

**DiMasi v McKuhan**

2019 NY Slip Op 30567(U)

March 6, 2019

Supreme Court, New York County

Docket Number: 155793/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

RONALD P. DIMASI, ILONA DIMASI, and RAYMOND W. PARIS

Plaintiffs,

- v -

MICHAEL MCKUHAN, JENNIFER MCKUHAN, and ANTHONY BARRIOS,

Defendants.

INDEX NO. 155793/2017
MOTION DATE 02/19/2019
MOTION SEQ. NO. 003

DECISION AND ORDER

NYSCEF Doc Nos. 45-53 were read on this motion for an order directing the entry of a default judgment.

Motion by Plaintiffs Ronald P. DiMasi ("Mr. DiMasi"), Ilona DiMasi, and Raymond W. Paris pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiffs and against defendant Anthony Barrios ("Barrios") is denied.

BACKGROUND

Plaintiffs commenced the instant action on or about July 11, 2017, by e-filing a summons with notice along with motion seq. 001 pursuant to CPLR 3213 for summary judgment in lieu of complaint against Defendants Michael McKuhan, Jennifer McKuhan (together, the "McKuhans") and Barrios. The motion was withdrawn by Plaintiffs on consent at the November 27, 2017 oral argument on the motion. (See NYSCEF Doc No. 27; November 27, 2017 oral argument tr at 9, lines 11-13.) On January 2, 2018, Plaintiffs e-filed a complaint verified by their attorney ("Complaint") alleging that Defendants signed a promissory note promising to pay \$100,000.00 to Plaintiffs.

As is relevant here, on January 23, 2018, Plaintiffs e-filed an affidavit of service indicating that Barrios was served with a copy of the Complaint with a mailing to "the last know[n] address" of 3515 Leverich Street Apt 107, Jackson Heights, NY 11372 (the "Jackson Heights Address"), on December 21, 2017. (Iannuzzi affirmation, exhibit 3, at 6.)

On February 16, 2018, Plaintiffs filed motion seq. 002 pursuant to CPLR 3215 for an order granting them a default judgment in their favor and against Defendants, jointly and severally, in the amount of \$100,000.00, plus interest, late fees, and costs of enforcement of the promissory note. In the summer of 2018, the Court conferenced the matter with the attorneys for Plaintiffs and the McKuhans to facilitate settlement of the controversy between those parties. Subsequently, the Court denied motion seq. 002 in an order dated September 6, 2018. (Iannuzzi affirmation, exhibit 5.) In the decision and order on motion seq. 002, the Court noted that Plaintiffs had: (1) failed to submit affidavits of service of the summons upon Defendants; (2) failed to submit adequate proof of the facts constituting their claims; and (3) failed to notice Barrios pursuant to CPLR 3215 (g) (3) (i).

On January 24, 2019, Plaintiffs filed motion seq. 003 pursuant to CPLR 3215 for an order granting them a default judgment against Barrios, only. In the caption in the pleadings filed under seq. 003, Plaintiffs have listed Barrios, only, in the caption as “Defendant.” Plaintiffs argue that Barrios depleted certain collateral that had guaranteed the \$100,000.00 loan amount in the promissory note. Plaintiffs further argue that the promissory note requires interest paid on a monthly basis at a 6% rate and for late charges at the rate of 2% of the overdue payments of principal and interest. Plaintiffs further argue that no interest has been paid on the promissory note since June 2017, and \$4000.00 in interest is due and outstanding. Plaintiffs then argue that they are entitled to \$8,500.00 in attorney’s fees. (Iannuzzi affirmation, exhibit 1 [Promissory Note].) Portions of the Promissory Note relevant to the motion are detailed below.

The Promissory Note contains a signature line with “Anthony Barrios” printed underneath and a plainly legible signature reading “Anthony Barrios” on the line above. The Promissory Note also contains an acknowledgement from a New York notary public indicating that Barrios appeared before her on May 15, 2015, and signed the Promissory Note.

Section 1 of the Promissory Note, titled “Creation,” states that the agreement was made on May 15, 2015, between Defendants, jointly and severally, as Borrowers, and Plaintiffs, as Lenders. Section 1 of the Promissory Note then states that the agreement “is intended by the parties to take effect immediately upon all documents, including a Security Agreement, being fully executed by all parties.” The section lists Barrios’s address as the Jackson Heights Address.

Section 2, titled “Borrower’s Promise to Pay,” indicates that Borrowers promise to pay the principal amount of \$100,000.00, plus interest, to Lenders.

Section 3, titled “Interest,” provides for interest at a yearly rate of 6% to be charged on unpaid principal until the full amount of principal has been paid and that this amount of interest will be paid both before and after any default described in section 7 (B) of the agreement.

Section 4, titled “Payments,” states that, “Beginning one month (30 days) after the full execution of all documents required by this Note, for three (3) years hence, we shall make monthly payments *solely of the interest due* upon this Note AT THE RATE OF FIVE HUNDRED (\$500.00) dollars per month.” The section further states that, at the end of the three-year period, the entire outstanding balance shall be due and payable. The section sets a maturity date of May 15, 2018, and indicates that the any outstanding amounts on the Promissory Note as of that date will be due and owing from Borrowers to Lenders in full as of that date. The section then indicates that monthly payments are to be made to Mr. DiMasi.

Section 7, titled “Borrower’s Failure to Pay as Required,” indicates, in section A, that a late charge of 2.000% of any overdue payment of principal and interest will be due and owing from Borrowers to Lenders. The section indicates that a payment is overdue where the full amount of any monthly payment has not been received by the end of 10 calendar days after the date it is due. The section further indicates that the late charge is applied once per overdue payment and is to be paid “promptly.”

Section 7 (B) indicates that Borrowers are in default if they do not pay the full amount of each monthly payment on the date it is due.

Section 7 (C) provides that the Note Holder may send Borrowers a written notice telling any borrower that if Borrowers do not pay the overdue amount by a certain date, the Note Holder may require immediate payment of the full amount of unpaid principal plus all interest owed on that amount. The section further provides that the date on which the entire balance must be paid must be at least 30 days after the date on which the notice is mailed or delivered by other means.

Section 7 (E) states, “If the Note Holder has required us to pay immediately in full as described above, the Note Holder will have the right to be paid back by us for all of their costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys’ fees.”

Section 8, titled “Giving of Notices,” indicates that any such notice to any borrower is to be sent by first class mail to the address listed for the borrower in the Promissory Note or to any other address provided to the Note Holder.

Section 11, titled “Uniform Secured Note,” states that the Promissory Note is a uniform instrument and makes reference to a certain Security Instrument, described more fully in Section 12. The Security Instrument protects the Note Holder from possible losses and describes how and under what conditions Borrowers may be required to make immediate payment in full of all amounts owed under the Promissory Note. Section 11 indicates that, if applicable, Lenders may give Borrowers a notice that payment in full is required under Section 11. The notice will give Borrowers at least 20 days to make the required payment and must be sent out in the manner required in section 8.

Section 12, titled “Security Agreement,” states that Barrios shall transfer to “Carmen Barrios, a third party to this Note, all his right, title, and interest in a Retirement Cornerstone Contract [] and agrees to sign all documents necessary to effect such transfer.” A signature line for Carmen Barrios appears on page six but is unsigned, and no acknowledgement of signature for Carmen Barrios is a part of the document.

Section 13 states that “[t]his Contract shall be considered binding and effective upon being properly executed and such proper execution will be acceptable when signed in Counterpoint” [sic].”

Plaintiffs have submitted an affidavit by Mr. DiMasi in support of their application. (NYSCEF Doc No. 47.) Mr. DiMasi’s affidavit alleges that Barrios has failed to pay interest on the Promissory Note since June 2017, has failed to pay the principal of the note when due, and has entirely invaded and depleted the collateral put into place to secure the Promissory Note.

Plaintiffs argue that Barrios was served personally with the summons with notice on July 3, 2017. (Iannuzzi affirmation, exhibit 2.) The July 5, 2017 affidavit of service indicates that the process server delivered the summons with notice of motion to “Mr. Barrios, a person of suitable age [and] discretion,” at the Jackson Heights Address on June 28, 2017, and mailed a copy to

Barrios at the Jackson Heights Address on July 3, 2017. Plaintiffs further argue that Barrios was served with the Complaint on December 21, 2017, by mail. Plaintiffs further argue that Barrios has been noticed pursuant to CPLR 3215 (g) (3) (i) by means of two mailings, on November 20, 2018, and January 23, 2019, each to Barrios at “the last know address,” which is followed on the two annexed affidavits of service as two addresses, the Jackson Heights Address and 6 Rhode Island Street, Coram, NY 11727 (the “Coram Address”). (Iannuzzi affirmation, exhibit 4.) Plaintiffs have annexed an affidavit of service indicating that a copy of the notice of motion and affirmation in support in seq. 003 was mailed to Barrios on January 23, 2019, at the Jackson Heights Address, “the last know[n] address.” (NYSCEF Doc No. 53.)

Barrios has not appeared in this action. Further, the McKuhans, who have appeared in the action, have submitted no opposition.

### 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 pursuant to 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].)

Upon the papers submitted, the Court finds that Plaintiffs have failed to show prima facie that Barrios 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, in relevant part, that:

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

“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.”

“[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.

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 July 5, 2017 affidavit of service of process indicates that Barrios was served with process when a copy of the summons with notice of motion was delivered to a “Mr. Barrios”, a person of suitable age and discretion, at the Jackson Heights Address, with a follow-up mailing to the Jackson Heights Address, both on July 3, 2017. The affidavit appears to indicate that personal service was made pursuant to CPLR 308 (2) and that “Mr. Barrios” is not defendant Anthony Barrios.

The July 5, 2017 affidavit does not indicate whether the Jackson Heights Address is Barrios’s actual place of business, dwelling place, or usual place of abode as required. Further, the other affidavits of service submitted with the motion only indicate that the Jackson Heights Address is Barrios’s last known address. This is insufficient. Moreover, the CPLR 3215 (g) (3) (i) affidavits of service in exhibit 4 list a second “last know[n] address” for Barrios, the Coram Address. This unexplained Coram Address amplifies the issue of fact as to whether the Jackson Heights Address or the Coram Address is Barrios’s actual place of business, dwelling place, usual place of abode, or last known residence. As such, Plaintiffs have failed to show prima facie that Barrios was served with process.

As Plaintiffs have failed to show prima facie that Barrios was served with process, there is no showing in the instant motion that Barrios was required to appear in this action, that his time to do so has expired, or that he is in any sort of default.

Further, Plaintiffs have failed to specify in the summons with notice of motion “the sum of money for which judgment may be taken in case of default” as required by CPLR 305 (b) and 3215 (b). Under these circumstances, the Court would be unable to direct the entry of any default judgment in any instance on this pleading alone. (*See. A.J. Eckert Co., Inc. v George A. Fuller Co., Inc.*, 51 AD2d 844 [3d Dept 1976]; *see also Cruz v Commonwealth Land Title Ins. Co.*, 157 AD2d 333 [1st Dept 1990], citing *Premo v Cornell*, 71 AD2d 223 [3d Dept 1979] [failure to include in the summons the amount of damages demanded is not a jurisdictional defect but an amendable irregularity].)

Even if Plaintiffs had shown prima facie that Barrios was served with the summons with notice of motion initially, Plaintiffs have failed to serve Barrios properly with the Complaint. CPLR 3012 (a) provides that “[a] subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons.” Here, Plaintiffs have submitted an affidavit of service indicating that Barrios was served with the Complaint by mail, only, on December 21, 2017, after Plaintiffs withdrew motion seq. 001 for summary judgment in lieu of complaint. Barrios had not appeared in the action as of that date, and has in fact never appeared in this action. Plaintiffs were required by CPLR 3012 (a) to serve Barrios with the Complaint by personal service under CPLR 308. This was not done. As such, Plaintiffs have failed to show that proper service of the Complaint was effectuated on Barrios or that he has any obligation to appear, answer, or move in response to it.

Assuming arguendo that service of the summons with notice of motion and Complaint were properly effectuated and that Barrios were in default in answering or appearing—which he is not—Plaintiffs have nevertheless failed to submit adequate proof of the facts constituting their claims. First, by its own terms, the Promissory Note “is intended by the parties to take effect immediately upon all documents, *including a Security Agreement*, being fully executed by all parties.” (Promissory Note ¶ 1 [emphasis added].) Movants have failed to annex any Security Agreement to the moving papers. Moreover, the transferee of the collateral indicated in the Promissory Note, Carmen Barrios, did not execute the submitted Promissory Note. As such, Plaintiffs have failed to show that the Promissory Note ever took effect.

Even if a valid Security Instrument had been annexed to the moving papers, Mr. DiMasi’s affidavit of merit fails to indicate specifically whether Barrios made any payments toward the principal. While a general statement that Barrios “has failed entirely to abide by the terms of the said Promissory Note” is made, the affidavit continues, indicating that Barrios “has failed to pay interest thereon since June 2017 [and] has failed to pay the princip[al] of the said note when due.” Without some statement in admissible form regarding how much, if any, of the principal has been paid to date by Barrios, the Court would be unable to enter a judgment.

As to Plaintiffs’ request for attorney’s fees, that request is wholly unsupported. In the first instance, Plaintiffs’ entitlement to any costs or expenses, including attorney’s fees, is based upon section 7 of the Promissory Note. That section provides that such entitlement is conditioned upon the Note Holder requiring immediate payment of the principal in accordance with the section 7 written notice requirement. Here, there is no submission in the instant motion of any notice sent to Borrowers, and even if there were, Plaintiffs allege a violation of sections 11 and 12 of the Promissory Note, under which no costs, expenses or attorney’s fees are available.

Moreover, even if Plaintiffs were entitled to such costs, expenses, and/or attorney's fees, Plaintiffs would have to make a showing as to the basis and reasonableness of any such amount sought. The instant submission of bereft of any showing whatsoever as to the amount Plaintiffs are entitled to except for counsel's bare affirmation that "[t]o date, the Attorneys' fees to enforce this Note is Eight Thousand Five Hundred (\$8,500.00) dollars and continuing." (Affirmation on Iannuzzi ¶ 4.)

Last, the Court notes that Plaintiffs have excluded the McKuhans from the caption on the motion papers and have made no mention of them whatsoever in the submission. The Court notes further that no stipulation of discontinuance has been filed as to the McKuhans and that they remain defendants in this action.

**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiffs Ronald P. DiMasi, Ilona DiMasi, and Raymond W. Paris pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiffs and against defendant Anthony Barrios is denied; and it is further

ORDERED that Plaintiffs shall serve a copy of this order with notice of entry upon the McKuhans by NYSCEF e-filing and upon Barrios by personal service within 10 days of the date of the decision and order on this motion and shall e-file proof of the personal service upon Barrios to NYSCEF within five days of completion of the service.

The foregoing constitutes the decision and order of the Court.

3/6/2019  
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE