SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JESSE CRONAN,

Plaintiff,

- v -

JEREMIAH PETERS,

Defendant.

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INDEX NO. 157469/2018

MOTION DATE 09/06/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

NYSCEF Doc Nos. 3–9 were read on this motion for an order directing the entry of a default judgment.

Motion by Plaintiff Jesse Cronan pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant Jeremiah Peters is denied and the action is dismissed.

BACKGROUND

Plaintiff commenced the instant action on August 10, 2018, by e-filing a summons and complaint. The complaint alleges that Plaintiff was assaulted by Defendant on June 30, 2018. On January 16, 2019, Plaintiff e-filed an affidavit of service indicating that, on January 2, 2019, Defendant was served with a copy of the summons by mail to 371 Van Siclen Avenue, Apt 1A, Brooklyn, NY (the "Van Siclen Address"), with a "copy/summons left at door also."

On August 2, 2019, Plaintiff filed the instant motion. Plaintiff argues that he sent Defendant default letters along with additional mailings of process on June 18, 2019, and July 11, 2019. (Delaney affirmation, exhibit B.) Based upon the tracking numbers submitted to the Court, as to the June 18, 2019 mailing, on June 20, 2019, the tracking was updated with "Notice Left (No Authorized Recipient Available), and on July 15, 2019, the tracking was updated with "Unclaimed/Being Returned to Sender." The shipment was last updated on July 27, 2019 and is still listed as being "In-Transit." As to the July 11, 2019 mailing, the shipment was marked "Delivered" on July 13, 2019. A return receipt included in the exhibit indicates that the July 11, 2019 was signed for by a "Lisa Clarke" based on the Court's reading of the signature.

Although the complaint is not verified by Plaintiff, Plaintiff has submitted an affidavit of merit with the motion attesting to the central facts of the case, namely that Defendant assaulted and stabbed Plaintiff with a weapon on June 30, 2018, at his place of employment, a construction site located at 155 Mercer Street, New York, New York 10002. (Delaney affirmation, exhibit C.)

Plaintiff argues that Defendant has failed to answer or appear in the instant action.

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 Plaintiff's submission that Defendant has failed to appear or to answer, move, or otherwise respond to the complaint. The Court finds further that Plaintiff has for the purposes of the instant motion submitted adequate proof of the facts constituting the claims by means of the affidavit of merit. As such, Plaintiff would be entitled to a default judgment against Defendant, provided Plaintiff were to establish that this Court has jurisdiction of Defendant.

In the instant motion, the Court finds that Plaintiff has failed to show prima facie that Defendant was served with process. The Court finds further that Defendant is not in default, as Plaintiff has failed to show prima facie that it even attempted to serve Defendant with process within 120 days after the commencement of the action pursuant to CPLR 306-b. As such, for the following reasons, the Court finds that Plaintiff has failed to establish that this Court has jurisdiction of Defendant.

CPLR 306-b provides that service of process must be made "within one hundred twenty days after the commencement of the action." CPLR 306-b further provides that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." Here, the action was commenced on August 10, 2018. The January 16, 2019 affidavit of service indicates that service was attempted on January 2, 2019, 145 days later. Assuming for the sake of argument that the affidavit of service demonstrated prima facie good service with respect to the method of service used, the service would nevertheless have been made at least 25 days late. Moreover, no application has been made by Plaintiff to extend the time to serve Defendant, nor is there any explanation in the papers as to any good cause for the delay in the attempt at service upon Defendant or as to why an extension of the time to do so would be in the interest of justice. As such, the Court finds that Plaintiff is in violation of CPLR 306-b.

As to the aforementioned method of service used, the affidavit of service suggests that the process server attempted to serve Defendant pursuant to CPLR 308 (4), commonly known as "nail and mail" service.

"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:
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> "1. by delivering the summons within the state to the person to be served; or
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> "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 . . .
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> "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; . . . ; . . .
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> "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].) 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 requirement of due diligence must be strictly observed because there is a reduced likelihood that a defendant will actually receive the summons when it is served pursuant to CPLR 308 (4)." (*Serraro v Staropoli*, 94 AD3d 1083, 1084 [2d Dept 2012].) "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality." (*Id.*)

The Appellate Division, First Department held in *Ayala v Bassett* (57 AD3d 387 [1st Dept 2008]) that a process server exercised due diligence where three different attempts were made to serve a defendant at the defendant's residence on three different days, at times of day that were in the morning, the afternoon, and the evening, over a 22-day period. The Appellate Division, First Department has also held that attempts at service were not diligent where two attempts were made at times when it was likely the defendant was in transit to or from work. (*Wood v Balick*, 197 AD2d 438 [1st Dept 1993]).

The Appellate Division, Second Department has held that "[f]or the purpose of satisfying the due diligence requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment." (*Serraro* at 1085.)

Here, Plaintiff has failed to address in any way whether any attempt was made to serve Defendant pursuant to CPLR 308 (1) or (2). As such, the Court finds that Plaintiff has failed to show that CPLR 308 (4) was available to Plaintiff as a method of substituted service, and the affidavit of service as to the attempt at "nail and mail" on January 2, 2019 fails to establish prima facie proper service of process on Defendant.

Assuming for the sake of argument that the process server had fulfilled the due diligence requirement of CPLR 308 (4), the "nail" prong of substituted service under CPLR 308 (4) would have to have been shown as having been completed at Defendant's "actual place of business, dwelling place or usual place of abode" while the "mail" prong must be completed at Defendant's "last known residence" or "actual place of business." Here, the affidavit of service is silent as to the nature of the Van Siclen Address with respect to this .

"[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.

In the instant motion, there is no indication as to whether the Van Siclen Address is Defendant's actual place of business, dwelling place, usual place of abode, actual dwelling, actual abode, actual residence, or last known residence. Moreover, the first default letter was returned with no authorized recipient available, while the second default letter was signed for by "Lisa Clarke." No explanation has been put forward by movant as to these events. As such, Plaintiff has failed to show prima facie that process was "nailed" or "mailed" to the appropriate place such that the attempted service would have been proper.

As previously discussed, pursuant to CPLR 306-b, "[i]f service is not made upon a defendant within [120 days after commencement of the action], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." In *Diaz v Perez*, the Appellate Division, First Department upheld a motion court's decision to dismiss a complaint sua sponte against a defendant on a plaintiff's motion pursuant to CPLR 3215 for entry of a default judgment where the motion court found that the defendant had not been served with the summons and complaint as required by CPLR 306-b. (113 AD3d 421, 421 [1st Dept 2014].) The court stated that "there exist[ed] no reason to disturb the dismissal of the complaint as against" the individual defendant in a case where the movant had sought a default judgment but had failed to take proceedings for a default judgment within a year of a supposed default by the defendants pursuant to CPLR 3215 (c), which provides, in relevant part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." The Appellate Division, First Department has recently defined a showing of "sufficient cause" as the setting forth of "a viable excuse for the delay" and "a meritorious cause of action." (*Selective Auto Ins. Co. of New Jersey v Nesbitt*, —NYS3d—, 2018 NY Slip Op 03616, *1 [1st Dept, May 17, 2018]; *see also Seide v Calderon*, 126 AD3d 417 [1st Dept 2015]; *Diaz v Perez*, 113 AD3d 421 [1st Dept 2014]; *Utak v Commerce Bank Inc.*, 88 AD3d 522 [1st Dept 2011].)

There appears to be a split of authority between the Appellate Division, First Department and the Appellate Division, Second Department regarding whether a court shall dismiss an action pursuant to CPLR 306-b without a motion to dismiss made by a defendant. In *Daniels v King Chicken & Stuff, Inc.*, the motion court denied the plaintiff's motion for leave to enter a default judgment because the plaintiff had failed to present proof of valid service of process on the defendant. (35 AD3d 345 [2d Dept 2006].) The motion court then dismissed the complaint for lack of personal jurisdiction. The Appellate Division, Second Department held that, pursuant to CPLR 306-b, it was error for the motion court to dismiss the complaint not "upon motion" of the defendant but sua sponte, upon its own initiative. (*Id.*; *see also Rotering v Satz*, 71 AD3d 861 [2d Dept 2010].)

Notwithstanding the rule in the Appellate Division, Second Department, the Appellate Division, First Department's decision in *Diaz* explicitly endorsed the "sua sponte" dismissal of a complaint pursuant to CPLR 306-b. This Court infers that the "upon motion" requirement of

CPLR 306-b means that a motion must be made by either party and considered by a court. The motion need not seek the specific remedy of dismissal of an action nor raise a CPLR 306-b issue explicitly. Rather, the motion court need only determine that CPLR 306-b has not been complied with.

In the instant action, the Court finds, with respect to an extension of time to serve Defendant, that there is neither good cause nor, on balance, should the Court exercise its discretion to extend the time in the interest of justice, where over a year has passed since the action was commenced, there is no indication that Defendant is aware that the action was commenced, and there were not timely, diligent efforts made to serve Defendant. (*See Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]; *see also Goldstein Group Holding, Inc. v 310 East 4th Street Hous. Dev. Fund Corp.*, 154 AD3d 458 [1st Dept 2017].) Although CPLR 306-b indicates that the dismissal of the action is to be "without prejudice," where, as here, the statute of limitations has run—as the assault was alleged to have occurred on June 30, 2018, and in a civil case, the statute of limitations for assault is one year—where there is not a basis for extending the time to affect proper service, the court has the option to dismiss the action outright. (*See Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012].)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Jesse Cronan pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Plaintiff and against Defendant Jeremiah Peters is denied and the action is dismissed.

The foregoing constitutes the decision and order of the Court.

10/25/2019
DATE

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

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE