

**Foster Constr. Mgt., LLC v Tillackdharry Seerattan**

2013 NY Slip Op 31609(U)

July 16, 2013

Sup Ct, New York County

Docket Number: 653255/2012

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 49

FOSTER CONSTRUCTION MANAGEMENT, LLC,

Plaintiff,

-against-

TILLACKDHARRY SEERATTAN, et al.,

Defendants.

INDEX NO. 653255/2012

MOTION DATE April 26, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for a default judgment.

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

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

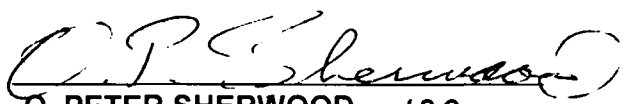
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for a default judgment is decided in accordance with the accompanying decision and order.

Dated: July 16, 2013

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X  
**FOSTER CONSTRUCTION MANAGEMENT, LLC,**

**Plaintiff,**

**DECISION AND ORDER**

**-against-**

**Index No. 653255/2012  
Mot. Seq. No. 001**

**TILLACKDHARRY SEERATTAN, SILOCHNI  
SEERATTAN, BOBBIE DE LUX, LLC f/k/a UNIQUE  
KITCHEN, LLC and SEERATTAN ENTERPRISES,  
LLC f/k/a UNIQUE KITCHEN AND BATHS, LLC,**

**Defendants.**

-----X  
**O. PETER SHERWOOD, J.:**

This action arises from plaintiff’s purchase of defendants’ cabinet-making business. Before the court is plaintiff’s motion for an order pursuant to CPLR 3215 granting a default judgment in its favor against defendants upon the first, second, third, fourth, fifth and sixth causes of action in the verified complaint, alleging, respectively, breach of contract, fraud, unjust enrichment, promissory estoppel, conversion and declaratory judgment, and awarding damages in the amount of \$425,000.00, based upon the defendants’ failure to timely appear or answer. The motion is unopposed. For the reasons that follow, the motion is denied.

On September 18, 2012, plaintiff commenced the instant action against defendants by the filing of a summons and verified complaint to recover, *inter alia*, the sum of \$425,000.00. An affidavit of service, annexed to the moving papers as Exhibit “B”, indicates that service of the summons and verified complaint was made upon defendant Tillackdharry Seerattan on September 27, 2012, at 11:20 a.m., pursuant to CPLR 308 (2), by delivering the summons and verified complaint to Vash Seerattan (Tillackdharry Seerattan’s nephew), a person of suitable age and discretion, at 92-30 173rd Street, Jamaica, New York 11433. Similarly, an affidavit of service, annexed to the moving papers as Exhibit “C”, indicates that service of the summons and verified complaint was made upon defendant Silochni Seerattan on September 27, 2012, at 11:20 a.m., pursuant to CPLR 308 (2), by delivering the summons and verified complaint to Vash Seerattan (Silochni Seerattan’s son), a person of suitable age and discretion, at 92-30 173rd Street, Jamaica,

New York 11433.

CPLR 308 (2), commonly known as “deliver and mail” service, allows personal service upon a natural person to be made, as relevant for the purposes of this motion,

“by delivering the summons . . . to a person of suitable age and discretion at the . . . dwelling place or usual place of abode of the person to be served and by . . . mailing the summons to the person to be served at his or her last known residence . . . in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing”

(CPLR 308 [2]). “CPLR 308 (2) requires strict compliance” (*Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980 [2d Dept 2011]). “Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court” (*Macchia v Russo*, 67 NY2d 592, 595 [1986]). Furthermore, “[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents” (*Raschel v Rish*, 69 NY2d 694, 697 [1986]).

Here, the affidavits of service annexed to the moving papers do not indicate that either Tillackdharry Seerattan or Silochni Seerattan were mailed a copy of the summons within twenty days of the delivery of the summons to Vash Seerattan, as required by CPLR 308 (2). The Court, however, has reviewed the electronic docket on the New York State Courts Electronic Filing (“NYSCEF”) system, and discovered that on November 15, 2012 plaintiff’s attorney filed a “Certification of Service,” dated September 17, 2012, wherein he indicates that on September 17, 2012, he mailed copies of the summons to Tillackdharry Seerattan, Silochni Seerattan, Seerattan Enterprises LLC and Bobbie De Lux LLC (NYSCEF Doc. No. 9, Ex. F). Proof of service upon Tillackdharry Seerattan and Silochni Seerattan was required to be filed within twenty days after delivery of the summons to Vash Seerattan, that is, by October 17, 2012 (CPLR 308 [2]). Although plaintiff initially filed affidavits of service as to Tillackdharry Seerattan and Silochni Seerattan on October 1, 2012 (NYSCEF Doc. Nos. 4-5), these affidavits do not indicate that copies of the summons were mailed.

Accordingly, plaintiff's completed filing of the proof of service on November 15, 2012 was late.

The failure to timely file proof of service is not a jurisdictional defect but, rather, "is a curable procedural irregularity" (*Zareef v Lin Wong*, 61 AD3d 749, 749 [2d Dept 2009]; *see also Discover Bank v Eschwege*, 71 AD3d 1413, 1414 [4th Dept 2010]). Where a plaintiff fails to timely file proof of service and does not obtain an order permitting a late filing, the late filing is a nullity, "and the defendants' time to answer never began to run" (*Zareef*, 61 AD3d at 749).<sup>1</sup> In such a circumstance, "the defendants never defaulted," and the plaintiff's motion for a default judgment must be denied (*id.*) The Court, however, *sua sponte*, in its exercise of discretion, permits the late filing of the proof of service *nunc pro tunc*, pursuant to CPLR 2001 (*Discover Bank*, 71 AD3d at 1414). Since the Court cannot "ma[ke] that relief retroactive to defendants' prejudice by placing defendants in default as of a date prior to the order" (*Rosato v Ricciardi*, 174 AD2d 937, 938 [3d Dept 1991]), defendants Tillackdharry Seerattan and Silochni Seerattan are granted thirty (30) days from service of this decision and order with notice of entry to serve and file an answer, or to otherwise move with respect to the complaint.

The motion for a default judgment must also be denied as to defendant Bobbie De Lux LLC. Plaintiff served Bobbie De Lux LLC by personal delivery to the Secretary of State, pursuant to Limited Liability Company Law § 303. In order to obtain a default judgment, plaintiff was required to submit an affidavit stating "that an additional service of the summons by first class mail has been made upon the defendant [LLC] at its last known address at least twenty days before the entry of

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<sup>1</sup>Defendant Tillackdharry Seerattan served plaintiff's attorney with a *pro se* answer on behalf of himself and the other three defendants. This answer was never filed with the Court, and is improper as to the LLC defendants, since an LLC cannot appear *pro se* (*Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593-594 [2d Dept 2007]). In any event, the individual defendants were never required to file an answer since their time to file an answer never began to run.

judgment” (CPLR 3215 [g] [4] [i]).<sup>2</sup> “The additional service of the summons by mail may be made *simultaneously with or after* the service of the summons on the defendant” LLC (CPLR 3215 [g] [4] [ii]) (emphasis added). In an “Affirmation of Additional Notice and Mailing” attached to the moving papers as Exhibit “F”, plaintiff’s attorney attests that the additional mailing was made to Bobbie De Lux LLC on September 17, 2012, *prior* to the time personal delivery was made to the Secretary of State on October 9, 2012, and not “simultaneous with or after the service of the summons,” as required by CPLR 3215 (g) (4) (ii). Since plaintiff has not complied with the additional notice requirement of CPLR 3215 (g) (4), the motion for a default judgment as to defendant Bobbie De Lux LLC is denied. Defendant Bobbie Dex Lux LLC is granted thirty (30) days to answer or to otherwise move with respect to the complaint upon service of a copy of this decision and order with notice of entry.

Defendant Seerattan Enterprises LLC was served pursuant to CPLR 311-a, by personal delivery of the summons and complaint to Nevin Persaud, who is described in the affidavit of service annexed to the moving papers as Exhibit “E”, as an employee and “person authorized to accept service on behalf of the company or agency.” Although it appears that Seerattan Enterprises LLC was properly served, the Court, in its exercise of discretion, denies the motion for a default judgment as to this defendant, because the plaintiff failed to properly obtain a default judgment as against the other three defendants. Seerattan Enterprises LLC is granted thirty (30) days to answer or to otherwise move with respect to the complaint upon service of a copy of this decision and order with notice of entry.

The Court notes that defendants Bobbie De Lux LLC and Seerattan Enterprises LLC must appear by counsel, and may not appear *pro se* (*Michael Reilly Design, Inc.*, 40 AD3d at 593-594

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<sup>2</sup>Although this provision only explicitly applies to corporations served pursuant to Business Corporation Law § 306 (b), the Appellate Division, First Department appears to have held the requirement applicable to limited liability companies served pursuant to Limited Liability Company Law § 303 (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 7 [1st Dept 2002] [noting that an “additional copy of the supplemental summons and amended verified complaint with notice had been mailed to defendants,” one of which was a Limited Liability Company served pursuant to Limited Liability Company Law § 303, “as *required* by CPLR 3215 (g) (4)”] [emphasis added]).

["like a corporation or a voluntary association, [an] LLC may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the state of New York"]; *see* CPLR 321 [a]).

Accordingly, it is hereby

**ORDERED** that plaintiff's motion for a default judgment is DENIED; and it is further

**ORDERED** that plaintiff shall serve a copy of this order with notice of entry upon all defendants within twenty (20) days of the date of entry of this order; and it is further

**ORDERED** that defendants Tillackdharry Seerattan, Silochni Seerattan, Bobbie De Lux LLC and Seerattan Enterprises LLC shall file and serve an answer, or otherwise move with respect to the complaint, within thirty (30) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

**DATED: July 16, 2013**

**ENTER,**

A handwritten signature in black ink, appearing to read "O. P. Sherwood", written in a cursive style with a large loop at the end.

**O. PETER SHERWOOD  
J.S.C.**