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| Green v Sweet Corner Inc. & Tobacco Corp. |
| 2007 NY Slip Op 31655(U) |
| June 8, 2007 |
| Supreme Court, New York County |
| Docket Number: 0101788/2006 |
| Judge: Paul G. Feinman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. PAUL Q. FEINMAN**

PART 52

Index Number : 101788/2006

GREEN, LUCILLE

vs

SWEET CORNER

Sequence Number : ~~002~~
DJ 001

DEX NO. 101788/2006
ACTION DATE 5/25/07
ACTION SEQ. NO. 001
ACTION CAL. NO. 64

The following papers, numbered 1 to _____ were read on this motion to/for DJ

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| <u>1</u> |
| |
| |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied per annexed

decision & order.

FILED
JUN 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/8/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
LUCILLE GREEN and JOSEPH GREEN,
Plaintiffs,

-against-

Index Number 101788/06
Submission Date 5/25/07
Mot. Seq. No. 001
Cal. No. 64

SWEET CORNER INC. & TOBACCO CORP.
MUHAMMED ALI, THE CITY OF NEW YORK and
THE NYC DEPARTMENT OF TRANSPORTATION,
Defendants.

DECISION AND ORDER

-----X

Papers considered in review of this motion for default:

| Papers | Numbered |
|---|----------|
| Notice of Motion and Affidavits Annexed | 1 |

Paul George Feinman, J.:

Plaintiffs move pursuant to CPLR 3215 for the entry of a default judgment as against defendant Muhammed Ali. For the reasons which follow, the motion is denied.

Plaintiff Lucille Green sustained injuries after a trip and fall outside of defendant Sweet Corner, Inc. & Tobacco Corp.'s store. The plaintiffs originally filed their complaint on April 26, 2006 against co-defendant Sweet Corner Inc. & Tobacco Corp. Their attorney notified defendant Ali by letter of the pendency of the action shortly thereafter. In response, an individual purporting to be Ali initiated a phone conversation with plaintiffs' counsel. That conversation compelled plaintiffs to join as co-defendants Ali, the City of New York, and NYC Department of Transportation and to file and serve an amended complaint and supplemental summons on May 8, 2006. A process server attempted to serve the supplemental summons and complaint on Ali at his last known residence, on May 11, 2006. On that occasion, the process server was informed that Ali had relocated. The record does not reflect that the process server left the summons with

a competent individual, returned to the residence on any other occasion, or affixed the summons to the residence.

On a motion for default, a plaintiff must file “proof of service of the summons and the complaint.” CPLR 3215(f). Additionally, the plaintiff must provide “proof by affidavit . . . of the facts constituting the claim, the default and the amount due.” CPLR 3215(f). Plaintiffs Lucille Green and Joseph Green move the court for a default judgment against defendant Muhammed Ali in his individual capacity on the ground that he has failed to answer the complaint or move to extend his time to answer the complaint. While the plaintiffs have provided sufficient documentation to support the facts of the claim and that defendant Ali has not answered, the plaintiffs have failed to prove proper service of the summons and complaint on him.

Service of process is the foundational basis for personal jurisdiction of the court over a party. Personal service may be made by delivery to the individual. CPLR 308(1). Alternatively, if an individual is not amenable to personal service then service may be effected by so-called “nail and mail” service. CPLR 308(2). “Nail and mail” consists of both the affixation of the summons at the last known residence of the party and a mailing to the same address within 20 days. CPLR 308(2).

Here, the affidavits of service before the court demonstrate that the instant plaintiffs failed to accomplish either the “nailing” or the “mailing” of the supplemental summons and amended complaint. The affidavit submitted by the process server in the instant case does not establish that service was sufficient to merit a default judgment. *See, Moss v Corwin*, 154 AD2d 443 (1st Dep’t 1989), *Chase Manhattan Bank, N.A. v Carlson*, 113 AD2d 734 (2d Dep’t 1985). The standard of due diligence for service to satisfy due process concerns for service of process is not clearly delineated. *Barnes v*

City of New York, 51 NY2d 906 (1980). In the instant case, the “due diligence” of the plaintiffs’ process server consisted of a single attempt to serve Ali at his last known residence. This single attempt is not analogous to examples of due diligence upheld by the courts. *See, Moss*, 154 AD2d at 443 (six attempts at personal service at home, all during work hours held insufficient); *Hochhauser v Bungeroth*, 179 AD2d 431 (1st Dep’t 1992) (three attempts to serve defendant at home at different times of the day held sufficient).

There is nothing in the record to indicate that, despite the knowledge of Ali’s relocation, the plaintiffs attempted service at Ali’s known place of business (also the site of the injury in question). *See, Moss*, 154 AD2d 443. Indeed, plaintiffs have named as a co-defendant Sweet Corner, Inc. & Tobacco Corp., the store purportedly owned and operated by Ali, and presumably a site where he could be served with process. Accordingly, the motion for entry of a default judgment against Ali in his individual capacity must be denied. It is therefore

ORDERED that the motion for entry of default judgment against defendant Ali is denied; and it is further

ORDERED that the parties who have appeared in the action are to appear for their previously scheduled compliance conference on August 15, 2007, at 2:00 p.m. at Supreme Court, 80 Centre Street, room 103.

This constitutes the decision and order of the court.

Dated: June 8, 2007
New York, New York



 J.S.C.

FILED
 JUN 18 2007
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