN. § 13.1-1050.5). Logically, if a dissolved company could sue in its name, it could be sued in its name. The chief way to sue a dissolved company is on its former officers, directors, or registered agents.

Indeed, the VSCA provides that suits may be brought against a foreign corporation that transacts business in the Commonwealth without a certificate of authority. VA. CODE ANN. § 13.1-758(E)[4]–(F). Specifically:

> Suits, actions, and proceedings may be begun against a foreign corporation that transacts business in the Commonwealth without a certificate of authority by serving process on any director, officer, or agent of the corporation doing such business, or, if none can be found, on the clerk of the Commission or on the corporation in any other manner permitted by law. If any foreign corporation transacts business in the Commonwealth without a certificate of authority, it shall by transacting such business be deemed to have thereby appointed the clerk of the Commission as an agent for service of process upon the foreign corporation. Service upon the clerk shall be made in accordance with § 12.1-19.1.

VA. CODE ANN. § 13.1-758(F).

In the present case, Home Health Connection could have canceled its registration with the SCC and terminated its registered agent, CRA, and asked the SCC to remove CRA from the public website. Likewise, if CRA felt discharged or unwilling to serve as Home Health Connection's registered agent, it could have formally resigned. *See* VA. CODE ANN. § 13.1-765. What the two cannot do is publicly state their agency relationship, have CRA accept service of process on behalf of Home Health Connection, and leave others to guess their real status.

[4] And such failure to obtain a certificate of authority does not prevent it from defending any proceeding in the Commonwealth.

C. Plaintiffs Fulfilled Statutory Service, and the Court is Satisfied Due Process Does Not Require More.

There is simply no evidence Home Health Connection was even dissolved. Rather, its status was merely revoked/inactive for its failure to pay the SCC fees. *See* VA. CODE ANN. § 13.1-768(A)–(B). Home Health Connection never publicly disavowed its registered agent, nor did the registered agent resign. Indeed, despite the revoked/inactive status, the registered agent is still listed under the SCC entry for Home Health Connection. (Pls. Ex. 3.) When Plaintiffs served the registered agent, it was publicly listed as such for Home Health Connection and the employee of the registered agent confirmed she was authorized to receive the process. (Pls. Ex. 1, Ex. 2.) The Court must presume the registered agent transmitted the process to its principal—Home Health Connection—who did not reply to the present lawsuit. Any error on the part of the registered agent is imputed to the principal; excusable neglect is not recognized in Virginia. *C.f. Media Gen., Inc. v. Smith*, 260 Va. 287, 291 (2000). Moreover, the Code allows for service via the Secretary of the Commonwealth; here, a registered agent was *personally* served and done so *in Virginia*. Nothing was lost in the mail.

Defendants are not without an escape hatch. The Virginia Code provides for an action to set aside default judgment. VA. CODE ANN. § 8.01-428(D). In an action filed under this section, the party must show default judgment should not, in equity and good conscience, be enforced; that it has a good defense; that fraud, accident, or mistake prevented it from obtaining the benefit of its defense; that there is an absence of fault or negligence by the defendant; and that there is an inadequate remedy at law. *Media Gen., Inc.*, 260 Va. at 290-91 (citing *Charles v. Precision Tune, Inc.*, 243 Va. 313, 317-18 (1992)).

III. DAMAGES.

Plaintiffs presented limited evidence on damages and did so by proffer. The Court asked Plaintiffs whether they wanted to empanel a jury for damages. They declined. As in the Complaint,[5] the proffer contained conclusory statements that the parents suffered a significant loss through the death of their son. The child, [redacted], was severely disabled, although the Court knows this only because he used a ventilator, breathing through an endotracheal tube. The Court does not know his degree of cognition. Plaintiffs presented almost no evidence of friends, interests, or daily behaviors. The parents, according to the proffer, were very close to their son, engaged with him, and were primary caregivers. They miss him deeply.

[redacted] died after the endotracheal tube dislodged from his neck and, despite alarms that should have sounded and, if so, alerted Defendant's employee-nurse, the nurse did not timely notice or try to reintubate him. When she did notice, she called for an ambulance which did not come in time. There was no evidence as to whether [redacted] suffered any pain and how much. For

[5] "As a result of the negligence, [redacted] died[,] and his statutory beneficiaries sustained injuries and damages recoverable at law." (Compl. ¶¶ 28, 35.)

example, he may have passed in his sleep or quickly without pain. There was no evidence as to economic loss—such as expected future earning capacity. There are no medical bills in evidence. No funeral expenses were presented. Certainly, there was no evidence of offsetting expenses—such as the expense to care for [redacted] by using private nurses. The Court recognizes that all children are priceless to their parents. However, the law cannot value a loss on such terms or else all negligent deaths would result in the award of all the assets of the tortfeasor.

Focusing heavily on loss of love and companionship, and in the form of consolation, the Court finds damages of $1 million are appropriate and supported by the evidence presented.

IV. CONCLUSION.

For the reasons stated herein, the Court holds it does not have a due process duty to ensure service of process on Home Health Connection beyond statutory service on the registered agent listed by the SCC for it, regardless of its revoked/inactive status. By serving the registered agent, Plaintiffs met their burden. Home Health Connection failed to answer. Accordingly, this Court avouches its Order granting Default Judgment and awards judgment in favor of Plaintiffs in the amount of $1 million for the wrongful death of their son.

Counsel for Plaintiffs shall please submit a sketch order consistent with this Opinion Letter, with any objections, no later than January 16, 2020, for entry.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

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