

**Sixth Ave. W. Assoc., LLC v Leadership
Transformation Group, LLC**

2014 NY Slip Op 31327(U)

May 21, 2014

Supreme Court, New York County

Docket Number: 156941/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

SIXTH AVENUE WEST ASSOCIATES, LLC,

Plaintiff,

INDEX NO. 156941/2013

- v -

MOTION DATE _____

LEADERSHIP TRANSFORMATION GROUP, LLC,
WILLIAM TOLLIVER,

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

Defendants.

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

PAPERS NUMBERED

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

1, 2

Answer — Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5

Cross-Motion: Yes X No

This action seeks to recover outstanding rental arrears owed under a lease agreement between Plaintiff Sixth Avenue West Associates, LLC (“Plaintiff” or “Sixth Avenue”), as tenant, and defendant Leadership Transformation Group, LLC (“LTG”), as landlord, and under a Good Guy Guaranty executed by defendant William Tolliver (“Tolliver”).

Plaintiff now moves for default judgment against defendants LTG and Tolliver based on their failure to answer. Plaintiff seeks a money judgment in the amount of \$70,775.29 against Defendants and a hearing to determine the amount of legal fees owed by Defendants. Tolliver opposes. LTG does not submit opposition.

Plaintiff submits the attorney affirmation of David B. Rosenbaum, which provides the Summons and Complaint, the Affidavit of Service attesting to service of the same upon LTG on September 3, 2013 and upon Tolliver by affixing a copy of the papers to the door of address “77 Neversink Drive, Port Jervis, NY 12771, the same being defendant/respondent’s place of Abode,” after previously attempting service” on six previous times, and by mail. Plaintiff also submits proof of additional mailing to Tolliver at this address.

Plaintiff further submits the affidavit of Ashok Mehra, which avers to the execution of the Lease and Guaranty and outstanding amount due of \$70,775.29. This amount represents unpaid rent, additional rent, late charges, real estate taxes,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

tax abatement reimbursement and re-letting expenses from June 2012 through April 2013. Mehra avers that Defendants stopped paying rent and/or additional rent in June 2012, owing rent and additional rent and leaving abandoned furniture and other property inside the Premises. In February 2013, Defendants vacated the Premises. Plaintiff re-rented the Premises to a new tenant as of May 2013.

In opposition, Tolliver contends that Plaintiff is not entitled to default judgment on the grounds that Plaintiff has failed to effect service on Tolliver. In addition, Tolliver contends that he has a meritorious defense.

Alternatively, Tolliver requests leave to serve an answer to the Summons and Complaint or to move for dismissal of the same. No formal cross motion for leave to file an untimely answer has been served and no proposed pleading has been provided.

Tolliver avers, “I have not been served a copy of the Summons and Complaint in this matter. That at the time that I executed the Lease on behalf of The Leadership Transformation Group, LLC, I was residing at 295 Convent Avenue, New York, New York. That since that time, I have continued to reside at 295 Convent Avenue, New York, New York. That I do not reside in Port Jervis, New York.”

In reply, Plaintiff states that Tolliver was properly served pursuant to CPLR §308(4) at his only known dwelling place or usual place of abode at 77 Neversink, Port Jervis, New York,” after several attempts to previously serve Tolliver there. Plaintiff states that although Tolliver claims that he does not reside in Port Jervis, New York, and continues to reside at 295 Convent Avenue, New York, Plaintiff attempted to personally serve Tolliver at 295 Convent Avenue, New York, New York. According to the Affidavit of Attempted Service, the “current super stated that defendant [Tolliver] was former super [sic] and hasn’t lived or worked at address [sic] in 2 years and also stated he’s not a tenant in the building.” Plaintiff then states that it conducted a LexisNexis Accurint search that revealed Tolliver to be the owner of the Property at 77 Neversink, Port Jervis, New York, and that the “Owner address” is “295 Convent Avenue, New York, NY.” Based on this information, Plaintiff served Tolliver at the Port Jervis address.

A process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkle*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]).

CPLR §308(4) provides:

where service under paragraphs one and two cannot be made with due diligence, *by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state* of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business 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 affixing 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 affixing or mailing, whichever is effected later; service shall be complete ten days after such filing...

(emphasis added).

“The ‘nail and mail method’ provision of the CPLR permits a plaintiff to mail duplicate process to the defendant at his last known residence, but clearly requires that the ‘nailing’ be done at the defendant’s actual place of business, dwelling place, or usual place of abode.” *David v. Moyer*, 133 A.D. 2d 737, 737 [2nd Dept 1987].

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3 d 459 [1st Dept. 2004]).

Here, in light of Tolliver’s affidavit that he does not reside at the location where the nailing was made, a traverse hearing is directed.

Wherefore, it is hereby

ORDERED that Plaintiff’s motion for default judgment is granted only as to defendant Leadership Transformation Group, LLC; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff Sixth Avenue West Associates, LLC, and against defendant Leadership Transformation Group, LLC, in the amount of \$70,775.29, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and

disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs owed by defendant Leadership Transformation Group, LLC, to Plaintiff is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing; and it is further

ORDERED that Plaintiff's action against defendant William Tolliver is severed and shall proceed; and it is further

ORDERED that the parties shall appear for a traverse hearing regarding service upon defendant William Tolliver on July 1, 2014 at 2 pm at 80 Centre Street, Room 327.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: MAY 21, 2014



HON. EILEEN A. SAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE