

Medina v Sheng Hui Realty LLC
2018 NY Slip Op 30872(U)
May 7, 2018
Supreme Court, New York County
Docket Number: 152877/2017
Judge: Robert D. Kalish
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

FABIAN MEDINA,

INDEX NO. 152877/2017

Plaintiff,

MOTION DATE 5/7/18

- v -

MOTION SEQ. NO. 002

SHENG HUI REALTY LLC et al.,

Defendants.

NYSCEF Doc Nos. 3-11 were read on this motion for an order directing the entry of a default judgment.

Motion by Plaintiff Fabian Medina (“Medina”) pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Medina and against defendants Sheng Hui Realty LLC (“Realty”), Tu Kang Yang (“Yang”), and Pan Link Construction, Inc. (“Construction”) is granted in part and denied in part, with leave to renew, as follows.

BACKGROUND

This is a trip-and-fall action. Plaintiff Medina commenced the instant action on March 28, 2017, by e-filing a summons and verified complaint (the “Complaint”). The Complaint, which is verified by Plaintiff, alleges, in sum and substance, that Medina tripped and fell on the sidewalk abutting the defendants’ premises on December 31, 2016, at 42-34 Forley Street, 42-36 Forley Street, 42-38 Forley Street, Queens County, NY, Block 1568, Lots 24 & 27 (the “Premises”). The Complaint further alleges that the defendants were responsible for the Premises and for the sidewalk where Medina fell. The Complaint further alleges that the sidewalk where Medina fell was “part of a construction site in front of the [P]remises.” (Complaint ¶ 81.)

On May 23, 2017, defendant Barmor Rehab, Inc. (“Rehab”) answered and appeared in the instant action. On December 1, 2017, this Court issued a gray sheet decision on motion seq. 001, a motion by Rehab pursuant to CPLR 3103 (a) for a protective order compelling Medina to accept Rehab’s response to Medina’s notice to admit. The Court noted that motion seq. 001 was “decided as per oral argument of 11/28/17.”

Medina now moves for an order directing the entry of a default judgment in favor of Medina and against Realty, Yang, and Construction. Medina submits an affidavit of merit, dated October 4, 2017, sworn to by Medina which reiterates the facts previously sworn to in Medina’s verified complaint and states that Medina “suffer[ed] serious injuries including a fractured left shoulder.” (Aff of Medina ¶ 3.)

Plaintiff submits sixteen exhibits which relate to service of the summons and complaint on Realty, Construction, and Yang. The Court will disregard for the purposes of the instant decision and order those exhibits filed in duplicate with the motion.

Plaintiff submits an affidavit of service, dated April 5, 2017, which states that Realty was served on April 4, 2017, by delivering a copy of the summons and complaint to Zhen Yu, officer., at “44-32 65th Street, 2nd Floor, Woodside, NY 11377.” (Affirmation of Armstrong, exhibit C.) Plaintiff then submits another affidavit of service, dated June 22, 2017, which states that Realty was served on June 21, 2017, through the secretary of state pursuant to Limited Liability Company Law § 303. (Affirmation of Armstrong, exhibit E.) Plaintiff then submits a “Notice to Take Default,” dated July 13, 2017, which cites Business Corporation Law § 306 and attaches a copy of the Complaint. (Affirmation of Armstrong, exhibit G.) Plaintiff further submits an affirmation, dated July 13, 2017, indicating that the “Notice to Take Default with Attachments” was mailed to Realty at “37-20 Prince Street 14A, Flushing, NY 11354” and “44-32 65th Street 2nd Floor, Woodside, NY 11377.” (Affirmation of Armstrong, exhibit H.)

Plaintiff next submits an affidavit of service, dated April 13, 2017, which states that Construction was served on April 12, 2017, by delivering a copy of the summons and complaint to Dan Liu, officer, at “29 Beach Road, Great Neck, NY 11023.” (Affirmation of Armstrong, exhibit I.) Plaintiff then submits another affidavit of service, dated June 22, 2017, which states that Construction was served on June 21, 2017, through the secretary of state pursuant to Business Corporation Law § 306. (Affirmation of Armstrong, exhibit K.) Plaintiff then submits a “Notice to Take Default,” dated July 13, 2017, which cites Business Corporation Law § 306 and attaches a copy of the Complaint. (Affirmation of Armstrong, exhibit M.) Plaintiff further submits an affirmation, dated July 13, 2017, indicating that the “Notice to Take Default with Attachments” was mailed to Construction c/o Dan Liu at “29 Beach Road, Great Neck, NY 11023.” (Affirmation of Armstrong, exhibit N.)

Plaintiff next submits an affidavit of service, dated April 20, 2017, which indicates that Yang was served pursuant to CPLR 308 (2) by: (1) on April 18, 2017, leaving a copy of the summons and complaint with “Jane Doe,” a person of suitable age and discretion, at “44-32 65th Street, Woodside, NY 11377,” allegedly “recipient’s ‘Home’ within the state”; and (2) on April 19, 2017, mailing a copy of the summons and complaint to “the above address.” (Affirmation of Armstrong, exhibit O.) The box for “Home” is marked with an “X” and the box for “Business Address” is unmarked. (*Id.*) The following line states “[p]erson spoken to, verified that defendant actually resides/is employed at these premises.” (*Id.*)

Plaintiff last submits an affidavit of service, dated April 27, 2017, which indicates that Yang was served pursuant to CPLR 308 (4) by: on April 26, 2017, affixing a copy of the summons and complaint to the door of “37-20 Prince Street, Apt 14A, Flushing, NY 11354,” allegedly “recipient’s ‘Home’ within the state”; and (2) on April 26, 2017, mailing a copy of the summons and complaint to “the above address.” (Affirmation of Armstrong, exhibit Q.) The box for “Home” is marked with an “X” and the box for “Business Address” is unmarked. (*Id.*) The next sentence states “[d]eponent was unable, with due diligence to find defendant or a person of

suitable age and discretion thereat, having called there: 3/30/17 @ 8:56 A.M.; 4/4/17 @ 9:09 P.M.; 4/22/17 @ 1:44 P.M.” (*Id.*)

At oral argument on May 7, 2018, Medina and Rehab appeared by counsel. Rehab stated that it had no position on the instant motion. Medina’s counsel indicated to the Court that he had served Realty and Construction with a copy of the summons and complaint to an officer and then by service on the secretary of state to make “doubly sure” that service was proper. Similarly, counsel for Medina argued that he served Yang at two addresses to make “doubly sure” Yang was properly served with process. Counsel for Medina further argued that exhibit O showed that a process server effectuated service of process at an address that was both Yang’s place of business and his home. Counsel for Medina further argued that Yang was served at the same place as Realty, which Yang allegedly co-owns. Counsel for Medina further argued that exhibit Q showed that a process server effectuated service of process at an additional home address for Yang. Counsel for Medina further argued that a person can have multiple homes and last known addresses. Counsel for Medina then argued that the process server’s efforts were diligent as shown on exhibit Q.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant’s default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

The Court finds based upon Medina’s submission that Realty, Yang, and Construction have failed to appear or to answer the complaint and their time to do so has expired. The Court finds further that Plaintiff has shown valid service of process upon Realty by means of exhibit C and upon Construction by means of exhibit I. The Court finds further that Plaintiff has for the purposes of the instant motion submitted adequate proof of the facts constituting his claims against Realty, Yang, and Construction by means of his verified complaint and affidavit of merit. As such, Medina is entitled to a default judgment against Realty and Construction. Medina is also entitled to a default judgment against Yang, provided he submits proof of service of the summons and complaint upon him.

In the instant motion, and after considering Medina’s counsel’s lines of reasoning at oral argument, the Court finds that Medina has failed to show *prima facie* that Yang was served with the summons and complaint.

“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:

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

“1. by delivering the summons within the state to the person to be served; or

“2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served 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, . . . ; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, . . . ; or . . .

“4. 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; . . . ; . . .

“6. For purposes of this section, “actual place of business” shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.”

Ordinarily, a “process server’s affidavit constitutes prima facie evidence of proper service.” (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; *see also Nazarian v Monaco Imports, Ltd.*, 355 AD2d 265, 266 [1st Dept 1998].) Here, the exhibit O affidavit and the exhibit Q affidavit, each viewed in isolation, could constitute prima facie evidence of proper service pursuant to CPLR 308 (2) and (4), respectively. But, taken together, the Court finds that the exhibit O and exhibit Q affidavits plainly contradict each other. Both affidavits indicate that a different address is Yang’s “Home.” The Court finds Medina’s counsel’s argument that the exhibit O affidavit indicates the address therein is Yang’s business address owing to the statement on the affidavit that “defendant actually resides/is employed at these premises” is unavailing. Medina’s counsel points to form language which is on the other affidavits used by Medina’s process server. (*See*,

e.g., exhibit Q.) The only relevant statement made by Medina's process server on exhibit Q is the affirmative mark in the check box indicating that "44-32 65th Street, Woodside, NY 11377" is Yang's "Home."

Medina's counsel's other argument, that Realty was also served at this same Woodside address, and therefore this must be Yang's business address, "Business Address" not being marked on the form, is also unavailing. In fact, exhibits C and H to which Medina's counsel refers do not have the same address, as exhibits C and H indicate service was effectuated on the "2nd Floor" of the Woodside address while exhibit O does not list a floor or apartment number.

"[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." (*Id.* at 241.) To "blur the distinction between [usual place of abode] and last 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 to complete the "nail" prong of CPLR 308 (4) at Bergner's last known residence. As a result,

"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, the plaintiff in *Feinstein* 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.

It is unclear to the Court where within 44-32 65th Street, Woodside, NY 11377 the process server found "Jane Doe," but there is nothing in the papers, and nothing submitted to the Court with the motion, beyond Medina's counsel's bare affirmation at oral argument, to suggest a business connection between Yang and the Woodside address. Further, the affidavits of service do not indicate whether the "mailing" address is the last known residence or the actual place of business of Yang. The only mark on both Yang affidavits is that two different addresses are Yang's "Home."

The Court also notes that CPLR 308 (4) "may only be used where service under CPLR 308 (1) or (2) cannot be made with 'due diligence.'" (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007], citing *Rossetti v DeLaGarza*, 117 AD2d 793, 793-794

[2d Dept 1986].) In the instant action, Plaintiff asserts that it validly served Yang under both CPLR 308 (2) and (4). This cannot be. While for the Realty and Construction entities, Medina’s efforts to be “doubly sure” of service of process did not work against Plaintiff, here, with respect to Yang, the two affidavits of service create an issue of fact.

CONCLUSION

Accordingly, it is

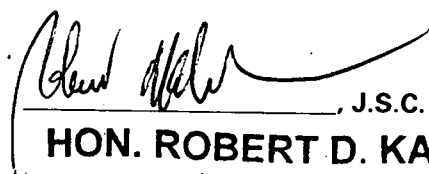
ORDERED that the motion by Plaintiff Fabian Medina pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Medina and against defendants Sheng Hui Realty LLC, Tu Kang Yang, and Pan Link Construction, Inc. is granted in part and denied in part, with leave to renew, to the extent that it is

ORDERED that the Clerk shall enter judgment in favor of Plaintiff and against Sheng Hui Realty LLC and Pan Link Construction, Inc., as to liability, with an inquest as to damages to be held at the time of trial in this action; and it is further,

ORDERED that the instant motion is denied as to Tu Kang Yang, with leave to renew.

The foregoing constitutes the decision and order of the Court.

Dated: May 7, 2018
New York, New York


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

- 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