

<b>63 W. LLC v Bicher</b>
2021 NY Slip Op 32803(U)
December 17, 2021
Supreme Court, New York County
Docket Number: Index No. 654257/2019
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART 07

*Justice*

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INDEX NO. 654257/2019

63 WEST LLC,

MOTION SEQ. NO. 004

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

KONRAD BICHER,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to

VACATE ORDER/JUDGMENT

*Rosenberg & Estis, P.C.*, New York, NY (Alex M. Estis of counsel), for plaintiff.

*Law Offices of Ari Mor, Esq., P.C.*, New York, NY (Ari Mor of counsel), for defendant.

Gerald Lebovits, J.:

In this action to enforce provisions of a residential lease, plaintiff, 63 West LLC, previously obtained on default a judgment, injunctive relief, and contempt sanctions against defendant, Konrad Bicher. Bicher now moves to vacate his default under CPLR 5015 (a) (4) and to dismiss the action for lack of personal jurisdiction under CPLR 3211 (a) (8). The motion is granted.

**BACKGROUND**

From 2015 to 2019, Bicher leased an apartment from 63 West.<sup>1</sup> The terms of the lease barred short-term rentals of the premises on platforms such as AirBnb, and required consent from 63 West to any other sublet. 63 West has claimed that Bicher has repeatedly rented out the premises on AirBnb and the like in violation of his lease.

63 West brought this action in July 2019, seeking injunctive relief barring Bicher from continuing to violate the lease by undertaking further short-term rentals of the premises, and also seeking the costs (including attorney fees) of enforcing the relevant lease provisions against him. 63 West also brought on a motion by order to show cause seeking injunctive relief to enforce the

<sup>1</sup> According to 63 West, Bicher remains in possession of the leased premises as a holdover tenant. The record does not reflect whether 63 West has ever brought a holdover proceeding in Housing Court seeking possession of the premises (as distinct from a nonpayment proceeding); and, if so, what the outcome was of that proceeding.

lease's prohibition on short-term rentals. (*See* NYSCEF No. 15.) 63 West served the complaint, order to show cause, and supporting documents on Bicher by "nail-and-mail" service under CPLR 308 (4). (*See* NYSCEF No. 16.)

Bicher did not appear, respond to the complaint, or oppose the preliminary-injunction motion. In August 2019, this court granted the requested injunction on default and without opposition. (*See* NYSCEF No. 17.) In December 2019, 63 West moved for contempt sanctions against Bicher for violating the preliminary injunction. (*See* NYSCEF No. 20.) Two days later, 63 West also moved for a default judgment against Bicher. (*See* NYSCEF No. 32.) In January 2020, this court granted the motion for contempt on default and without opposition, and directed plaintiff to settle order (*see* NYSCEF No. 46); and this court granted the default-judgment motion, again on default and without opposition (*see* NYSCEF No. 47).<sup>2</sup>

In November 2021, Bicher moved to vacate the default judgment against him, to dismiss the action altogether under CPLR 3211 (a) (8) for lack of personal jurisdictions, and for sanctions. (*See* NYSCEF No. 62.) In opposing the motion, 63 West sought sanctions of its own against Bicher.<sup>3</sup> Bicher's motion to vacate and to dismiss is granted; the parties' respective requests for sanctions are denied.

## DISCUSSION

### I. Bicher's Motion to Vacate Default Judgment and Dismiss the Action

Bicher's motion to vacate and to dismiss is based on what he contends is lack of personal jurisdiction due to bad service of the initiating papers (and preliminary-injunction motion) in July 2019.

#### A. 63 West's Threshold Arguments in Opposition to the Motion

In opposing the motion, 63 West raises two threshold arguments. Neither persuades. *First*, 63 West contends that a CPLR 5015 motion to vacate must be supported by a showing of a reasonable excuse and meritorious defense, and that Bicher's motion must be denied for failing to provide that showing. 63 West's contention is incorrect. A reasonable excuse/meritorious defense showing certainly is required for a motion to vacate under CPLR 5015 (a) (1) based on an excusable default; but it is *not* required for a motion to vacate under CPLR 5015 (a) (4) for lack of jurisdiction. (*See Harkless v Reid*, 23 AD3d 622, 622-623 [2d Dept 2005].)

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<sup>2</sup> 63 West filed a proposed order for settlement in early March 2020. As a result of the pandemic, review and entry of that order was considerably delayed; but this court ultimately imposed a contempt sanction of \$250 against Bicher.

<sup>3</sup> 63 West's request for sanctions was styled as a cross-motion; but the cross-motion papers were untimely under CPLR 2215. This court informed the parties by email that it would treat the sanctions request as if it had simply been made in ordinary opposition papers, and it afforded Bicher an opportunity to submit a post-return-date reply to that request, which he did.

*Second*, 63 West contends that regardless of service, Bicher waived any challenge to personal jurisdiction by including a request for sanctions in its motion to vacate. But when a defendant both asserts a jurisdictional defense and seeks other relief, no waiver occurs as long as the defendant's request for relief is sufficiently related to plaintiff's claims against defendant. (*See Dinicu v Groff Studios Corp.*, 215 AD2d 323, 323 [1st Dept 1995].) Bicher's request for sanctions is, for waiver purposes, "inextricably linked to and arise out of the same set of transactions or occurrences as plaintiff's claims" against Bicher (*id.*), because Bicher seeks sanctions based on assertedly false statements made by 63 West's counsel in obtaining a preliminary injunction against Bicher. (*See* NYSCEF 58 at ¶¶ 53-61.) This is quite different from Bicher's "taking affirmative advantage of the court's jurisdiction" to obtain unrelated relief against 63 West. (*Textile Technology Exch., Inc. v Davis*, 81 NY2d 56, 59 [1993].)

### **B. The Merits of Bicher's Challenge to the Validity of Service**

On the merits, this court agrees with Bicher that 63 West's initial service of process on Bicher was invalid, and that this court lacks personal jurisdiction.

As noted above, 63 West served Bicher by nail-and-mail. This form of substituted service is permitted under CPLR 308 (4) only where "service under paragraphs one and two cannot be made with due diligence." 63 West contends that its process server acted with due diligence because he attempted service under CPLR 308 (1) and (2) on three different days, one of which was a Saturday, at varying times of day. (*See* NYSCEF No. 75 at 9-10.) 63 West is correct that "in some circumstances" this showing may be enough to demonstrate due diligence. (*Board of Mgrs. of 50 W. 127th St. Condominium v Kidd*, 169 AD3d 432, 432 [1st Dept 2019], citing *Ayala v Bassett*, 57 AD3d 387, 388 [1st Dept 2008]; *accord Brafman & Assocs., P.C. v Balkany*, 190 AD3d 453, 453 [1st Dept 2021].) But the court concludes that in the unusual circumstances of *this* case, something more was required.

In particular, CPLR 308 (4) permits nail-and-mail service only to "the actual place of business, dwelling place or usual place of abode" of the person being served. But the entire premise of 63 West's action is that Bicher has violated his lease by consistently subletting the leased premises on a short-term basis—thus raising the obvious question whether the leased premises *were*, in fact, Bicher's "dwelling place or usual place of abode" at the time of service. (*Cf. Stillman v City of New York*, 39 AD3d 301, 302-303 [1st Dept 2007] [holding that plaintiff failed to establish that nail-and-mail service was valid where record established that defendant had moved from the service address three weeks before plaintiff effected service].)

63 West's papers opposing the motion to vacate do not answer this question: They merely assert that the leased premises were Bicher's "home address," without elaborating on or supporting that assertion. (*See* NYSCEF Nos. 64 at ¶ 16, 74 at ¶ 31, 75 at 9.) 63 West does also point to a lease provision providing that notices from the landlord or its agents to Bicher will be properly delivered if sent by specified means to the leased premises. (*See* NYSCEF No. 75 at 10, citing NYSCEF No. 65 at ¶ 25 [lease].) But the fact that a term of a contract between 63 West and Bicher provides *for purposes of the contract* that notices will be deemed proper if sent to Bicher at the leased premises does not establish that the leased premises are as a factual matter Bicher's "dwelling place or usual place of abode."

Nor does the affidavit of service establish that the process server diligently attempted to confirm that Bicher in fact lived at the leased premises, as opposed to subletting them to Airbnb renters and the like while living elsewhere. The affidavit does not, for example, indicate that the process server cross-checked Bicher's address against Department of Motor Vehicles records, voter-registration records, or other available databases; or, for that matter that the process server attempted to check with one of Bicher's neighbors in the building (or building employees) about whether Bicher lived at the leased premises. (*See e.g. Bank of Am., N.A. v Budhan*, 171 AD3d 622, 622-623 [1st Dept 2019] [finding due diligence when record reflected process server checked address in available address database and confirmed defendant's residence with a neighbor]; *Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007] [finding lack of due diligence when process server served address where defendant no longer lived without checking DMV records].)

Additionally, the affidavit of service does not reflect whether the process server attempted to ascertain Bicher's business address or to serve him there—the affidavit merely recites that Bicher's "employer and . . . place of employment is unknown." (NYSCEF No. 16.) 63 West is correct to argue that a plaintiff is not necessarily required to attempt to serve the defendant at a business address before resorting to nail-and-mail service. (*See* NYSCEF No. 75 at 11, citing *Farias v Simon*, 73 AD3d 569, 570 [1st Dept 2010].) But given the reason to doubt that defendant was living at the leased premises, the lack of evidence that the process server attempted first to verify other possible service addresses for Bicher further undermines plaintiff's due-diligence showing. (*See Serraro v. Staropoli*, 94 AD3d 1083, 1085 [2d Dept 2012] [finding no due diligence when process server "did not make any inquiries about the defendants' . . . business addresses," but instead "simply reviewed the residential address on [the] summons and complaint, and made four attempts at personal service at that address"]; *One Arden Partners, L.P. v Bicher*, 2021 NY Slip Op 30232[U], at \*2 [Sup Ct, NY County Jan. 26, 2021] [Jaffe, J.] [holding, in an unrelated action against Bicher for engaging in impermissible short-term subleases, that process server had not shown due diligence by attempting service only at the leased premises "without attempting to serve him at his other addresses or conducting a search for his place of employment"].<sup>4</sup>)

In short, given the facts of this case, due diligence for purposes of CPLR 308 (4) required 63 West's process server to do more than simply make three service attempts at the leased premises before resorting to nail-and-mail service. Absent the necessary showing of due diligence, 63 West's service on Bicher was invalid, and this court lacks personal jurisdiction.

## II. The Parties' Requests for Sanctions

As noted above, each party has requested sanctions against the other, based on allegations that counsel each made false statements in motion filings about the procedural/litigation history of 63 West's past efforts in Housing Court to evict Bicher. Given the complexity of that

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<sup>4</sup> The *One Arden* decision does reflect that a process server was able to hand-deliver motion papers to Bicher at his 63 West address in August 2020. (*See* 2021 NY Slip Op 30232[U], at \*2, citing Index No. 152705/2020, NYSCEF No. 29 [affidavit of service].) But that service does not, without more, establish that Bicher was living at the 63 West leased premises in July 2019.

litigation history, the court is not persuaded that any inaccurate descriptions of the Housing Court litigation by counsel here constitute sanctionably false statements. The parties' respective requests for sanctions are denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of Bicher's motion under CPLR 5015 (a) (4) seeking to vacate the default judgment entered against him on January 14, 2020, is granted; and it is further

ORDERED that this court's order entered August 28, 2019, is hereby vacated; and it is further

ORDERED that this court's order entered April 22, 2021, is hereby vacated; and it is further

ORDERED that the branch of Bicher's motion under CPLR 3211 (a) (8) seeking to dismiss the action for lack of personal jurisdiction is granted, and the action is dismissed, with costs and disbursements to be awarded by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Bicher serve notice of entry on 63 West, on the office of the General Clerk, and on the office of the County Clerk, which is directed to enter judgment accordingly.

12/17/2021  
DATE

  
HON. GERALD LEBOVITZ  
J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: