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| B&H Assoc. of N.Y., LLC v Fairley |
| 2013 NY Slip Op 34151(U) |
| April 10, 2013 |
| Supreme Court, Nassau County |
| Docket Number: 600904/12 |
| Judge: Karen V. Murphy |
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

**B&H ASSOCIATES OF NY, LLC d/b/a
PRUDENTIAL DOUGLAS ELLIMAN,**

Index No. 600904/12

Plaintiff(s),

Motion Submitted: 2/28/13

Motion Sequence: 001

-against-

**PATRICK FAIRLEY, ANA FAIRLEY, GOLDEN
HORN DEVELOPMENT LP, DL PARTNERS LLC,
KEVIN SALMON, SALMON & MARSHALL
CORP. d/b/a SALMON AND MARSHALL REAL
ESTATE INVESTMENTS,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff moves this Court unopposed for an Order granting default judgments against all defendants, with the exception of defendant Ana Fairley.

Plaintiff alleges that Patrick Fairley, a member of defendants DL and Golden Horn, signed an Exclusive Right to Sell Agreement (ERSA) with plaintiff relative to the sale of commercial property located at 74 Kent Avenue, Brooklyn, New York. Plaintiff further claims that Fairley, DL, and Golden Horn violated the ERSA by entering into an agreement with the Salmon defendants to list the same property for sale, during the effective time period of the ERSA. The subject property was apparently sold by the Salmon defendants on or about and between December 9, 2011 and January 19, 2012, and plaintiff now sues for its commission pursuant to the ERSA. The complaint was filed on or about May 14, 2012.

CPLR §3215(f) requires proof by affidavit, made by the party, of the facts constituting the claim, the default and the amount due. “Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party’s attorney.”

Plaintiff’s motion is denied as to defendant Patrick Fairley. The affidavit of service contained in plaintiff’s Exhibit 3 is an incomplete copy, cutting off the area where a complete description of the person served, and the signature of the process server would be located. Moreover, the ERSA and deed submitted in support of the instant motion are signed by a person named Patrick Fairley, but the payment demand letters are addressed to Dennis Patrick Fairley. It is unknown whether this discrepancy is simply reflective of an alias, or a misidentification of the defendant.

Plaintiff’s motion is denied as to Golden Horn and DL. The affidavits of service submitted reflect that, on May 22, 2012, service upon each of those defendants was unable to be made because Golden Horn was “no longer in business at address,” and DL “was unknown at address given.” The Court notes that service upon each of those business entities was attempted at 74 Kent Street, Brooklyn, New York, which is the very property plaintiff was aware had been sold on or about December 2011 to mid-January 2012.

Knowing that the property had been sold approximately five months earlier, it is not surprising to the Court that service was unable to be effected at 74 Kent Street. Thus, plaintiff’s subsequent service upon the Secretary of State in July 2012 is ineffective to confer this Court with jurisdiction over Golden Horn and DL. The addresses on file with the Secretary of State for the service of process upon each of those entities is 74 Kent Avenue, an address that plaintiff knew for a fact to be invalid since late May 2012. Plaintiff cannot cure its inability to serve Golden Horn and DL by belatedly serving the Secretary of State, knowing that process will be sent to an invalid address.

The Court also notes that the payment demand letters were sent to both Fairley defendants, to Golden Horn, and to DL at 641 Merrick Road, in Baldwin, Nassau County, New York.¹ Service of process upon the Fairley defendants took place at the Baldwin

¹The summons in this action lists the defendants’ addresses, one of which is “641 Merrick Road, Bellmore, New York.” The Court takes judicial notice of the fact that Baldwin and Bellmore, New York are two different communities within Nassau County; therefore, plaintiff

address; yet, based upon the submitted exhibits, service upon Golden Horn and/or DL was never attempted at that address although plaintiff alleges that Patrick Fairley is a member of both entities. Additionally, the instant Notice of Motion lists DL's address as "100 W. 124th Street, New York, NY," but service at that address was apparently not attempted.

Plaintiff's motion for a default judgment against Kevin Salmon is likewise denied. The affidavit of service states that Salmon was served with the summons and complaint on July 3, 2012, by delivery to Salmon's sister at 100 West 124th Street, Apartment 1A, New York, New York. The summons and complaint were thereafter mailed to that same address on July 3, 2012, as indicated in the affidavit of service.

The instant motion, however, was not sent to Kevin Salmon at the 124th Street address, but to 505 Park Avenue, New York, New York, without a floor number. It is apparent to the Court that defendant Salmon & Marshall Corp. was served with the summons and complaint at 505 Park Avenue, 17th floor, and that Kevin Salmon was served with an amended complaint at 505 Park Avenue, 17th floor, on September 6, 2012. Thus, the address to which the instant motion was sent should have contained a floor number, given that the building is at least 17 stories high, and undoubtedly houses a number of occupants. The instant motion could also have been sent to the 124th Street address.

Plaintiff's motion for a default judgment against Salmon & Marshall Corp. is granted. The amended complaint is verified by plaintiff's executive vice president and general counsel, Kenneth Haber (Exhibit 4), and plaintiff has also submitted an affidavit from the licensed salesperson who was the listing agent for the subject property, Lisa Deturris. Ms. Deturris' affidavit also verifies the original complaint upon which plaintiff seeks judgment. Thus, plaintiff has established the facts constituting the claim against Salmon & Marshall, Corp. The affirmation of plaintiff's counsel, Naomi Trainer, Esq., establishes defendant's default. This Court is satisfied that plaintiff has established its entitlement to the relief requested and that Salmon & Marshall, Corp. has been served.

Submit a separate judgment on notice with respect to defendant Salmon & Marshall, Corp., accompanied by a bill of costs and an affirmation as to reasonable attorneys' fees.

Plaintiff is granted leave to renew its default motion with respect to defendants Patrick Fairley and Kevin Salmon upon the submission of proper papers in accordance with the

has raised an issue as to where service/mailings were made in Nassau County.

[* 4]
foregoing.

The foregoing constitutes the Order of this Court.

Dated: April 10, 2013
Mineola, N.Y.


J. S. C.

ENTERED

APR 16 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**