

<b>Martinez v Goolcharran</b>
2021 NY Slip Op 32895(U)
July 20, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20983/2012E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. # 3

ADAM MARTINEZ,

Index No.: 20983/2012E

Plaintiff,

- against -

**DECISION and ORDER**

VISHNUDAT GOOLCHARRAN and NINA SINGH,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant’s motion is whether the default judgment against her should be vacated upon a jurisdictional defect or a reasonable excuse for not appearing in time to defend. This court holds service of process was appropriate and Defendant Nina Singh’s (“Defendant”) excuse insufficient.

This case arises from a personal injury action sounding in negligence, which was commenced by Plaintiff for injuries he sustained from a trip and fall accident on the sidewalk abutting Defendant’s property. Plaintiff obtained a default judgment in the amount of two hundred thirty-five thousand dollars (\$235,000.00) on December 5, 2013, and Defendant now seeks to vacate same.

CPLR §317 allows a defendant against whom a default judgment has been rendered to move to vacate a default and is available only to a defendant who: (1) was served by a method other than personal delivery; (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry); and (3) demonstrates a potentially meritorious defense to the action. *Caba v. Rai*, 63 A.D.3d 578, 882 N.Y.S.2d 56 (1st Dep’t 2009). In addition, pursuant to CPLR §5015(a)(4), a default must be vacated once a movant demonstrates lack of

jurisdiction.

Defendant claims that her default in this action was unintentional as she never received the summons and complaint. She argues because Plaintiff effectuated service of the summons and complaint via CPLR §308(4) by affixing the summons and complaint upon the front door of her home<sup>1</sup> and not on the door to her specific unit, 2F, that service was improper. Moreover, she contends that service was defective because there was no showing of due diligence prior to Plaintiff resorting to service under CPLR §308(4). In addition, she argues that the subsequent mailing of the summons and complaint did not include her unit, 2F, therefore, rendering the mailing defective. Thus, she posits that this court lacked jurisdiction over her at the time it rendered its default judgment, thereby, requiring a vacatur of same. Lastly, she contends that she possesses a meritorious defense to the underlying action as she claims that she did not have notice of the defective sidewalk.

In opposition, Plaintiff contends that service of the summons and complaint was proper. Plaintiff relies upon the affidavit of service of his licensed process server, Joe Matos, who averred that he attempted to personally serve the Defendant at her home located at 1322 Croes Avenue Bronx, New York 10472, three times: (1) Thursday, May 31, 2012, at 12:42 p.m.; (2) Monday, June 4, 2012, at 10:43 a.m.; and (3) Tuesday, June 5, 2012, at 8:28 p.m. After those unsuccessful attempts, Mr. Matos averred that on Wednesday, June 20, 2012, at 2:46 p.m., he affixed the summons and complaint to the front door of the subject property after he was unable to gain access or locate Defendant. In addition, Mr. Matos took a photograph depicting the summons and complaint affixed to the front door of Defendant's home and annexed same to his affidavit of service.

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<sup>1</sup> Defendant's deed dated March 19, 2008, provides that the property type is a 1-2 family home with an attached garage and/or vacant land.

Thereafter, on June 21, 2012, Mr. Matos averred that he mailed via first class mail delivery a copy of the summons and complaint to Defendant's home address. Further, he annexed to his affidavit of service a copy of the USPS certificate of mailing receipt dated June 21, 2012, evincing that the mailing requisite under CPLR §308(4) was completed on said day. Therefore, Plaintiff argues that service was properly completed in accordance with CPLR §308(4), and Defendant's affidavit containing bald denials claiming otherwise provides an insufficient basis to contest service. Lastly, Plaintiff contends that Defendant failed to present a meritorious defense to the underlying action as his complaint clearly provides how Plaintiff sustained his injuries.

This court finds that Defendant's reliance upon CPLR §317 is misplaced. Defendant claims that she was not personally served. However, CPLR §308 provides that personal service upon a natural person may be made under CPLR §308(4). CPLR §308 begins with: "[p]ersonal service upon a natural person shall be made by any of the following methods...", thus, "nail and mail" service pursuant to CPLR §308(4) constitutes a methodology of personal service.

Therefore, since service of a summons and complaint under CPLR §308(4) is a method of personal service it precludes Defendant from availing herself of the relief contained in CPLR §317 since the statute explicitly proscribes that it is only applicable to a person that was served by a method other than personal delivery. *See Rothopf v. Rothopf*, 191 A.D.2d 685, 595 N.Y.S.2d 506 (2d Dep't 1993); *cf. Seijas v. Rawhide Ranch, Inc.*, 99 A.D.2d 739, 472 N.Y.S.2d 385 (1st Dep't 1984).

In addition, this court finds that Plaintiff's licensed process server, Mr. Matos', affidavit of service constituted *prima facie* evidence of proper service, as it indicated the efforts to serve Defendant at her residence on three different occasions (early morning, afternoon and evening)

prior to resorting to “nail and mail” delivery under CPLR §308(4). *See Ayala v. Bassett*, 57 A.D.3d 387, 870 N.Y.S.2d 261 (1st Dep’t 2008). Consequently, the burden then shifted to Defendant to rebut the presumption of proper service, which she failed to do.

It is undisputed that service was at Defendant’s actual residence. Similarly, it is undisputed that the summons and complaint was affixed to the front door of Defendant’s home and with a subsequent mailing to the same address. Accordingly, this court is not persuaded by Defendant’s argument that service of the summons and complaint was defective because Mr. Matos did not affix them to the door of her particular unit, 2F, but rather to the front door of her home. It is not refuted that service attempts were made at her residential home during business and nonbusiness hours over a span of a week. However, after attempts to personally serve Defendant, the ability to gain access to the interior of Defendant’s home was arrested, therefore the affixing of the summons and compliant to the front door of her home together with the subsequent mailing established personal service pursuant to CPLR §308(4), as under these circumstances Defendant’s actual dwelling place must be deemed to extend to the exterior door of her home. *See Matter of 322 W. 47th St. HDFC v. Loo*, 153 A.D.3d 1143, 61 N.Y.S.3d 204 (1st Dep’t 2017); *see also F. I. Du Pont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 364 N.E.2d 1115, 396 N.Y.S.2d 343 (1977); *see also State of NY Higher Educ. Servs. Corp. v. Sparozic*, 35 A.D.3d 1069, 826 N.Y.S.2d 493 (3d Dep’t 2006) [leave to appeal dismissed, 8 N.Y.3d 958, 868 N.E.2d 218, 836 N.Y.S.2d 537].

Moreover, Defendant’s affidavit is bereft of any facts to demonstrate that: (1) the process server could not have reasonably expected that she would not be home during the times that service was attempted; or (2) she was not home during those times due to work, travel or otherwise; or (3) she was home at the time service was attempted and she did not hear the

doorbell or that she did not find the summons and complaint affixed to the front door of her home, therefore rendering her affidavit insufficient to create an issue of fact to justify a traverse hearing. *See Brafman & Assoc., P.C. v. Balkany*, 190 A.D.3d 453, 139 N.Y.S.3d 199 (1st Dep't 2021); *cf. Richardson v. Lopez*, 154 A.D.3d 617, 62 N.Y.S.3d 787 (1st Dep't 2017).

Furthermore, it is noted that at multiple junctures Defendant was provided notice of: (1) Plaintiff's good faith letter dated October 3, 2012, advising her of the summons and complaint; (2) Plaintiff's notice of motion and supporting documents for default judgment served upon her on October 3, 2012; (3) Justice Hunter, Jr.'s decision and order dated January 4, 2013, granting Plaintiff's application for a default judgment with notice of its entry served upon her on May 15, 2013; (4) Plaintiff's note of issue and certificate of readiness for trial served upon her on July 29, 2013; and (5) the undersigned's decision and order granting Plaintiff a default judgment against Defendant in the amount of two hundred thirty-five thousand dollars (\$235,000.00) together with notice of its entry served upon her on May 4, 2017.

Finally, Defendant's stark claim that she did not have notice of the defective sidewalk without more is insufficient to raise a meritorious defense. At inquest on November 21, 2013, Plaintiff established that he tripped and fell because of the defective sidewalk abutting Defendant's property that resulted in his injuries.

Therefore, this court holds it has jurisdiction over Defendant as she was properly served, she did not provide a reasonable excuse for her default, and she has failed to set forth a meritorious defense to allow this court to vacate its prior default judgment. Thus, this court holds Defendant's motion to vacate its default is denied.

Accordingly, it is

ORDERED, that Defendant's order to show cause is denied.

This constitutes the decision and order of the court.

Dated: July 20, 2021



Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**