

**Board of Mgrs. of Strivers Garden Condominium v
Oh**

2017 NY Slip Op 32293(U)

October 26, 2017

Supreme Court, New York County

Docket Number: 152413/2017

Judge: Robert D. Kalish

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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. _____ ROBERT D. KALISH
Justice

PART 29

**BOARD OF MANAGERS OF STRIVERS GARDEN
CONDOMINIUM, ON BEHALF OF ITS UNIT OWNERS,**

INDEX NO. 152413/2017

MOTION DATE 9/26/17

Plaintiff,

MOTION SEQ. NO. 001

- v -

**JAMES OH, CHANG DO OH, CHUNJA OH, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
PARKING VIOLATIONS BUREAU OF THE CITY OF NEW
YORK, UNITED STATES OF AMERICA and "JOHN
DOE" (Said name being fictitious, it being the
intention of Plaintiff to designate any and all
occupants of Premises being foreclosed herein, and
any parties, corporations or entities, if any, having or
claiming an interest or lien upon the subject premises),**

Defendants.

The following papers, numbered 18-33, were read on this motion for entry of a default judgment.

**Notice of Motion – Affirmation in Support – Affidavit in Support – Exhibits A-
G – Proposed Order – Affidavit of Service – RJ1 – 840A Addendum – Request
for Adjournment of Motion** | **Nos. 18-33**

Motion by Plaintiff Board of Managers of Strivers Garden Condominium, on
Behalf of its Unit Owners, for entry of a default judgment against Defendants
James Oh, et al., is denied.

BACKGROUND

Plaintiff commenced this action on March 13, 2017 by e-filing a summons
and complaint (James aff, exhibit A). On March 20, 2017, at 8:20 p.m., March 24,
2017, at 12:57 p.m., and March 29, 2017, at 9:03 p.m., a process server allegedly
attempted service of process upon defendants James Oh, Chang Do Oh, and
Chunja Oh (the "Ohs") pursuant to CPLR 308 (1) and (2) at 300 West 135th Street,
#4V, New York, New York 10030 (the "Unit"), allegedly the Ohs' usual place of

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

abode (James aff, exhibit F, at 2–4). Allegedly, neither the Ohs nor a person of suitable age and discretion were at the address to receive this personal service (*ibid.*).¹ On April 6, 2017, at 7:11 a.m., the same process server allegedly affixed the summons and complaint to the door of the Unit (*ibid.*). On April 7, 2017, a different process server allegedly mailed the summons and complaint to the Unit, “[t]hat address being the usual place of abode of the [Ohs]” (*ibid.*).

DISCUSSION

“Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308” (*Washington Mut. Bank v Murphy* (127 AD3d 1167, 1175 [2d Dept 2015] [internal quotation mark and citations omitted]). CPLR 308 provides the following, in relevant part:

Personal service upon a natural person shall be made by any of the following methods: . . .

(4) “where service under [CPLR 308 (1) and (2)] 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.”

(Emphasis added.) “[Usual place of abode] may [not] be equated with the ‘last known residence’ of the defendant” (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979] [internal citations omitted]). This distinction is no “mere redundancy” (*Feinstein* at 241). To “blur the distinction between [usual place of abode] and last

¹ The Court notes that defendant James Oh signed and delivered to the motion support office two written statements in this case. On July 20, 2017, Mr. Oh stated “I, James Oh, defendant in this case require 30 days to answer a motion [and] obtain an attorney. I need the 30 days to provide more time on this case to find a resolution.” On September 8, 2017, Mr. Oh stated “I, James Oh, defendant in this case require more time to answer this motion [and] obtain an attorney.” The effect of these statements was to adjourn the instant motion to September 26, 2017, when it was marked “fully submitted—no opposition.” Mr. Oh never submitted any papers in this case other than these requests for adjournment of the instant motion. The Court further notes that Plaintiff mailed its notice of motion to the Unit.

known residence . . . would be to diminish the likelihood that actual notice will be received by potential defendants” (*id.* at 240), contrary to the legislature’s intent.

In *Feinstein*, a process server attempted the “nail” prong of this “nail and mail” method of personal service at Bergner’s last known residence. Nevertheless,

“the purported service was ineffective, since the plaintiff failed to comply with the specific mandates of CPLR 308 [(4)]. The summons here was affixed to the door of defendant’s last known residence rather than his actual [or usual place of] abode. That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court.”

(*Id.* at 241 [internal citation omitted].) As such, plaintiff failed to meet its burden of proof that it had satisfied the “nail” prong of CPLR 308 (4). Similarly, in *Washington* (at 1174), “the plaintiff failed to meet its burden of proof that its mailing of copies of the summons and complaint satisfied the mailing requirement of CPLR 308 (2),” which is analogous to the “mail” prong of CPLR 308 (4); by failing to mail the summons to Murphy’s last known residence.

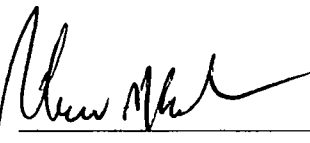
In the instant motion, Plaintiff fails to meet its burden of proof that it has satisfied the "mail" prong of CPLR 308 (4). Personal service of process is not made upon a defendant pursuant to CPLR 308 (4) without proof of a mailing of the summons to either the defendant's last known residence or the defendant's actual place of business. Here, Plaintiff presents affidavits of service which show that the summons was mailed to the Ohs' "usual place of abode," only. Whether the Ohs' "usual place of abode" is in fact their last known residence or actual place of business (or actual residence) may be, but there is no proof in support of such a proposition in the record. As such, this Court finds that Plaintiff has failed meet its burden of proof in satisfying the "mail" prong of CPLR 308 (4).

CONCLUSION

Accordingly, it is ORDERED that Plaintiff's motion for entry of a default judgment is denied with leave to renew upon a showing of proof of proper service of process.

The foregoing constitutes the decision and order of the Court.

Dated: October 26, 2017
New York, New York


_____, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE