

**Rosillo v Mortgage Elec. Registration Sys., Inc.**

2012 NY Slip Op 30743(U)

March 23, 2012

Sup Ct, New York County

Docket Number: 103022/2009

Judge: Paul G. Feinman

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

HON. PAUL G. FEINMAN

PRESENT: \_\_\_\_\_  
Justice

PART 12

Index Number : 103022/2009  
ROSILLO, SALVADORE  
vs.  
MOT. ELEC. REG. SYS.  
SEQUENCE NUMBER : 002  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, It is ordered that this motion is **DENIED** in accordance  
with the annexed decision & order.

It is further ordered that the Clerk  
of Court enter judgment dismissing the action  
in its entirety without prejudice.

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

**FILED**

MAR 26 2012

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/23/2012

PHF, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
SALVADORE ROSILLO

Plaintiff,

against

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., AS NOMINEE FOR  
AMERICAN BROKERS CONDUIT, AND  
AMERICAN HOME MORTGAGE  
SERVICES, 4600 REGENT BLVD. IRVING TX  
70663,

Defendant.

Index Number 103022/2009  
Mot. Seq. No. 002

**DECISION AND ORDER**

-----X  
**For the Plaintiff:**  
Salvadore Rosillo, *pro se*  
78 Reade St. #4FW  
New York, NY 10007  
212-593-3000

**For the Defendant:**  
*no appearance*

Papers considered in review of this motion for a default :

<b>Papers</b>	<b>Document Number:</b>
Notice of Motion, affidavit, exhibits	1

**PAUL G. FEINMAN, J.:**

Plaintiff, who is self-represented, moves pursuant to CPLR 3215 for entry of a default judgment as against defendant Mortgage Electronic Registration Systems, Inc. as nominee for American Brokers Conduit and American Home Mortgage Services. For the reasons which follow, the motion, though unopposed, is denied and the matter is dismissed without prejudice to commence a new action subject to the statute of limitations.

Plaintiff commenced this action by filing a summons with notice on March 4, 2009. He then moved for summary judgment in July 2009. His motion was denied by decision and order

dated Oct. 7, 2009 on the ground that the motion was premature (CPLR 3212 [a]). The court noted that because the County Clerk's file did not contain an affidavit of proof of service of the summons with notice on defendant, plaintiff's motion could not be treated as one seeking a default judgment based on non-appearance. However, the court allowed plaintiff to file proof of service of the summons with notice with the County Clerk "within 20 days of entry of this order," that is to say within 20 days of October 13, 2009, and to move for a default judgment within 45 days of October 13, 2009.

More than two years later, on December 22, 2011, plaintiff filed this instant motion seeking a default judgment. He explains that he had to travel to Mexico for the funeral of his brother, he hired an attorney who was ill and away from the office for seven months, and that he suffers from various "organic inflections", as well as post-traumatic stress disorder following the collapse of the World Trade Center in the terrorist attack in 2001. Although very untimely filed, the court will not deny the motion nor dismiss the case merely based on plaintiff's untimeliness.

Included in plaintiff's motion papers is a copy of the Summons with Notice that was stamped as "Filed" by the New York County Clerk's office on March 4, 2009, as well as a copy of an Affidavit of Service after Commencement of Action, dated March 25, 2009, indicating that defendant had been served with the summons with notice by mail on that date. Thus, plaintiff establishes that his action was filed in 2009, and that an attempt was made to serve defendant. Defendant has never answered or opposed this motion for a default judgment.

In order to be granted a judgment on default, plaintiff must fulfill the requirements of CPLR 3215 which governs default judgments. Among the requirements of the statute is that the plaintiff establish that the defendant was properly served with the summons and complaint or

summons with notice (CPLR 3215 [f]). This is done by showing proof in the form of an affidavit that service of process was performed as set forth under Article 3 of the CPLR which governs jurisdiction and service.

Defendant is a corporation. CPLR 311 provides that personal service upon a corporation is done by delivery of the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." (CPLR 311 [a]). Alternatively, the same statute allows for a business corporation to be served pursuant to sections 306 or 307 of the Business Corporation Law, depending on whether the corporation is based in New York or is a non-domiciled corporation.

According to the affidavit of service provided in the motion papers, plaintiff attempted to serve the corporate defendant on March 25, 2009, by mailing the summons with notice to its Texas address. This attempt at service does not comply with the provisions of CPLR 311 concerning service of process on a corporation,<sup>1</sup> set forth above. Without a defendant being correctly served, this court has no jurisdiction over that defendant unless it voluntarily appeared. Therefore, plaintiff cannot obtain a default judgment, because defendant has not been properly brought before the court. The motion is therefore denied based on the failure to prove adequate service of process.

Even if service had been properly established, the court would be compelled to deny the instant motion because plaintiff does not establish sufficient proof of his claims against defendant, as required under CPLR 3215 (f). He provides some documents pertaining to a piece

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<sup>1</sup>Plaintiff's process server used the form affidavit entitled "AFFIDAVIT OF SERVICE After COMMENCEMENT OF LITIGATION," which is clearly the form for use of serving papers after litigation has commenced, but is not used in order to commence litigation.

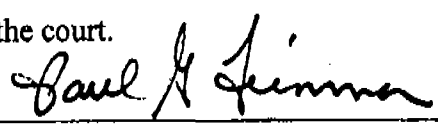
of real property in Brooklyn, and alleges breach of contract, fraud, banking law violations, and discrimination, among other claims, but does not show his relationship to the property at issue, does not offer any indication of when any of these wrong actions occurred, and offers nothing at all that implicates defendant in any wrongdoing that would form the basis for any of the causes of action alleged whatsoever.

Accordingly, it is

ORDERED, that the motion for a default judgment, although unopposed, is denied and the Clerk of Court shall enter judgment dismissing this action in its entirety without prejudice to plaintiff commencing a new action.

This constitutes the decision and order of the court.

Dated: March 23, 2012  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
MAR 26 2012  
COUNTY CLERK'S OFFICE  
NEW YORK