

Flatiron 30 LLC v Joachimsthaler
2021 NY Slip Op 32547(U)
December 2, 2021
Supreme Court, New York County
Docket Number: Index No. 650546/2021
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS NOCK PART 38M

Justice

-----X
FLATIRON 30 LLC

Plaintiff,

- v -

ERICH JOACHIMSTHALER,

Defendant.

INDEX NO. 650546/2021

MOTION DATE 05/27/2021,
09/14/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 43, 44, 45, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for EXTEND - TIME

Upon the foregoing documents, the motion of Plaintiff Flatiron 30 LLC (“Plaintiff”) for entry of a default judgment (motion sequence 001) is denied, and the motion of defendant Erich Joachimsthaler (“Defendant”) for an extension of time to answer (motion sequence 002) is granted, in accord with the following memorandum decision. The motions are consolidated for disposition herein.

Background

Plaintiff commenced this action to enforce a lease guaranty by filing a summons and complaint on January 25, 2021. In an affidavit of service filed on March 11, 2021, Plaintiff’s process server purports to have served Defendant with copies of the summons and complaint pursuant to CPLR 308 (4) on February 20, 2021 at 2:14 p.m. by affixing copies of the documents to the door of a residence located at 311 Amsterdam Avenue, Apt PH-B, New York, New York

(NYSCEF Doc No. 3). The address is indicated on the affidavit as “upon information and belief, the usual place of abode, last known residence of the Defendant” (*id.*). The affidavit states that there were two prior attempts at service on February 8, 2021 and February 15, 2021, and also states the following details regarding service:

COMMENTS: ON 2/8/2021, DEPONENT ATTEMPTED TO SERVE THE DEFENDANT BUT RECEIVED NO ANSWER AT THE RESIDENCE AFTER BUZZING THE INTERCOM FOR THE APARTMENT. ON 2/16/2021, DEPONENT RETURNED TO THE BUILDING AND SPOKE WITH AN OCCUPANT OF APARTMENT PH-B THROUGH THE INTERCOM, WHICH SAID PERSON CONFIRMED THAT THE APARTMENT PH-B WAS DEFENDANT'S RESIDENCE BUT STATED THAT DEFENDANT WAS NOT HOME TO ACCEPT THE DOCUMENTS. ON 2/20/2021, DEPONENT RETURNED TO THE BUILDING AND ON THIS OCCASION SPOKE (THROUGH THE INTERCOM) WITH AN INDIVIDUAL WHO IDENTIFIED HIMSELF AS DEFENDANT ERICH JOACHIMSTHALER. DEFENDANT PROVIDED DEPONENT WITH ACCESS TO THE BUILDING AND ADVISED TO LEAVE THE DOCUMENTS OUTSIDE OF THE APARTMENT. AFTER CONFIRMING THE NATURE OF THE DOCUMENTS WITH THE DEFENDANT, DEPONENT POSTED THE SUMMONS AND VERIFIED COMPLAINT WITH NOTICE OF ELECTRONIC FILING ON A BLACK DOOR LABELED PH-B WITH BROWN WALLS.

(*id.*). Finally, the affidavit states that a copy of the summons and complaint were mailed to Defendant at the same residence on February 24, 2021 (*id.*).

There being no appearance by Defendant, Plaintiff filed a motion for entry of a default judgment on May 27, 2021 (NYSCEF Doc Nos. 4-14). The parties thereafter entered into a stipulation dated July 29, 2021, whereby they agreed to extend the return date for the motion for entry of a default judgment (NYSCEF Doc No. 18). The stipulation also designates that, “[a]s a condition of the within adjournment, Defendant has paid the amount of \$17,500.00 and shall further pay or cause to be paid to Plaintiff on or before August 16, 2021, the sum of \$12,500.00. Said payments shall be paid and accepted without prejudice and shall not impact upon the parties' rights and claims to the pending motion or the within action” (*id.*). On August 13, 2021,

Defendant filed an answer to the complaint (NYSCEF Doc No. 20), followed by an opposition to the motion for entry of a default judgment and a separate motion to compel acceptance of the late answer on August 31, 2021.

In support of the motion to compel, Defendant submits an affidavit in which he alleges that the representations regarding service set forth in the affidavit of service are “false and incorrect” (NYSCEF Doc No. 25 ¶ 23). Defendant attests that he “did not speak with any process server, nor identify myself to any unknown person on February 20, 2021,” did not receive the papers as alleged, and contends that he was away from the residence at the purported time of service and did not return to the residence until 2:57 p.m. on that date (*id.* ¶¶ 26-27).

Additionally, he avers that the digital log from his home monitoring system indicates he returned to the residence for the first time at 2:57 p.m. on the date in question, and he submits a photograph from his home doorbell monitoring system that purportedly depicts him entering the residence at 2:57 p.m. (*id.* ¶ 27; NYSCEF Doc No. 32). Finally, Defendant contends that Plaintiff is aware of his business address, but did not attempt to serve him there, as required by CPLR 308 (4) (NYSCEF Doc No. 25 ¶ 25). As a reasonable excuse for his default in this action, Defendant asserts that the deficiencies in service prevented him from timely appearing because he was not aware of the action, and he seeks an order from this court compelling Plaintiff to accept his late filed answer.

Discussion

New York public policy strongly favors disposing of cases on their merits, (*see Berardo v Guillet*, 86 AD3d 459, 459 [1st Dept 2011]), and “toward that end a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that parties may have their day in court” (*Mate Picinic v Seatrains Lines, Inc.*, 117 AD2d 504, 508 [1st Dept

1986]). “In order to successfully oppose a motion for a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense” (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). However, “a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where [] no default order or judgment has been entered” (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]). Whether a reasonable excuse exists is a “discretionary, *sui generis* determination to be made by the court based on all relevant factors,” including, among other things, whether there has been prejudice to the opposing party, whether there has been willfulness, and the policy in favor of resolving cases on the merits (*id.* at 465). “Moreover, courts have the inherent power to forgive even an unexplained default in the interest of justice” (*id.* [quotations omitted]). Pursuant to CPLR 3012 (d), “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” In making a determination under CPLR 3012 (d), the court must take into account the excuse offered for the defendant’s delay in responding to the summons, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense (*see Jones v 414 Equities*, 57 AD3d at 65; *Sippin v Gallardo*, 287 AD2d 703 [2nd Dept 2001]).

On the facts presented here, the court finds it appropriate to exercise its discretion to compel Plaintiff to accept Defendant’s late filed answer. A process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR (*see Strober King Bldg. Supply Centers, Inc v Merkley*, 697 NYS2d 319, [2nd Dept 1999]). A sworn affidavit alleging the particulars concerning why service is improper is required to rebut a process server’s affidavit (*see, Hinds v 2461 Realty Corp.*, 169 AD2d 629 [1st Dept

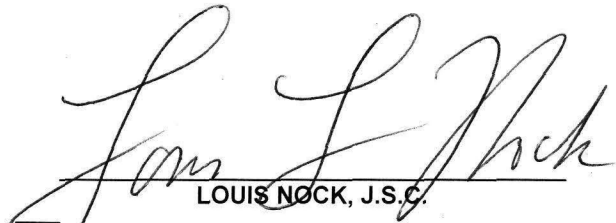
1991]). Defendant has supplied such an affidavit in which he provides detailed rebuttal allegations to those set forth in the affidavit of service. Additionally, Plaintiff has made no showing that it attempted service at Defendant's place of business or attempted to ascertain the location of Defendant's place of business, which he asserts is set forth in the guaranty that is the subject of this action (NYSCEF Doc No. 8). "Service of process pursuant to the affix-and-mail provisions of CPLR 308(4) is only permitted where service by personal delivery under CPLR 308(1) or by delivery to a person of suitable age and discretion and a subsequent mailing pursuant to CPLR 308(2) 'cannot be made with due diligence' (*Candlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 629 [1st Dept 2014], *citing* CPLR 308 [4]). "For 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" (*id.* [internal quotation and citation omitted]). Moreover, the length of the default was not substantial and there is not indication that it was willful. A showing of a meritorious defense is not required because a default has not been entered (*Jones v 414 Equities*, 57 AD3d at 81). In light of these factors, Defendant's motion to compel is granted and the motion for entry of a default judgment is denied.

Accordingly, it is

ORDERED that the motion for entry of a default judgment (motion sequence 001) is denied, and the motion to compel acceptance of Defendant's answer (motion sequence 002) is granted; and it is further

ORDERED that Defendant's answer (NYSCEF Doc No. 20) is deemed served upon entry of this order, and Plaintiff is compelled to accept same; and it is further

ORDERED that the parties are directed, within 30 days of the date of this order, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at <https://www.nycourts.gov/LegacyPDFS/courts/ljd/suptctmanh/PC-CD.pdf>, to the Principal Court Attorney of Part 38 at lfurdyna@nycourts.gov.

<u>12/2/2021</u>				
DATE			LOUIS NOCK, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
APPLICATION:	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE