

**319 Smile Corp. v Eui Dong Do**

2007 NY Slip Op 33399(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0602547/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
Justice

PART 10

319 SMILE CORP

INDEX NO.

602547/06

MOTION DATE

- v -

MOTION SEQ. NO.

01

EUI DORIS DO.

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

OCT 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/15/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

10-10-01  
L.A. RE-01  
W

Supreme Court of the State of New York  
County of New York: Part 10

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319 Smile Corp.,

Plaintiff,

Decision/Order

-against-

Index# 602547/06

Eui Dong Do

Mot. Seq. # 001

Defendant.

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Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
OSC, Horn affirm., Do Affd., exhibits.....	1
Yi affd., exhibits.....	2

**FILED**  
OCT 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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Gische, J.:

*Upon the foregoing papers, the decision and order of the court is as follows:*

A default judgment was entered against defendant Eui Dong Do on December 28, 2006 in the amount of \$99,729.56. Defendant seeks to vacate the judgment and have the case against him dismissed, because he claims he was never served with the underlying summons and complaint. Alternatively, he seeks to have this court vacate the judgment on the basis of excusable default and meritorious defense. CPLR §§ 317; 5015. The underlying action sought unpaid rent under a commercial lease, for which defendant was the guarantor.

Defendant claims that he never received the underlying summons and complaint prior to the entry of a default judgment against him. He contests the adequacy of service. Even if service is good, however, he claims that because he did not personally receive service and he has a meritorious defense, the default judgment should at the very least be

vacated and he should be permitted to defend on the merits.

There are two affidavits of service filed with the court. The first was filed in August 21, 2006. Daniel Gately, the process server, claims to have served the summons and verified complaint on defendant at 11-4 Rice Lane Worcester, MA by nail and mail on August 8, 2006. He asserts that service was made at 7:15 pm, although the typewritten seven and one appear to have been written over in pen. He states that two prior attempts at service were made on August 3<sup>rd</sup> at 10:00 am and August 4<sup>th</sup> at 2:00 pm.

A subsequent affidavit of service made by Mr. Gately was filed on September 21, 2006. This second affidavit claims that the summons and verified complaint were affixed on the door at 11-4 Rice Lane, Worcester, MA at 1:15 pm on August 8<sup>th</sup>, 2006. No mention is made about service at 7:15 pm as previously recited in the earlier filed affidavit. This affidavit claims three prior attempts at service on August 4<sup>th</sup> at 6:15 am, August 5<sup>th</sup> at 9:20 pm and August 8<sup>th</sup> at 1:15 pm. No mention is made about any attempted service at the premises at 2:00 pm on August 4<sup>th</sup> as recited in the earlier filed affidavit.

Each affidavit claims that a "neighbor" confirmed that defendant actually resided at 11-4 rice Lane in Worcester. Defendant claims, however, that he did not live at 11-4 rice Lane at the time process was allegedly served. He claims that he lived at 379 Main Street in Fitchburg, MA. There is no indication that the process server (or anyone else) made any attempt to determine plaintiff's place of business.

At the outset the court rejects plaintiff's argument that service of process is guided by Massachusetts law. The method of service of the underlying actions is governed by the laws of New York. CPLR §313. Nor do the papers from the Massachusetts Court show that it expressly ruled upon the sufficiency of process of this New York action.

Where a court fails to obtain personal jurisdiction over a defendant, a default judgment cannot lie. Harkless v. Reid, 23 AD3d 622 (2<sup>nd</sup> dept. 2005). This is true regardless of whether a defendant otherwise has a meritorious defense. In this case plaintiff served the defendant by nail and mail at his last known address. Under New York Law a "nail and mail" service is only available after the process server tries with due diligence to effect service under CPLR §§ 308(1) and 308(2). This usually requires that one attempt be made within normal business hours and one attempt be made outside such hours. Further some attempt should be made to ascertain the location of plaintiff's place of business. O'Connell v. Post, 27 AD3d 30 (2<sup>nd</sup> dept. 2006).

In reviewing the two filed affidavits of service, the court cannot tell whether the process server exercised due diligence. There is no indication whether the second affidavit is intended to replace or supplement the earlier one. The process server's credibility is called into question by at the least, the fact that the affidavits are at odds with one another concerning dates and times that the process server was at the premises, the circumstances of the possible alteration on the time of service on the first affidavit, and that each affidavit contains information that the other omits. In addition defendant claims that he did not reside at the premises at the time. While the location of service as defendants "last known residence" is not an issue (see below), the veracity of the process servers' sworn statements that a "neighbor" told him that defendant lived at the location, when considered in light of the other irregularities, calls into question the entire service.

The disputed issues regarding service of process needs to be decided after a testimonial hearing. In this regard the court holds that the location of service was defendant's last known address and, as long as due diligence was otherwise exercised,

defendant cannot contest the location of the service.

The framed issue of whether plaintiff appropriately served defendant in accordance with law is respectfully referred to the Special Referee for hearing and a report back to the court. If service was not made according to law, then the case will be dismissed. If service was made according to law, then the court will consider whether the judgment should be vacated based upon the legal standard of excusable default and meritorious defense.

Accordingly it is hereby:

ORDERED that defendant's motion to vacate the default judgment entered in this case is granted only to the extent that the court directs that a framed issue hearing on the issue of service of process be held before a Special Referee who shall report his/her recommendations back to the court, and it further

ORDERED that defendants motion is otherwise denied without prejudice to renew at the time a motion for confirmation and/or rejection of the Referee's report is made to this court, and it is further

ORDERED that within 30 days of this decision defendant is directed to file a copy of this decision and order upon the office of the Special Referee so that this matter may be calendared for hearing, and it is further

ORDERED that any requested relief not expressly addressed herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York  
October 15, 2008

**FILED**  
OCT 22 2007  
NEW YORK COUNTY CLERK'S OFFICE  
SO ORDERED:  
J.G. J.S.C.