Motor Veh. Acc. Indem. Corp. v BK Ent Inc.
2022 NY Slip Op 31841(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 451742/2019
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORP.,

Plaintiff,

- v -

BK ENT INC, ADE DAVID

Defendants.

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INDEX NO. 451742/2019

MOTION DATE 11/30/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiff Motor Vehicle Accident Indemnification Corporation brings this action against Defendants BK Ent Inc. ("BK"), a Pennsylvania Corporation, and Ade David, a resident of New York, seeking the reimbursement of $55,762.42 that it paid to nonparty Damian Romero in the aftermath of a motor vehicle accident occurring on March 23, 2018. Defendant Ade David was allegedly driving an uninsured truck owned by Defendant BK and struck Romero, causing him to sustain injuries.

Plaintiff commenced this action on September 23, 2019 and filed motion sequence 001 for default judgment, which is unopposed, on November 15, 2021. For the reasons that follow, the motion is denied.

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, NY County 2016], *quoting Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

BK Ent Inc.

Because BK Ent Inc. is allegedly a non-resident corporation with an address of 322 N. Shore Drive, Pittsburgh, Pennsylvania, Plaintiff attempted service pursuant to Vehicle and Traffic Law § 253 ("Service of summons on non-residents"). That provision requires service of the summons upon the Secretary of State and further provides that:

> notice of such service and a copy of the summons and complaint are forthwith sent by or on behalf of the plaintiff to the defendant by certified mail or registered mail with return receipt requested. The plaintiff shall file … [1] an affidavit of compliance herewith, [2] a copy of the summons and complaint, and [3] either
>
> [a.] a return receipt purporting to be signed by the defendant or a person qualified to receive his certified mail or registered mail, in accordance with the rules and customs of the post-office department; or,
>
> [b.] if acceptance was refused by the defendant or his agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by or on behalf of the plaintiff that notice of such mailing and refusal was forthwith sent to the defendant by ordinary mail; or,
>
> [c.] if the registered or certified letter was returned to the post office unclaimed, the original envelope bearing a notation by the postal authorities of such mailing and return, an affidavit by or on behalf of the plaintiff that the summons was posted again by ordinary mail and proof of mailing certificate of ordinary mail.
>
> … The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete when such papers are filed.

(VTL § 253.)

Here, Plaintiff submits one affidavit of service indicating that it served the Secretary of State on November 21, 2019 and sent a copy of the summons and complaint to the Pennsylvania address via Registered Mail # 9417911899561348307342, although it fails to note the date of such

mailing. (NYSCEF Doc No. 5.) This affidavit of service sworn on December 4, 2019 and filed with the court on December 12, 2019.

Plaintiff then filed an "amended affidavit of service" on December 31, 2019, which adheres to the same November 21, 2019 date of service upon the Secretary of State, but fails to clearly indicate how service of the second copy of the summons and complaint was sent. (NYSCEF Doc No. 6.) Plaintiff marked a box titled "Registered or". The box next to "1st Class Mail and Certified Mail" is unmarked, yet the blank next to it contains "#9417911899561155115406". The words "Return receipt" are then struck through, although "12/31/19" is written next to "Requested on".

Plaintiff then filed an affidavit of compliance with VTL 253 on February 14, 2020 (NYSCEF Doc No. 7), together with what appears to be a partial scan of an envelope sent via USPS First Class Mail with "RTS Not @ this address" written in the margin, and a certificate of additional mailing dated February 13, 2020. Plaintiff alleges that the postal authorities had marked the partial envelope with "RTS," to mean "return to sender," after it was unclaimed.

This is insufficient under VTL § 253, as "service is complete where a defendant is notified of the existence of the letter even though he sits passively by and does not claim it, or has actual notice of the mailing but refuses to accept it. In either case, the defendant is charged with notice of the letter." (*Nunez v Nunez*, 145 AD2d 347, 348 [1st Dept 1988]; *see also Zimmerman v Elsner*, 102 AD2d 707, 708 [1st Dept 1984] ["The statute, however, makes no specific provision for the return of the mailed process with notations, such as occurred in this case, of 'Addressee Unknown' 'Insufficient Address', etc. … the Legislature intended the term 'unclaimed' to cover a situation where the defendant is notified of the existence of the letter by the postal authorities but passively sits by and does not claim it."].)

Indeed, it makes little sense for Plaintiff to have received the USPS First Class Mail envelope (which, as an aside, is not registered or certified mail as required by the statute) with notation from the post office that Defendant was not at 322 N. Shore Drive, Pittsburgh, PA, only to send a second copy of the summons and complaint to the same address.

Finally, Plaintiff fails to provide the date on which it received the returned partial envelope, which date is required for compliance with the statute, as that is the date from which Plaintiff has 30 days to file all of the papers required. (VTL § 253 ["The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery *or the original envelope bearing a notation of refusal*, as the case may be, *is received by the plaintiff.* Service of process shall be complete when such papers are filed."].) Upon these errors, together with the "amended affidavit of service" which is confusing on its face, the court finds that Plaintiff fails to prove that service was proper upon BK.

Defendant Ade David

Plaintiff submits an affidavit of service indicating that a process server attempted service upon David on November 16, 2019, at 643 East 77th Street, Brooklyn, NY, by leaving a copy of the summons and complaint with "Jane Doe (Name Refused) (Co-Tenant)." (NYSCEF Doc No. 3.) A second copy of service was sent via mail to the same address.

The court finds this to be insufficient as well, as the affidavit of service fails to indicate the unit number of the building at which service was attempted. The police accident report submitted by Plaintiff provides that David resided in the basement unit of the building. Further, the mailing requirement of CPLR 308[2] requires that a copy of the summons and complaint be mailed to the Defendant's "last known residence". Here, the mailing was sent to the "above address", which was marked "dwelling house (usual place of abode)". (NYSCEF Doc No. 3.) "It is well settled

that the terms 'dwelling place' and 'usual place of abode' may not be equated with the 'last known residence' of a defendant for purposes of substituted service pursuant to CPLR 308[2]." (*Hamilton Equity Group, LLC v JNS Sources, Inc.*, 2014 WL 4796606 [Sup Ct, NY County 2014], *citing Cuomo v Cuomo*, 144 AD2d 331, 332 [2d Dept 1988].)

CPLR 3215[c]

Finally, the court notes that even if service were proper upon either Defendant, Plaintiff has failed to move for default judgment within the one-year period required by CPLR 3215[c]. Assuming that service was properly completed on David on November 18, 2019 and upon BK on February 14, 2020, their answers would have been due on December 18, 2019 and March 15, 2020, respectively. (CPLR 320[a].) Plaintiff, then, must have moved for default judgment as to those Defendants by December 18, 2020 and March 15, 2021. Plaintiff did not move for such relief until November 15, 2021. (NYSCEF Doc No. 12.)

Although Plaintiff conclusively asserts that this was caused by the law office failure of Plaintiff's former counsel (which was replaced by current counsel on July 16, 2021 [NYSCEF Doc No. 8]), this fails to "rise to the level of a reasonable excuse, as it was vague, conclusory, and unsubstantiated." (*Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 964 [2d Dept 2018].) Thus, pursuant to the language of CPLR 3215[c], which states that in the absence of good cause, the court "shall dismiss the complaint as abandoned," the court must dismiss this complaint. It is hereby

ORDERED that Plaintiff's motion sequence 001 for default judgment is denied; and it is further

ORDERED that the complaint is dismissed as abandoned, pursuant to CPLR 3215[c].

6/9/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE