

Benitez v Armstrong
2019 NY Slip Op 31541(U)
April 4, 2019
Supreme Court, Richmond County
Docket Number: 152062/2017
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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SERGIO BENITEZ,

DCM PART 21

Plaintiff,

**Present:
Hon. Orlando Marrazzo, Jr.**

- against -

DECISION and ORDER

**GEORGE ARMSTRONG and HEIGHTS
HOUSES 1 CORP. f/k/a HEIGHTS
HOUSES CORP.,**

**Index No. 152062/2017
Motion No. 215 - 002**

Defendants.

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The following papers numbered 1 to 3 were fully submitted on the 26th day of February, 2019.

Papers Numbered

Order to Show Cause by Defendant George Armstrong to Vacate the Default Judgment and Dismiss the Complaint, with Supporting Papers (dated January 11, 2019).....	1
Affirmation in Opposition (dated January 30, 2019).....	2
Affidavit in Reply (dated February 22, 2019).....	3

Upon the foregoing papers, the application of defendant George Armstrong by order to show cause dated January 11, 2019 (Motion Sequence. No. 003) to vacate the Judgment entered on August 16, 2018, and dismiss the Complaint as against him on the grounds that the court lacks personal jurisdiction over him, is granted.

This action was commenced on September 12, 2017 to recover money damages for the alleged breach of a certain “Priority Agreement” between plaintiff Sergio Benitez, the Obligee, and defendants George Armstrong and Heights Houses Corp., the obligors. Defendants failed to appear or answer the Complaint. On March 13, 2018, the Court granted plaintiff’s motion for a default judgment and set the matter down for an inquest on the issue of damages. The hearing was held on June 6, 2018 whereupon Special Referee Kenneth McGrail ordered that plaintiff recover from defendants the sum of \$375,000 plus interest. The Clerk entered a Judgment on August 16, 2018 for a total sum of \$544,072.00.

Presently before the Court is an order to show cause dated January 11, 2019 by defendant George Armstrong (hereinafter, “Armstrong”) seeking, *inter alia*, vacatur of the default judgment and dismissal of the Complaint on the grounds that the Court lacks personal jurisdiction over him. Plaintiff’s Affidavit of Service indicates that on October 26, 2017 the process server effectuated service upon defendant Armstrong pursuant to CPLR §308(4), *i.e.*, by affixing the Summons and Complaint to the door of 124 Bertha Place, Staten Island, New York, and thereafter mailing a copy to the residence.

In support of the application, Armstrong maintains that he never received the documents allegedly served upon him or any other legal notices related to this action. He attests that during the relevant time period, he experienced “significant financial hardship” and his marriage was deteriorating; he was “not on good terms [with his wife] and [they] were not communicating regularly.” According to defendant, he “was forced to move out” of his residence at 124 Bertha Place, Staten Island, New York, and thereafter, resided at his mother’s residence located at 881 Washington Avenue, Brooklyn, New York. Armstrong claims he learned of the Judgment from

his estranged wife, although she never previously informed him of the Summons and Complaint in this action.

Defendant challenges the legal sufficiency of plaintiff's affidavit of service. He correctly points out that it fails to indicate that the process server made *any* attempts to serve him personally prior to affixing and mailing the pleadings. Armstrong maintains, in effect, that plaintiff's Affidavit of Service is fatally defective as a matter of law, therefore, the Court lacks personal jurisdiction over him.

"Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR §308" (*FV-1 Inc. v Reid*, 138 AD3d 922, 923 [2d Dept 2016]; *see Washington Mutual Bank v Murphy*, 127 AD3d 1167, 1174 [2d Dept 2015]). It is well settled that service pursuant to CPLR 308(4) may only be used in those instances where service under CPLR §308(1) and §308(2) cannot be made with due diligence (*see Bank United, FSB v Verbitsky*, 167 AD3d 835, 837 [2d Dept 2018]; *Gurevitch v Goodman*, 269 AD2d 355, 355 [2d Dept 2000]). Moreover, "[t]he 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" (*Gurevitch v Goodman*, 269 AD2d at 355; *see McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008], *lv denied* 10 NY3d 715). "Since CPLR §308(4) does not define 'due diligence', it has been interpreted and applied on a case-by-case basis" (*see Bank United, FSB v Verbitsky*, 167 AD3d at 837).

In opposition to the order to show cause, plaintiff submits a so-called "affidavit of non-service" wherein the process server avers that on September 12, 2017 (*i.e.*, six weeks *prior* to service of process on October 26, 2017 by "nail and mail"), he made two attempts to personally deliver the Summons and Complaint to defendant at 124 Bertha Place, a "vacant private house"

(see *Bank United, FSB v Verbitsky*, 167 AD3d at 837). The attempts were allegedly made on that day at 3:52 p.m. and 7:00 p.m. To the extent relevant, the purported affidavit of non-Service was not filed in the Court's e-filing system. In any event, it fails to correct the fatal deficiency in plaintiff's Affidavit of Service (see *Chan v Zoubarev*, 157 AD3d 851, 851 [2d Dept 2018]). Two attempts to deliver the Summons and Complaint to Armstrong on the same day at an alleged vacant residence, would not reasonably be calculated to apprise him that he is being sued (see *Ruffin v Lion Corp.*, 15 NY3d 578, 581-582 [2010]). Moreover, his "eventual awareness of pending litigation will not affect the absence of jurisdiction over him...where service of process is not effectuated in compliance with CPLR §308" (*Washington Mutual Bank v Murphy*, 127 AD3d at 1174).

In view of the foregoing, the process server's affidavit of service does not constitute *prima facie* evidence that proper service was made upon the named recipient (see *Emigrant Mtge. Inc. v Westervelt*, 105 AD3d 896, 897 [2d Dept 2013], *lv denied* 22 NY3d 947; *Wells Fargo Bank, N.A. v Decesare*, 154 AD3d 717, 717 [2d Dept 2017]; *Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733, 733 [2d Dept 2015]). The statements contained in both of the process server's affidavits are insufficient to establish that he exercised "due diligence" in attempting to effectuate service pursuant to CPLR §308(1) or (2) before using the "affix and mail" method pursuant to §308(4). Accordingly, service of process was defective (see *Chan v Zoubarev*, 157 AD3d at 851; *Prudence v Wright*, 94 AD3d 1073, 1074 [2d Dept 2012]).

Plaintiff has failed to establish, *prima facie*, that the moving defendant was served with process in "strict compliance" with CPLR §308(4) (see *Emigrant Mtge. Inc. v Westervelt*, 105 AD3d at 897). It cannot be said that the defect was a mere irregularity that courts may disregard

under CPLR §2001. To the contrary, the process server’s failure to comply with the “due diligence” requirement of CPLR §308(4) constitutes a jurisdictional defect which may not be overlooked (*see Ruffin v Lion Corp.*, 15 NY3d 578, 581-582 [2010]).

Since the Court has not acquired personal jurisdiction over defendant Armstrong “all subsequent proceedings [including the default judgment entered against him] are rendered null and void” (*Washington Mutual Bank v Murphy*, 127 AD3d at 1174; *Emigrant Mtge. Co . v Westervelt*, 105 AD3d at 897; *see Prudence v Wright*, 94 AD3d 1073, 1074 [2d Dept 2012]).

In light of the Court’s determination, the moving defendant’s remaining contentions need not be considered.

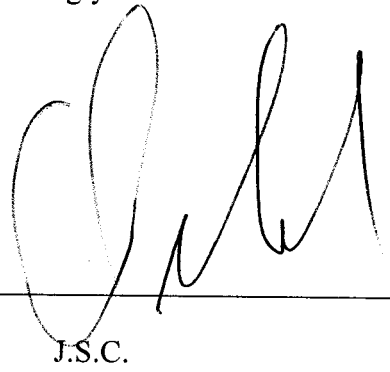
Accordingly, it is

ORDERED, the application of defendant George Armstrong brought by Order to Show Cause dated January 11, 2019 is granted, and it is further

ORDERED, that the Judgment entered on August 16, 2018 is vacated and the Complaint as against this defendant is hereby dismissed; and it is further

ORDERED, that the Clerk mark his records accordingly.

ENTER,


J.S.C.

Dated: 4/4/19.

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice