

**Ivanovic v Ash**

2019 NY Slip Op 33441(U)

November 22, 2019

Supreme Court, New York County

Docket Number: 156765/2018

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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INDEX NO. 156765/2018

ARSENIJE IVANOVIC, TADEJ PESTOTNIK,

MOTION DATE 11/07/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

TOM ASH, PAUL COVER, ZORAN TURKOVIC, PETER VUKOVIC, PAN PACIFIC FINANCIAL CORP.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - DEFAULT

In this action for fraud, plaintiffs move pursuant to CPLR 3215 for a default judgment against defendants Tom Ash, Pan Pacific Financial Corporation and Paul Cover based on their failure to appear and answer the complaint. Plaintiffs have been unable to effectuate service on the other defendants in this action. Defendants Ash, Pan Pacific and Cover filed opposition to the motion as well as cross-motions seeking dismissal of the complaint.

With respect to defendant Ash, the motion for a default judgment must be denied. First, the affidavit of service is defective as it was sworn to and signed in California and plaintiffs have failed to include a certificate of conformity as required under CPLR 2309(c). Affirmation of Marc S. Gottlieb dated May 8, 2019, Exh. B. Second, the affidavit of service states that it was served pursuant to CPLR 308(2) upon a person of suitable age and discretion. However, in opposition to the motion, defendant Ash submits an affidavit stating that he never resided at this address and that insofar as this was defendant Pan Pacific's place of business, he is not an employee of Pan Pacific and thus this was not his "actual place of business, dwelling place or

usual place of abode” as required by the statute. Affidavit of Thomas Ash sworn to on August 17, 2019. Thus, there is an issue of fact as to whether service on defendant Ash was proper.

Third, plaintiffs failed to include an affidavit of merit with their moving papers and the affirmation from their attorney is insufficient to satisfy this requirement. CPLR 3215(f).

Accordingly, the motion for a default judgment as against defendant Ash must be denied.

Defendant Ash cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(8) based on plaintiff’s failure to effectuate service within 120 days of filing this action in accordance with CPLR 306-b. As discussed above, there is an issue of fact as to whether service was properly made on defendant Ash at his actual place of business and a traverse hearing is warranted to resolve this issue. Notably, even if the hearing results in defendant Ash’s challenge being upheld, dismissal of the action against defendant Ash would be without prejudice under CPLR 306-b and plaintiffs may simply re-file the action.

With respect to defendant Pan Pacific, the motion for a default judgment must be denied. First, as with defendant Ash, the affidavit of service for defendant Pan Pacific is improper as it was signed and sworn to in California and certificate of conformity was not included in accordance with CPLR 2309. Gottlieb Aff., Exh. C. In addition, plaintiffs failed to include an affidavit of merit with their moving papers in compliance with CPLR 3215(f). Accordingly, the motion for a default judgment as against Pan Pacific must be denied.

Defendant Pan Pacific’s cross-motion pursuant to CPLR 3211(a)(8) must also be denied. The only argument defendant Pan Pacific makes in support of its motion is that service upon the owner of the corporation is not permitted under CPLR 311(a)(1). However, defendant Pan Pacific fails to cite any caselaw to support this argument and there is no basis for finding that

Robert Ash, the owner of Pan Pacific, would not be authorized to accept service on behalf of the corporation. Accordingly, defendant Pan Pacific's cross-motion must be denied.

With respect to defendant Cover, plaintiffs' motion for a default judgment must be denied. Among other defects, it appears that defendant Cover was not properly served with the summons with notice. The affidavit of service with respect to defendant Cover, aside from the fact that it was signed in New Jersey and lacks a certificate of conformity, states that defendant Cover was served pursuant to CPLR 308(2) by delivery of the summons to a person of suitable age and discretion. Gottlieb Aff., Exh. D. The affidavit of service states that delivery was made to Lorriane Thompson, a person of suitable age and discretion at a "Private Mailbox Store." The private mailbox store is clearly not defendant Cover's actual place of business or residence and thus such service fails to comply with CPLR 308(2). Thus, the motion for a default judgment as against Cover must be denied. Likewise, defendant Cover's cross-motion to dismiss under CPLR 3211(a)(8) must be granted as defendant Cover was not properly served. Accordingly, it is

ORDERED that the motion for a default judgment is denied; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the issue of service upon defendant Ash; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that defendant Ash's cross-motion to dismiss the complaint based on improper service is denied without prejudice subject to renewal based on the Special Referee's report; and it is further

ORDERED that defendant Pan Pacific's cross-motion to dismiss is denied; and it is further

ORDERED that defendant Cover's cross-motion to dismiss is granted and the complaint is dismissed against said defendant, with costs and disbursements awarded to said defendant, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and continued; and it is further

ORDERED that the parties shall appear for a preliminary conference on January 30, 2020 at 9:30 am, at 80 Centre Street, Room 320, New York, NY.

11/22/2019  
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: