

**Whittaker v Tapia**

2020 NY Slip Op 31272(U)

April 30, 2020

Supreme Court, Kings County

Docket Number: 525740/2018

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of April, 2020

HONORABLE FRANCOIS A. RIVERA

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 ERNESTO WHITTAKER and ALBERTINA  
 WHITTAKER,

**DECISION & ORDER**  
 Index No. 525740/2018

Plaintiff,

- against -

FERNANDO ALARCON TAPIA,

Defendant.

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By order to show cause, filed on September 9, 2019, plaintiffs Ernesto Whittaker and Albertina Whittaker (hereinafter plaintiffs) sought an order, pursuant CPLR 3215, for a default judgment against defendant Fernando Alarcon Tapia, among other things.

By supplemental affirmation, filed on November 18, 2019, the plaintiffs seek an order pursuant to CPLR 308 (5) directing the service of the order show cause and supporting papers upon the defendant by electronic mail (hereinafter email) addressed to [tapia6934@hotmail.com](mailto:tapia6934@hotmail.com) and [tony77fa@gmail.com](mailto:tony77fa@gmail.com) (hereinafter the subject email addresses).

It is well established that CPLR 308(5) permits a court with the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4) are impracticable (*Safadjou v Mohammadi*, 105 AD3d 1423, 1424 [4th Dept 2013] citing *Astrologo v Serra*, 240 AD2d 606, 606 [2nd Dept 1997]). A movant need not satisfy the more stringent standard of due diligence required under CPLR 308 [4] (*see Wells Fargo Bank, NA v Patel* 175 AD3d 1350, 1351 [2nd Dept 2019]). The determination of whether service is impracticable depends on the facts and circumstances surrounding each case (*see id.* citing *Liebeskind v Liebeskind*, 86 AD2d 207, 210 [1st Dept 1982]). Accordingly, the movant is required to make a competent showing as to the actual prior efforts that were made to effect service (*Hollow v Hollow*, 193 Misc2d 691, 693-94 [Sup Ct 2002]). Once the impracticability standard is satisfied, due process requires that the method of service be reasonably calculated, under all the circumstances, to apprise the defendant of the action (*Safadjou v Mohammadi*, 105 AD3d 1423, 1424-25 [4th Dept 2013] citing *Contimortgage Corp. v Isler*, 48 AD3d 732, 734 [2nd Dept 2008]).

Here, the plaintiffs' submitted an affirmation of their counsel and affidavits of due diligence to demonstrate the prior attempts to effectuate service of the order to show cause upon the defendant. In addition to the statutorily permitted methods of service, plaintiff's counsel avers that he notified the defendant of a prior court appearance by emailing the defendant using the subject email addresses. At the prior court appearance, the defendant acknowledged that the subject email addresses are his email addresses and he received the email sent by plaintiffs' counsel.

In light of the foregoing, the plaintiffs' have established that reasonable efforts were made to effectuate service upon the defendant by the methods specified in CPLR 308 (1), (2), and (4) but such service is impracticable (*see Safadjou*, 105 AD3d at 1424).

## CONCLUSION

ORDERED, that a copy of this Order, the Order to Show Cause, together with the papers upon which it is based, in the above entitled action be served on defendant Fernando Alarcon Tapia by electronic mail (hereinafter e-mail) at the following addresses:

[tapia6934@hotmail.com](mailto:tapia6934@hotmail.com) and [tony77fa@gmail.com](mailto:tony77fa@gmail.com), on or before June 1, 2020;

ORDERED, that a copy of this Order, the Order to Show Cause, together with the papers upon which it is based, in the above entitled action be served on defendant Fernando Alarcon Tapia at his last known address by first class mail, on or before June 1, 2020;

ORDERED, that a copy of this Order, the Order to Show Cause, together with the papers upon which it is based, in the above entitled action be served on defendant Fernando Alarcon Tapia, by publishing the same, together with notice to the defendant, and a brief statement about the nature of the action, pursuant to CPLR 316, in The Brooklyn Daily Eagle, to be published in the County of Kings, the State of New York, once a week for three consecutive weeks. The publication shall be made on or before June 1, 2020.

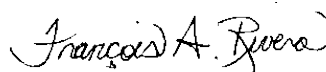
Due to COVID-19, the Court will be communicating by email and using Skype for Business for conferencing and hearing. In the interim, any communications should be addressed to the Court on notice to your adversaries by e-mail at [bjjacque@nycourts.gov](mailto:bjjacque@nycourts.gov) and copied to

milperez@nycourts.gov.

As such the parties are to appear before this Court for hearing to address Order to Show Cause via Skype for Business on July 8, 2020 at 11:00 A.M. A notice of the hearing will be sent to parties via e-mail.

The foregoing constitutes the decision and order of this Court.

Enter:



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J.S.C.