

521 Broadway Holdings LLC v Christian
2016 NY Slip Op 31530(U)
August 11, 2016
Supreme Court, New York County
Docket Number: 651173/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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521 BROADWAY HOLDINGS LLC,

Plaintiff,

Index No.
651173/2016

**DECISION AND
ORDER**

- against -

Mot. Seq. #001

NATHANIEL CHRISTIAN and
NCG REAL ESTATE LLC d/b/a
NATHANIEL CHRISTIAN GROUP,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff 521 Broadway Holdings LLC (“Broadway Holdings” or “Plaintiff”) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants Nathaniel Christian (“Christian” or “Defendant”) and NCG Real Estate LLC d/b/a Nathaniel Christian Group (“Nathaniel Christian Group” and collectively, “Defendants”), jointly and severally, in the total amount of \$203,061.01, with interest from October 1, 2014. Plaintiff alleges that Christian is the sole member, owner, and managing member of Nathaniel Christian Group and that Defendants are in default of their obligations under four amended and restated promissory notes, which were assigned to Broadway Holdings on June 2, 2014.

Plaintiff submits the attorney affirmation of Alan E. Sash, Esq., the affidavit of Richard Rumpf, manager of 521 Broadway Holdings, and copies of the four amended and restated promissory notes (each individually, a “Note” and collectively, the “Notes”). Rumpf avers that Broadway Holdings is the current holder of the Notes and that, pursuant to the terms of the Notes, Defendants agreed to repay loans in the principal amounts of \$150,343.75 (Note 1), \$29,834.40 (Note 2), \$14,800 (Note 3), and \$8,082.86 (Note 4) on or before October 1, 2014. Rumpf avers that Defendants have failed to repay any of the Notes, in whole or in part, and are in default, entitling Plaintiff to the principal amounts of the Notes, plus interest at the default rate of 12% as of October 1, 2014.

Defendant Christian submits an affidavit in opposition, in which he avers that the alleged promissory notes have been paid in full. He further avers that the Notes were signed by and agreed to only by the individual "Nathaniel Christian" and not on behalf of the company Nathaniel Christian Group. Defendant argues that the alleged service of the summons on Nathaniel Christian Group does not constitute service because Nathaniel Christian Group "has nothing to do with nor has any involvement with these promissory notes and therefore should not be included as a defendant."

Defendant also challenges Plaintiff's alleged service of process on Christian in California. Christian avers that he is a resident of New York State and has never had a full time residence in Los Angeles. Christian asserts that he was not properly served because service was attempted at an Airbnb hotel complex located at 7044 Hawthorn Avenue, Los Angeles, California, where he had stayed for a short period of time, checking out a week prior to the attempted service.

In reply, Plaintiff asserts that the Notes were executed by "Nathaniel Christian, businessman, and the Nathaniel Christian Group, jointly and severally (collectively, the 'Maker')" and that every Note except Note 3 has an Assignment and Consent Agreement annexed to it executed by "Nathaniel Christian, Maker". Plaintiff argues that Christian executed the Notes as "Maker", a term which expressly includes Christian and the Nathaniel Christian Group. In addition, Plaintiff points out that Christian provides no proof of payment to support his allegation that the Notes were paid in full.

Responding to Defendant's argument that service on Christian was improper, Sash avers that Plaintiff has attempted to serve Christian at multiple residential and business addresses in Manhattan and California and that Christian has been evading service of process for a long time. On March 7, 2016, process server Carlos Canas attempted service on Christian at 7044 Hawthorn Avenue, #215, Los Angeles, California, 90028. According to the affidavit of service, Canas saw the name "Nathaniel Christian" with the listed apartment number 215 on the building's electronic touch intercom. After buzzing the intercom, Canas was able to speak with Mr. Christian through the intercom. Christian refused to provide Canas with the apartment number and stated that he was in New York. Plaintiff challenges Christian's allegation that the intercom rang his cellphone, attaching a photo of the Linear model intercom and suggesting that the model is antiquated and did not contain that technologically advanced feature. Plaintiff argues that Christian's attempts to evade and challenge of service are contrary to law because there is a duty to accept service, and that Christian has nevertheless waived any alleged defect in service by addressing the motion on the merits.

Pursuant to CPLR 308(4), a plaintiff must use due diligence in effectuating service by either personal delivery (308[1]), or the “deliver and mail” method (308[2]). If either method of service is not successful, the plaintiff may affix the summons to the door of the defendant’s “actual place of business, dwelling place or usual place of abode,” and must also mail the summons to the defendant at his or her “last known residence” or “actual place of business.” (CPLR § 308[4]). As defined in CPLR 308, “dwelling place” is a location at which the defendant is actually residing at the time of delivery. (*Feinstein v. Bergner*, 48 N.Y.2d 234 [1979]). A defendant may “actually” reside at more than one location for purposes of the statute. (*Litton Loan Servicing, LP v. Vasilatos*, 7 A.D.3d 580 [2d Dept. 2004]).

“The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received.” (*McSorley v. Spear*, 50 A.D.3d 652 [2d Dept. 2008], *lv denied* 10 N.Y.3d 715, *rearg denied* 11 N.Y.3d 751, *quoting Gurevitch v. Goodman*, 269 A.D.2d 355 [2d Dept. 2000]). What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality. (*McSorley*, 50 A.D.3d at 652). One of the factors to be considered is the extent of inquiry by the process server concerning defendant’s whereabouts. (*Id.*).

Plaintiff claims that its process server delivered the summons and notice of motion for summary judgment in lieu of complaint to Christian by “affixing” a copy of each to Defendant’s “last known residence” within the state of California and mailing a copy of the same by certified mail to the same address. The process server states that he was “unable, with due diligence to find defendant or a person of suitable age and discretion” at such residence, after attempting service on March 7, 2016 at 4:49 p.m., March 8, 2016 at 10:01 a.m., and March 9, 2016 at 6:45 a.m. On the second attempt, deponent states that he accessed the apartment building lobby and spoke with the “person in charge” in the management office, who informed him that “there is no such tenant with the name: Nathaniel Christian, residing in the apartment building.” The process server also spoke with other tenants, who “did not know Mr. Christian.” On the third attempt, the process server “posted said papers” at the address, noting that he was no longer able to find Mr. Christian’s name listed in the directory of the intercom. Defendant attests that the address was an Airbnb rental where he stayed for a short period of time, and that he had already “checked out” and was back in New York when the process server made the first attempted service.

The affidavit of Plaintiff's process server does not state that the address at which the process server "affix[ed]" the summons and notice of motion for summary judgment in lieu of complaint was the "actual place of business, dwelling place or usual place of abode within the state of the person to be served" as required under CPLR 308(4). Rather, the affidavit of the process server states that he served the summons by "affixing" a copy of the summons to the door of Defendant's "last known residence." The Court of Appeals has defined "usual place of abode" as a place at which the defendant lives with a degree of permanence and stability, even if not in actual residence at the time of delivery, but with the intention to return. (*Feinstein*, 48 N.Y.2d at 234). Neither "dwelling place" nor "usual place of abode" has been defined as "last known residence." (*Id.* at 239). Accordingly, Plaintiff has failed to make a prima facie showing that it served Defendant with process pursuant to CPLR 308(4).

Plaintiff's argument that Defendant Christian waived any alleged defect in service of process is also without merit. While a party may waive its objection to the court's personal jurisdiction by making a formal appearance or by "substantially participating in the litigation", *Sessa v. Bd. of Assessors of Town of N. Elba*, 46 A.D.3d 1163, 1164 [3d Dept. 2007], Defendant properly objected to the court's personal jurisdiction through his arguments in opposition to the instant motion for summary judgment in lieu of complaint, and therefore did not waive his objection the court's personal jurisdiction by substantially participating in the litigation.

In this action, no attorney has appeared for Defendant NCG Real Estate, LLC d/b/a Nathaniel Christian Group. Pursuant to CPLR 321(a), "a corporation or voluntary association shall appear by attorney[.]" See *Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592, 593-94 (2d Dept. 2007) ("[L]ike a corporation or 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."). Plaintiff submits an affidavit of service, sworn to by Mary M. Bonville on March 8, 2016, stating that Bonville served the summons and notice of motion for summary judgment in lieu of complaint on "NCG Real Estate LLC d/b/a Nathaniel Christian Group" by "personally serving two copies of the aforesaid papers at the office of the New York State Secretary of State by delivering to and leaving the papers with Nancy Dougherty . . . an authorized person in the Corporate Division of the Department of State and empowered to receive such service." The affidavit of service on Nathaniel Christian Group was filed on March 15, 2016.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint as against Defendant Nathaniel Christian is denied; and it is further

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint as against Defendant NCG Real Estate LLC d/b/a Nathaniel Christian Group is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff, 521 Broadway Holdings LLC, and against Defendant NCG Real Estate LLC d/b/a Nathaniel Christian Group, in the sum of the four Notes totaling \$203,061.01, with interest at a rate of 12% per annum from October 1, 2014, as per the Notes, and thereafter at the statutory rate (9% per annum).

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

DATED: AUGUST 11, 2016

AUG 11 2016



EILEEN A. RAKOWER, J.S.C