

65 W. Capital LLC v Espinoza
2018 NY Slip Op 31136(U)
June 4, 2018
Supreme Court, New York County
Docket Number: 151192/2018
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

65 WEST CAPITAL LLC,

INDEX NO. 151192/2018

Plaintiff,

MOTION DATE 5/24/18

- v -

MOTION SEQ. NO. 001

WENDY RENATA ESPINOZA,

Defendant.

NYSCEF Doc Nos. 4-21 were read on this motion for an order directing the entry of a default judgment.

Motion by Plaintiff 65 West Capital LLC pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant Wendy Renata Espinoza is denied.

BACKGROUND

Plaintiff commenced the instant action on February 7, 2018, by e-filing a summons and complaint (“Complaint”). The Complaint alleges in sum and substance, that Defendant, Plaintiff’s tenant at 65 West 55th Street, Apartment 8H, New York, New York 10019 (the “Apartment”), owes Plaintiff: (1) certain arrears in rent and/or use and occupancy from March 1, 2017 through August 31, 2017 in the amount of \$12,231.48; (2) the fair market value of the use and occupancy of the Apartment, in an amount to be determined by the Court; and (3) a money judgment in the sum certain amount of \$16,773.65 for legal fees incurred in a summary holdover proceeding in the Civil Court of the New York, New York County, L&T Index No. 050269/17, which was dismissed after Defendant surrendered and vacated the Apartment on or about September 1, 2017.

On March 6, 2018, Plaintiff e-filed an affidavit of service, dated February 23, 2018, indicating that PM Legal, LLC attempted to serve Defendant with process by: (1) on February 22, 2018, at 12:23 p.m., affixing a copy of process to the door of 225-12 144th Avenue, Springfield Gardens, New York 11413 (the “Springfield Address”), allegedly Defendant’s usual place of abode; and (2) on February 23, 2018, mailing a copy of process to Defendant “at the above address AS EVIDENCED BY CERTIFICATE OF MAILING HEREWITH ATTACHED. That address being the usual place of abode of the DEFENDANT(s).” (NYSCEF Doc No. 2 [PM Legal Affidavit].) The PM Legal Affidavit states that process server Luis Perez had attempted to serve Defendant at the Springfield Address on February 9, 2018, at 11:52 a.m., on February 12, 2018, at 7:12 p.m., and on February 15, 2018, at 6:14 a.m. In the section of the PM Legal Affidavit regarding the February 22, 2018 affixing, there is the statement, “COMMENTS: . . .

AS EVIDENCED BY CERTIFICATE OF MAILING HERewith ATTACHED, ADDITIONAL MAILING TO 65 WEST 55TH STREET, APT. 8H, NEW YORK, NY 10019.”
(*Id.*)

On March 30, 2018, Plaintiff e-filed an affidavit of service, dated March 28, 2018, indicating that Plaintiff was noticed pursuant to CPLR 3215 (g) (3) (i) with an additional mailing of process to Defendant at both the Springfield Address and the Apartment.

As Defendant has not answered or appeared in the instant action, Plaintiff now moves pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant.

Movant submits an affidavit of merit, dated May 8, 2018, reiterating the allegations in the Complaint, which was verified by Plaintiff’s attorney. Movant has also annexed, among other things, copies of the lease, lease renewal, deed, notice of nonrenewal, notice of holdover proceeding, Defendant’s September 1, 2017 vacate notice, the December 22, 2017 civil court decision, a rent breakdown, and a breakdown of legal fees from the civil proceeding.

Movant also submits an affidavit of investigation dated May 9, 2018. (Preponis affirmation, exhibit M [Preponis Affidavit].) The purpose of the Preponis Affidavit appears to have been to confirm that Defendant is not in the military based upon Mr. Preponis’ search of the website of the United States Department of Defense. The Preponis Affidavit then states that:

“Additionally, an online search of the Defendant, WENDY RENATA ESPINOZA, showed that she currently works for Ingalls & Snyder as a compliance officer as stated on her LinkedIn webpage. A copy of the webpage is attached to this affidavit along with a search of her broker license to trade securities which is currently active and also verifies her employment status at Ingalls & Snyder, LLC.”

(*Id.* ¶ 3.)

Movant further submits an affidavit of service, dated May 10, 2018, stating that a copy of the instant motion was mailed to Defendant at both the Springfield Address and the Apartment.

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].)

Based upon the submitted papers, the Court finds that Plaintiff has failed to show prima facie that Defendant was served with process in the instant action. “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].) The PM Legal Affidavit appears to indicate that the process server attempted to serve Defendant pursuant to CPLR 308 (4), commonly referred to as “nail-and-mail” service. 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].) The PM Legal Affidavit indicates that the process server made three attempts to serve process on Defendant at the Springfield Address before attempting nail-and-mail delivery, with the both the “nailing” and the “mailing” allegedly being made at Defendant’s “usual place of abode.”

“[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.

Here, the PM Legal Affidavit indicates that the process server attempted to effectuate service of process upon Defendant pursuant to CPLR 308 (4). The PM Legal Affidavit identifies the Springfield Address as Defendant’s usual place of abode but is silent as to whether it is Defendant’s last known residence. Moreover, it is unclear to the Court why Plaintiff has continued to attempt to serve Defendant by mail at the Apartment where, based upon Plaintiff’s own motion submission, Defendant vacated the Apartment on September 1, 2017. As such, the Court finds that Plaintiff has failed to show prima facie that either the Springfield Address or the Apartment were Defendant’s last known residence when service of process was attempted.

Further, even if the Court had found that either the Springfield Address or the Apartment was Defendant’s last known residence—which it has not—service under CPLR 308 (4) would likely have been unavailable because service under CPLR 308 (1) or (2) would have been possible at Defendant’s actual place of business. On May 9, 2018, Defendant was allegedly employed at Ingalls & Snyder, LLC. While it is unclear to the Court whether Defendant was employed at Ingalls & Snyder, LLC in February 2018 when service of process was attempted, it

was Plaintiff's burden to investigate at that time and make diligent efforts to ascertain Defendant's whereabouts or actual place of business and attempt to serve her there before resorting to nail-and-mail. (See *Prudence v Wright*, 94 AD3d 1073, 1074 [2d Dept 2012]; *McSorley v Spear*, 50 AD3d 652, 654 [2d Dept 2008]; *Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007]; *Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007].)

The Court finds that, as Plaintiff has failed to show prima facie that Defendant was served with process, Defendant's time to answer or appear has not begun to run in this action, Defendant is not in default, and this Court has no jurisdiction over Defendant. As such, a default judgment against Defendant cannot lie, and the Court need not consider the sufficiency of movant's submission as to proof of the facts constituting its claims.


CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff 65 West Capital LLC pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant Wendy Renata Espinoza is denied.

The foregoing constitutes the decision and order of the Court.

Dated: June 4, 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