

**Greenway Mews Realty LLC v MPDL Design &
Architecture, LLC**

2022 NY Slip Op 30119(U)

January 18, 2022

Supreme Court, New York County

Docket Number: Index No. 154726/2021

Judge: William Perry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

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GREENWAY MEWS REALTY LLC,
Plaintiff,

- v -

MPDL DESIGN AND ARCHITECTURE, LLC, MONICA
PONCE DE LEON

Defendant.

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INDEX NO. 154726/2021
MOTION DATE 08/10/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff Greenway Mews Realty LLC brings this action against its commercial tenant, MPDL Design and Architecture LLC (“MPDL”) and Monica Ponce de Leon, the lease guarantor, alleging that MPDL has failed to pay rent charges but has remained in possession of the premises. In motion sequence 001, Plaintiff moves for default judgment. The motion has been submitted unopposed.

On a motion for leave to enter a default judgment, a plaintiff is required to submit: (1) proof of service of the summons and complaint on the defendant; (2) proof of the merits of the subject claims; and (3) proof of the defendant's default in answering or appearing. (*SMROF II 2012-I Tr. v Tella*, 139 AD3d 599 [1st Dept 2016].) “Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists.” (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, New York County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Plaintiff fails to demonstrate that the Defendants were properly served. First, nail-and-mail alternative service, pursuant to CPLR 308 [4], is only applicable to defendants who are natural persons, and thus Plaintiff's alleged service upon MPDL was improper. (*Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984]; NYSCEF Doc No. 9, Affidavits of Service, at 1.)

Service upon de Leon was also improper, as the affidavit of service states that the process server attempted personal service at 416 West 13th Street, Room 311, New York, NY 10014 ("Room 311") on May 25, 2021 at 4:15pm; May 26, 2021 at 10:44am; and May 27, 2021 at 9:09am, prior to affixing a copy of service upon the door, which is allegedly "recipient's dwelling within the state." (*Id.* at 3.) However, this is contrary to the Complaint, wherein Plaintiff alleges that Room 311, the leased premises at issue in this case, is a "commercial premises[.]" (NYSCEF Doc No. 2, Complaint, at ¶ 4.) The same affidavit of service provides that the process server mailed a second copy of service to the same address, i.e., de Leon's "dwelling within the state." (Affidavits of Service at 3.)

CPLR 308[4] provides that, where service under CPLR 308[1] and 308[2] cannot be made with due diligence, service upon a natural person may be made:

by affixing the summons to the door of *either the actual place of business, dwelling place or usual place of abode* within the state of the person to be served *and* by either mailing the summons to such person at his or her *last known residence* or by mailing the summons by first class mail to the person to be served at his or her *actual place of business* in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other[.]

(CPLR 308[4] [emphasis added].)

Here, Plaintiff alleges that service was affixed to Room 311, de Leon's "dwelling" within the state, and the same address to which the second copy was mailed. However, "[w]hile there may be some question as to whether there is a distinction between 'dwelling place' and 'usual place of abode', there has never been any serious doubt that neither term may be equated with the 'last known residence' of the defendant." (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979].) As such, this affidavit of service is insufficient for the entry of default judgment. (*65 West Capital LLC v Espinoza*, 2018 WL 2739425, at *4 [Sup Ct, NY County 2018].)

A separate affidavit of mailing states that a process server mailed additional copies of service to de Leon at two addresses in Massachusetts and Michigan, although Plaintiff does not state de Leon's relationship to those addresses. (*Id.* at 5.) However, "[w]ithout anything further, these affidavits of mailing fail to comply with any of the service provisions of the CPLR." (*Banerjee v Alfredo*, 2021 WL 2940971, at *2 [Sup Ct, NY County 2021].)

A second affidavit of service provides that a process server personally served de Leon at 14 Nassua Street, Princeton, NJ 08542 by affixing and mailing service to that address, which is also referred to as de Leon's "dwelling within the state." (Affidavits of Service at 10.) This affidavit of service is insufficient for the same reason as provided in the affidavit of service pertaining to Room 311.

Further, Plaintiff fails to demonstrate compliance with CPLR 3215[g][3][i], which requires that Plaintiff submit an affidavit of additional notice of default "by mailing a copy of the summons by first-class mail to the defendant at his place of residence[.]" Here, Plaintiff's affidavit of mailing demonstrates that it mailed four copies of the notice of default addressed to de Leon at Room 311 and the New Jersey, Massachusetts, and Michigan addresses listed above. (NYSCEF Doc No. 15 at 15.) Plaintiff states that each of these addresses are "the last known address

designated by the party for that purpose[.]” (*Id.*) However, “the last known address designated by the party for that purpose” is not an address recognized by CPLR 3215, which instead provides that “if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed ... to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence.” As such, it is hereby

ORDERED that Plaintiff’s motion sequence 001 is denied.

1/18/22
DATE


WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: