[* 1].

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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Index Number : 112984/2009

SUMAR, NAGHIB

VS.

FOX, BARRY

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 112984-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED

MAY 21 2010

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: May 18, 2010

HON. JOAN A. MADDEN 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: PART 11

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NAGHIB SUMAR,

Plaintiff, INDEX NO. 112984/09

-against-

BARRY FOX and MALLA PERRY,

Defendants.

----------X

JOAN A. MADDEN, J.;

Defendants move for an order pursuant to CPLR 3211(a)(1), (5), (7) and (8), and 3211(f), dismissing the complaint on the grounds of a defense founded on documentary evidence, collateral estoppel, res judicata, failure to state a cause of action, and lack of personal jurisdiction based on improper service.

Prior to commencing the instant action, plaintiff commenced an identical action on March 26, 2009, under Index No. 104257/09. On May 14, 2009, defendants moved to dismiss the prior action for lack of personal jurisdiction based on improper service. According to plaintiff's counsel, plaintiff did not put in timely opposition to defendants' motion, due to law office failure. As a result, on August 17, 2009, the Hon. Debra James issued a short form order granting defendants' motion to dismiss "on default." Plaintiff's counsel explains that "[i]n order to avoid time-consuming motion practice to vacate the dismissal, plaintiff simply decided to re-file his lawsuit – the instant suit – and re-serve defendants."

Plaintiff thereafter commenced the instant action on September 14, 2009, and around the same time, mailed copies of the summons and complaint to defendants "as a courtesy." Plaintiff

thereafter made "arrangements" to have defendants formally served. According to the affidavits of service, defendants were served on October 16, 2009. Meanwhile, after receiving the courtesy copies, defendants made the instant motion to dismiss on October 5, 2009, before they were actually served. In his affirmation in support of the motion, also dated October 5, 2009, defendants' counsel states that his "office has not had the opportunity to check the Court files to determine whether or not plaintiff has filed an affidavit of service." At that time, the affidavit of service could not have been filed, since defendants were not actually served until October 16, 2009. In opposition to defendants' motion, plaintiff submits copies of the affidavits of service, which were filed on October 27, 2009. Defendants have had an opportunity to address those affidavits of service in their reply papers, which include an additional affidavit from defendant Perry. Thus, even if defendants' motion was initially premature, that defect has been cured and the service of process issue is properly before this court.

A properly executed affidavit of service raises a presumption of proper service, and a mere conclusory denial of receipt is not enough to rebut that presumption. See Kihl v. Pfeffer, 94 NY2d 118, 122 (1999); Slimani v. Citibank, N.A., 47 AD3d 489 (1st Dept 2008); Northern v. Hernandez, 17 AD3d 285 (1st Dept 2005); Aames Capital Corp. v. Ford, 294 AD2d 134 (1st Dept 2002); Fairmont Funding Ltd v. Stefansky, 235 AD2d 213 (1st Dept 1997).

Here, the process server's affidavits, which indicate that defendants were personally served in accordance with CPLR 308(2), constitutes prima facie evidence of proper service and defendants' conclusory assertions that they were "never served," and their hearsay statements as to what the doormen and dog walker purportedly told them, are insufficient to dispute the veracity and content of the process server's affidavits. See Aames Capital Corp. v. Ford, supra;

Fairmount Funding Ltd v. Stefansky, supra at 214. The affidavits of service state that on October 16, 2009 at 8:12 p.m, the papers were delivered to and left with "Oscar 'Doe,' refused to [sic] last name, *doorman, refused to let the deponent into the building*, a person of suitable age and discretion at 12 East 88th Street, Apt PH, New York, NY 10128, the said premises being the defendants Dwelling Place within the State of New York" (emphasis added). The affidavits also state that the papers were mailed by first class mail to defendants at the same address on October 20, 2009. The court's records indicate that the affidavits of service were filed on October 27, 2009.

It is well settled that where a process server is denied access to the specified apartment, a doorman is a person of suitable age and discretion within the contemplation of CPLR 308(2). See F.I. du Pont, Glore Forgan & Co. v. Chen, 41 NY2d 794 (1977); Al Fayed v. Barak, 39 AD3d 371 (1st Dept 2007); Charnin v. Cogan, 250 AD2d 513 (1st Dept 1998); Rosenberg v. Haddad, 208 AD2d 468 (1st Dept 1994). Thus, since the affidavits of service establish that access to defendants' building was prohibited, service was validly made by leaving the papers with the doorman. See Al Fayed v. Barak, supra; Charnin v. Cogan, supra; Rosenberg v. Haddad, supra.

Defendant Perry submits a reply affidavit which repeats the statement in her original affidavit that "I was never served, either in person, nor was anyone in my household personally served with this latest Summons and Complaint." Although Perry states that she reviewed the process server's affidavits submitted by plaintiff's counsel, she fails to make a sufficient showing to raise a traversable issue. Perry simply states that the process server's affidavits are "pure prevarication," and that "[o]ther than what counsel describes as 'courtesy copies,' neither Barry

nor I have been served with any other documents in any other manner." Perry's reliance on what she was told by the doormen at her building and her dog walker is unavailing, absent affidavits from those individuals. Moreover, Perry's discussion of events that allegedly occurred on October 15, 2009 is not relevant, as the papers were served on October 16, 2009. Defendants, therefore, fail to rebut the proof, based on the affidavits of service, that the papers were properly served in accordance with CPLR 308(b), by leaving them with the doorman who prohibited access to the building. See Fayed v. Barak, supra; Charnin v. Cogan, supra; Rosenberg v. Haddad, supra.

Defendants further contend that they are entitled to dismissal based on documentary evidence, and on the doctrine of res judicata. Defendants argue that the dismissal of the first action by Justice James is a "dismissal with prejudice on the merits," since they served notice of entry on August 28, 2009, and plaintiff's time to move for relief from the prior order or to appeal that order has expired. Defendants' argument is without merit. In seeking dismissal of the prior action, defendants moved on one ground alone, lack of personal jurisdiction grounded on improper service. Where, as here, the prior order of dismissal is based on the court's lack of personal jurisdiction over defendants, such dismissal is not "on the merits" and cannot be relied on by defendants for res judicata purposes. See Landau, P.C. v. LaRossa, Mitchell & Ross, 11 NY3d 8, 13, fn3 (2008); Wynn v. Security Mutual Insurance Co., 12 AD3d 1100 (4th Dept 2004); Kokoletsos v. Semon, 176 AD2d 786 (2nd Dept 1991); Dutcher v. Town of Shandaken, 97 AD2d 922 (3rd Dept 1983). Defendants provide no legal authority to support their position that plaintiff's default or failure to take an appeal, alters that conclusion.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is denied in its entirety, and within 20 days of the date of this order defendants shall serve and file answers to the complaint; and it is further

ORDERED that the preliminary conference previously scheduled for May 27, 2010 is adjourned to June 17, 2010 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order to counsel.

DATED: May 18, 2010

ENTER:

J.S.C.