

Hyman v Iron State Dev.
2020 NY Slip Op 30839(U)
March 23, 2020
Supreme Court, New York County
Docket Number: 157698/2018
Judge: Robert David 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

-----X

DORENE HYMAN,

Plaintiff,

- v -

IRON STATE DEVELOPMENT, 29 PARK LLC,
215 WEST 29TH STREET CONDOMINIUM CORP.,
CM & ASSOCIATES CONSTRUCTION MANAGEMENT,
LLC, D AND G MASONRY CORP., and
SIX BROTHERS CONSTRUCTION, LLC,

Defendants.

-----X

CM & ASSOCIATES CONSTRUCTION MANAGEMENT, LLC,

Third-Party Plaintiff,

- v -

D AND G MASONRY CORP.,

Third-Party Defendant.

-----X

D AND G MASONRY CORP.,

Second Third-Party Plaintiff,

- v -

SIX BROTHERS CONSTRUCTION, LLC,

Second Third-Party Defendant.

INDEX NO. 157698/2018
MOTION DATE 03/06/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595893/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Motion by defendant/third-party defendant/second third-party plaintiff D&G Masonry Corporation (“D&G”) and cross-motion by plaintiff Dorene Hyman (“Plaintiff”), pursuant to CPLR 3215, for respective default judgments against defendant/second third-party defendant Six Brothers Construction LLC (“Six Brothers”) are each denied, with leave to renew.

BACKGROUND

Plaintiff commenced the instant action on August 17, 2018. (Affirm in Supp of Motion [D&G Affirm in Supp], Ex B [Complaint].) The complaint alleges that Plaintiff was injured on June 10, 2017 when she allegedly tripped and fell on a piece of wood while on the rooftop of a building located at 215 West 29th Street, New York, New York, due to the alleged negligence of Defendants Iron State Development, 29 Park LLC, 215 West 29th Street Condominium Corporation, and CM & Associates Construction Management, LLC (“CM”). (Complaint ¶¶ 95, 96.) On November 7, 2018, CM commenced a third-party action against D&G. (D&G Affirm in Supp, Ex E [Third Party Summons and Complaint against D&G].) On August 5, 2019, Plaintiff filed an amended complaint adding D&G as a defendant. ([Amended Verified Complaint] [NYSCEF No 30].) Further, on October 3, 2019, Plaintiff filed a second amended complaint adding Six Brothers as a defendant. (Affirm in Supp of Cross-Motion [Plaintiff Affirm in Supp of Cross-Motion], Ex G [Second Amended Verified Complaint] [NYSCEF No 96, originally No 47].)¹ In the second amended verified complaint, Plaintiff describes Six Brothers as a foreign corporation. (Second Amended Verified Complaint ¶ 109 [NYSCEF No 96].)

D&G’s Supposed Service of Process, Letter, and Further Communication

It is alleged that, on October 14, 2019, D&G’s process server served Six Brothers with a summons and second third-party unverified complaint through Jose Yulca, an alleged agent authorized to accept service on behalf of Six Brothers, at its alleged place of business at 476 4th Street, Newark, New Jersey 07107. (D&G Affirm in Supp ¶ 35; *see also* D&G Affirm in Supp Ex H [D&G’s Affidavit of Service] [NYSCEF 77].) In the second third-party unverified complaint, D&G describes Six Brothers as a limited liability company, not as a foreign corporation. (D&G Affirm in Supp ¶ 8.)

D&G asserts that on November 12, 2019, it sent a “good faith letter” to the alleged managing agent of Six Brothers, along with copies of D&G’s and Plaintiff’s complaints, communicating D&G’s position that Six Brothers is in default. (D&G Affirm in Supp, Ex K [D&G’s letter].) D&G’s letter also stated that if Six Brothers did not appear in this matter within ten days, D&G would file a motion for default judgment against them. (D&G letter.)

D&G further asserts that D&G’s counsel spoke with “Vincente,” the alleged president of Six Brothers “on numerous occasions, advising him that Six Brothers has been named in this action and that [the president] should seek the assistance of an attorney to appear on Six Brothers’ behalf.” (D&G Affirm in Supp ¶ 13.)

¹ On November 6, 2019, D&G and Six Brothers were named as direct defendants based on Plaintiff’s amended complaints and stipulation by all parties. (Affirm in Supp, Ex I [November 6, 2019 So-Ordered Stipulation].)

Plaintiff's Supposed Service of Process and Letter

Plaintiff asserts that on October 17, 2019, Plaintiff's process server served Six Brothers with a summons and second amended verified complaint by personally delivering said documents to Jose Gulca² as a "managing agent authorized to accept service" on behalf of Six Brothers, at its alleged place of business, 476 4th Street, Newark, New Jersey 07107. (Plaintiff Affirm in Supp of Cross-Motion ¶ 11; *see also* Plaintiff Affirm in Supp of Cross-Motion, Ex H [Plaintiff's Affidavit of Service] [NYSCEF No 97].) Plaintiff's Affidavit of Service designated Jose Gulca as a "managing agent." (*Id.*) At the same time, the Affidavit states that the service was effectuated by delivering the summons and second amended verified complaint to a "person of suitable age" and discretion—rather than by personally delivering to an agent of a corporation, i.e., a managing agent. (*Id.*)

Plaintiff asserts that on January 20, 2020, it sent a "good faith letter" to Six Brothers' alleged place of business, along with copies of Plaintiff's summons and complaint, and a "default letter," communicating Plaintiff's position that Plaintiff had properly served Six Brothers with a summons and complaint, and the January 20, 2020 default letter. (Plaintiff Affirm in Supp of Cross-Motion, Ex I [Plaintiff letter].) The said default letter also stated that if Six Brothers did not appear for Plaintiff's court-scheduled deposition on January 27, 2020, in Plaintiff's counsel's office, Plaintiff's position would be that Six Brothers waived its right to depose Plaintiff. (Plaintiff letter.)

At present, both D&G and Plaintiff argue in their respective motion (Seq. 001) and cross-motion (Seq. 001) that they are entitled to default judgments against Six Brothers because to date, Six Brothers has not responded to their letters and telephone calls, appeared in this action, served an answer, or asked for an extension of time to answer. (D&G Affirm in Supp ¶ 14; Plaintiff Affirm in Supp of Cross-Motion ¶ 12.) They assert that this motion is brought within one year of Six Brother's default. (D&G Affirm in Supp ¶ 15; Plaintiff Affirm in Supp of Cross-Motion ¶ 13.) Upon entry of the default judgment, Plaintiff and D&G seek an inquest on damages against Six Brothers, together with such other and further relief as this Court deems just and proper. (D&G Affirm in Supp ¶ 2; Plaintiff Affirm in Supp of Cross-Motion ¶ 2.) There are no opposition papers filed.

² The Court notes that Plaintiff and D&G indicate that they have served a "managing agent" with a very similar but slightly different last name—Plaintiff, "Gulca, Jose" with a "G," and D&G, "Yulca, Jose" with a "Y." (Plaintiff Affirm in Supp of Cross-Motion ¶ 11; Plaintiff Affirm in Supp of Cross-Motion, Ex H [Plaintiff's Affidavit of Service] [NYSCEF No 97]; *see also* D&G Affirm in Supp ¶ 35; D&G Affirm in Supp Ex H [D&G's Affidavit of Service] [NYSCEF 77].) The Court also notes the differences in the description of the alleged managing agent(s) on the affidavits. (*See* Plaintiff's Affidavit of Service; D&G's Affidavit of Service.)

DISCUSSION

I. Applicable Law

CPLR 3215 (a) provides, in relevant part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him. If the plaintiff’s claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default.” 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, (3) proof of the defendant’s default in answering or appearing, and (4) proof of the amount due by an affidavit made by the party. (*See* CPLR 3215 [f].)

“Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and amount due.” (*Id.*) On the other hand, it has been consistently held that “a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215.” (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006] [internal citations omitted].)

A. Service of process to a foreign corporation

CPLR 311 sets out the jurisdictional requirements for personal service over domestic and foreign corporations. CPLR 311 (a)(1) provides that, “[p]ersonal service upon a corporation or governmental subdivision shall be made by delivering the summons . . . upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.” Strict compliance with CPLR 311 is required in order to obtain jurisdiction. (*Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351 [1st Dept 2002].)

“The delivery need not take place in New York. Service may be made on an authorized representative anywhere he or she may be found.” (*Town Sports Intern., LLC v Zakharyayev*, 2011 N.Y. Slip Op. 33904[U] [N.Y. Sup Ct, New York County 2011], citing Alexander, Practice Commentaries, C311:1 [McKinney 2014].)

The listed representatives are those in the corporation who can likely ensure that the process will be received by those officials in within the corporation who will protect the interests of the company. (Alexander, Practice Commentaries, C311:1 [McKinney 2014].)

“[A] managing agent must be some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it.” (*Colbert v Intl. Sec. Bur. Inc.*, 79 AD2d 448, 453 [2d Dept 1981], quoting *Taylor v Granite State Provident Ass’n*, 136 NY 343, 346 [1893]; *see generally also* § 70. Service on a Corporation, Siegel, N.Y. Prac. § 70 [6th ed.] [stating that the term “managing agent” is “liberally construed”]; *Green v*

Morningside Hgts. Hous. Corp., 13 Misc 2d 124, 125 [Sup Ct, NY County 1958] [holding that “the probable meaning would include one in charge of a branch office whose powers are general”], *affd*, 7 AD2d 708 [1st Dept 1958]; *cf. Isaf v Pennsylvania R. Co.*, 32 AD2d 578, 579 [3d Dept 1969] [holding that a railroad station’s chief clerk, whose duties did not include “the exercise of judgment and discretion” was not a managing agent].)

The latter part of the provision “to any other agent authorized by appointment or by law to receive serve” has long been interpreted as including service on the New York Secretary of State in accordance with Business Corporation Law § 306 (domestic or foreign corporation authorized to do business in New York) and § 307 (*unauthorized* foreign corporation over which a basis of jurisdiction exists). (Alexander, Practice Commentaries, C311:1 [McKinney 2014].) Business Corporation Law § 307 provides for service of process upon a foreign corporation doing business in this state without authority. (Business Corporation Law § 307 (a).)

Further, the managing agent of an *unauthorized* foreign corporation may be served under CPLR 311. (*See Van Wert v Black & Decker Inc.*, 246 AD2d 773, 774 [3d Dept 1998] [“Initially, we find that Business Corporation Law § 307 does not provide the only method by which an unauthorized foreign corporation may be served; rather, it is merely an alternative to CPLR 311.”]; *cf. Flick v Stewart-Warner Corp.*, 76 NY2d 50, 54 [1990] [holding that compliance with Business Corporation Law § 307 (a) “constituted literal compliance with the jurisdictional requirements of CPLR 311(a)”].)

B. Service of process to a limited liability company

CPLR 311-a (a) provides:

“Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in the state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.”

Unlike CPLR 311—which again does not allow for substituted service on corporations—this Court has previously held that CPLR 311-a “authorizes the effectuating of service of process upon an LLC by means of the use of the substituted service provisions of CPLR 308 upon any of the enumerated persons in CPLR 311-a (a).” (*Tetteh v Infinite Beauty NYC, LLC*, 2017 N.Y. Slip Op. 32452[U], 8 [N.Y. Sup Ct, NY County 2017] [Kalish, J].)

The last sentence of 311-a (a) states that service may also be made on the Secretary of State under, for example, Limited Company Law § 304. (Alexander, Practice Commentaries, C311-a [McKinney].) Limited Liability Company Law § 304 provides for service of process

upon a foreign limited liability company that does business in this state without authority. (NY Lim Liab Co § 304 [a].) It is “substantially identical” to Business Corporation Law § 307, and both are strictly construed. (*Interboro Ins. Co. v Tahir*, 129 AD3d 1687, 1689 [4th Dept 2015].)

II. Findings

As a preliminary matter, the Court notes that neither D&G nor Plaintiff makes reference to the statutory provision under which, in its view, it served process upon Six Brothers. This is not helpful to the Court.

With regard to D&G, the motion is denied, as D&G fails to make a *prima facie* showing for entitlement to a default judgment under CPLR 3215. Its unverified complaint is insufficient to prove facts constituting its claim. (*See Beltre*, 32 AD3d at 723; *see also* D&G Affirm in Supp, Ex H [D&G Affidavit of Service].)

With regard to Plaintiff, the cross-motion is denied because Plaintiff’s Affidavit of Service, on its face, suggests that Plaintiff’s process server attempted to serve Six Brothers by delivering the summons “to a person suitable age and discretion at the actual place of business,” pursuant to CPLR 308 (2). This method of service is not available for service upon corporations. (*Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551, 551 [2d Dept 1984], *affd*, 65 NY2d 865 [1985]; *see also Persaud*, 290 AD2d 351 [“Strict compliance with all the service dictates of CPLR 308 and 311 is required in order to obtain jurisdiction.”].) To the extent that Six Brothers is an LLC, Plaintiff’s process server could properly serve Six Brothers pursuant to CPLR 308’s substituted service provisions. However, this Court must still nonetheless deny the instant cross-motion by Plaintiff because Plaintiff’s Affidavit of Service does not clearly indicate whether an additional mailing of the summons and complaint was made pursuant CPLR 308 (2).

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant/third-party defendant/second third-party plaintiff D&G Masonry Corp. pursuant to CPLR 3215 for a default judgment against defendant/second third-party defendant Six Brothers Construction, LLC, is denied;

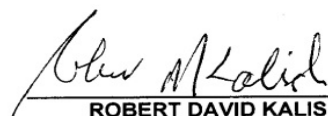
ORDERED that the cross-motion by plaintiff Dorene Hyman pursuant to CPLR 3215 for a default judgment against Six Brothers Construction, LLC, is denied;

ORDERED that the counsel for D&G Masonry Corp. shall serve via NYSCEF a copy of the instant decision and order with notice of entry within twenty (20) days after Governor Cuomo’s Executive Order 202.8 or any order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Order of the Chief Administrative Judge of the Courts dated March 20, 2020 (AO/71/20).

The foregoing constitutes the decision and order of this Court.

3/23/2020
DATE


ROBERT DAVID KALISH, J.S.C.

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