

<b>Mori v Riomar Corp.</b>
2021 NY Slip Op 31437(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 154687/2020
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. DAVID BENJAMIN COHEN      **PART**      **IAS MOTION 58EFM**

*Justice*

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HENRY MORI,

Plaintiff,

- v -

RIOMAR CORP., MARTHA SILVA FRANSA, KANA  
RESTAURANT, D/B/A KANA, D/B/A KANA TAPAS BAR  
AND RESTAURANT, ARMANDO OROFINA, ALEJANDRO  
VEGA, ANDRES VEGA, JOHN DOE

Defendant.

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**INDEX NO.**      154687/2020

**MOTION DATE**      01/04/2021,  
01/25/2021

**MOTION SEQ. NO.**      001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 34, 35, 36, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 40, 41, 42, 43, 44, 53, 56

were read on this motion to/for DISCOVERY.

Defendants Armando Roberto Orofina (“Orofina”), and Carlos Andres Vega (“Vega”) move, pursuant to CPLR § 3211, to dismiss the claims against them for plaintiff’s failure to properly serve them. Plaintiff opposes the motion and cross-moves, pursuant to CPLR § 3215, for a default judgment against Orofina and Vega on the issue of liability. Additionally, in his reply papers, plaintiff requests – pursuant to CPLR § 306-b – an additional 120 days to serve the defendants. Plaintiff separately moves to compel responses to his discovery demands.

For the reasons set forth herein, Defendants’ motion is granted, Plaintiff’s cross-motion is denied, and Plaintiff’s motion to compel discovery is denied as moot.

## **BACKGROUND**

Plaintiff Henry Mori (“Mori”) commenced this lawsuit by filling the summons and complaint on June 24, 2020 (Def. Exh. A, Summons and Complaint). Mori alleges that, on May 5, 2019, while he was at the premises of the Kana Restaurant (the “Restaurant”) – owned by Riomar Corp. – he was assaulted by an employee (the “John Doe” defendant) of the Restaurant, who put Mori in a choke hold which caused Mori to fall unconscious (*Id.*) Mori then alleges that the employee dragged his limp body out of the restaurant and threw him to the ground on the sidewalk outside the restaurant. Plaintiff alleges that the moving defendants were negligent in the hiring, training, and supervision of “John Doe.” Defendants Riomar Corp., Orofina, and Vega filed their Answer on August 7, 2020 (Def. Exh. B, Answer). The Answer contained the affirmative defense of lack of jurisdiction based upon plaintiff’s failure to serve them according to the provisions of the CPLR (*Id.* at ¶ 20).

## **DEFENDANTS’ MOTION TO DISMISS**

Defendants Orofina and Vega (the “moving defendants”) contend that they have never been properly served. They were purportedly served on July 7, 2020 by leaving copies of the summons and complaint with Mr. Mateo, a person of suitable age and discretion, at their place of business – Kana Tapas Bar & Restaurant, located at 324 Spring Street, New York, NY 10013 – and mailing copies to the same location (*see* Def. Exh. C, Aff. of Service). However, the moving defendants’ affidavits and accompanying executed Stock Purchase Agreement establish that they had divested themselves of all interest in, Riomar Corp. d/b/a Kana Tapas Bar & Restaurant on or about February 6, 2020, and thereafter were not employed by, or affiliated with, said restaurant (*see* Def. Exh D, Orofina Aff.; Def. Exh E., Vega Aff.). Therefore, serving the

summons and complaint at the restaurant could not effectuate service upon them as it was not their actual place of business (*see* CPLR § 308[2]).

Following the filing of the defendants' motion, the plaintiff again attempted to serve the moving defendants, this time at the home addresses provided in their affidavits in support of defendants' motion to dismiss. The affidavit of service on Orofina indicates that he was served on October 28, 2020 by affixing a copy of the summons and complaint to the defendant's door and mailing a copy of the same to the defendant at his home address (*see* NYSCEF Doc. 46, Aff of Service – Orofina). The affidavit of service on Vega indicates that, on October 22, 2020, a copy of the summons and complaint were delivered to “JANE DOE a person of suitable age and discretion” who identified herself as the co-tenant of the defendant and mailing a copy to the defendant at 80-57 Lefferts Boulevard, Kew Gardens, NY 11415 (*see* NYSCEF Doc. 47, Aff of Service – Vega).

Defendants argue that these attempts at service were deficient. With respect to Orofina, defendant correctly asserts that the service was untimely. Pursuant to CPLR § 306-b, “service of the summons and complaint ... shall be made within one hundred twenty days after the commencement of the action” and “if 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.” This action was commenced with the filing of the summons and complaint on June 24, 2020. Therefore, the defendant was required to be served by October 22, 2020. Accordingly, service on October 28, 2020 was untimely.

Service upon Vega was not *completed* by the October 22, 2020 deadline either. Service by delivering the summons and complaint to a person of suitable age and discretion at the

defendant's usual place of abode shall be complete *ten days after filing of the proof of service* upon the clerk of the court (CPLR § 308[2]). The affidavit of service upon Vega was not filed with the clerk until October 30, 2020. Therefore, even assuming *arguendo* that such service was valid,<sup>1</sup> service upon Vega was untimely.

As the moving defendants were not served within 120 days of commencement of the action, the case must be dismissed against them. Plaintiffs request for an additional 120 days to serve the defendant, contained only within his reply papers, is not a properly noticed motion and will not be considered absent a motion for the same.

Therefore, the defendants' motion to dismiss is granted, and the case is dismissed against Orofina and Vega.

#### **PLAINTIFF'S CROSS-MOTION FOR DEFAULT JUDGMENT**

The plaintiff's cross-motion for a default judgment is denied. Even though they had yet to be served, Orofina and Vega interposed an answer on or about August 7, 2020. "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Macchia v Russo*, 67 NY2d 592, 595 [1986]). Therefore, as Orofina and Vega were not properly and timely served, and did not come within the jurisdiction of the court, they are not in default. Additionally, they are not in default because they did, in fact, answer the complaint. Accordingly, plaintiff's cross-motion must be denied.

#### **PLAINTIFF'S MOTION TO COMPEL DISCOVERY**

Plaintiff moves to compel discovery pursuant to CPLR § 3124. In light of the decision hereinabove, plaintiff's motion to compel discovery is denied as moot.

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<sup>1</sup> Vega contends that service was invalid. He affirms that he lives alone, does not have a relationship with any other person who resides in the apartment building, and has never been served at his dwelling place located at 80-57 Lefferts Boulevard, *Fourth Floor*, Kew Gardens, New York 11415 (*see* NYSCEF Doc. 48, Vega Aff.).

**CONCLUSION**

For the reasons set forth herein, it is hereby

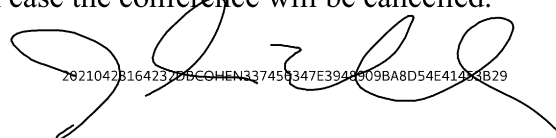
ORDERED that the motion of defendants Armando Roberto Orofina and Carlos Andres Vega to dismiss the complaint against them is granted, the complaint is dismissed as against these defendants and Clerk shall enter judgment accordingly; and it is further

ORDERED that plaintiff’s cross-motion for a default judgment is denied; and it is further

ORDERED that plaintiff’s motion to compel discovery is denied as moot; and it is further

ORDERED that this action is severed and continue as to the remaining parties; and it is further

ORDERED that all remaining parties shall appear for a preliminary conference in this matter on May 17, 2021 at 2:30 p.m., which will be held by Microsoft Teams, with a link to the conference to be sent via a subsequent court notice, unless, prior to that day, the parties meet and confer in order to complete a bar coded preliminary conference form to be provided by the Part 58 Clerk at [SFC-Part58-Clerk@nycourts.gov](mailto:SFC-Part58-Clerk@nycourts.gov), in which case the conference will be cancelled.



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**DAVID BENJAMIN COHEN, J.S.C.**

4/28/2021

**DATE**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE