

**230 Fifth Ave. Assoc. LLC v Tramar Inc.**

2022 NY Slip Op 32235(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 155931/2021

Judge: Louis L. Nock

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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. LOUIS NOCK** PART **38M**

*Justice*

-----X	INDEX NO.	155931/2021
230 FIFTH AVENUE ASSOCIATES LLC,		
		08/04/2021,
Plaintiff,	MOTION DATE	09/21/2021,
		10/01/2021
- v -	MOTION SEQ. NO.	001 002 003
TRAMAR INC., PERRY CROOKE		

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 16 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 17, 18, 19 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 20, 21, 22, 23, 24, 25 were read on this motion to/for DISMISS

Upon the foregoing documents, it is ORDERED that the motion of defendant Tramar Inc. to dismiss the complaint (Mot. Seq. No. 001) is denied, for the reasons set forth in plaintiff's opposition papers to the motion (NYSCEF Doc. No. 16). As set forth more specifically therein, the predicate notice provisions of the lease (NYSCEF Doc. No. 9, ¶ 17) do not apply where, as here, Tramar, Inc. is alleged to have defaulted in the payment of rent; and it is further

ORDERED that the motions to dismiss the complaint against defendant Perry Crooke for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) are consolidated and granted based on the following memorandum decision.

Plaintiff attempted to serve Crooke by nail and mail service pursuant to CPLR 308(4) in two different locations. CPLR 308(4) provides that where service cannot, with due diligence, be

made by personal delivery or delivery to a person of suitable age and discretion at a defendant's usual place of abode, dwelling place, or actual place of business followed by a mailing to the defendant, then service may be made by affixing a copy of the summons to the door of the defendant's usual place of abode, dwelling place, or actual place of business followed by a mailing to the defendant's last known residence or actual place of business. "[T]he due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008]). At minimum, the process server must make multiple attempts to deliver the summons in person on different days and at different times of day when the defendant or a person of suitable age and discretion are likely to be present (*see Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007]). Further, the process server must make some inquiry "to ascertain [the defendant's] whereabouts or [their] place of business" (*id.*).

Initially, plaintiff's process server attempted to serve Crooke at his residence, 3504 Out of Bounds Drive, Monroe, North Carolina five times before affixing the summons and complaint to the door: 10:35 AM and 6:40 PM on July 11, 2021, 9:36 AM and 6:56 PM on July 12, 2021, and 9:24 AM on July 13, 2021 (NYSCEF Doc. No. 3). The Court takes judicial notice of the fact that July 11, 2021 was a Sunday, and valid service on that day would have been impossible (General Business Law § 11 ["Service or execution of any process upon said day except as herein permitted is absolutely void for any and every purpose whatsoever"]). Both other days were weekdays, and the process server made no attempt to serve defendant in the morning prior to working hours. Further, their affidavit does not set forth that they made any inquiries as to defendant's whereabouts or his place of business prior to affixing the summons to the door. Accordingly, the process server did not satisfy the "due diligence" requirement necessary for

affix and mail service pursuant to CPLR 308(4) (*see Spath*, 36 AD3d at 413 [“The three previous attempts to serve Miller . . . were insufficient to satisfy the due diligence requirement. None of these attempts was made on a weekend, nor is there any indication that the process server made any inquiries to ascertain Miller's whereabouts or her place of business”])).

One month later, and following Crooke’s first motion to dismiss the complaint for lack of personal jurisdiction, plaintiff attempted to serve Crooke at the premises that are the subject of the instant action, claiming that the premises are Crooke’s actual place of business and again resorting to nail and mail service (NYSCEF Doc. No. 15). A person’s actual place of business “must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location” (*Selmani v City of New York*, 100 AD3d 861, 861 [2d Dept 2012]). Here, plaintiff’s leasing director admits in his affidavit in opposition to the motion that Crooke only visited the premises occasionally, and since the onset of the pandemic Crooke has not been present there at all (NYSCEF Doc. No. 18, ¶¶ 6-8). Additionally, the process server’s affidavit states that the premises were “completely empty and vacant” when he attempted service (NYSCEF Doc. No. 15, ¶¶ 1-3). Accordingly, the premises are not Crooke’s actual place of business and service upon him there is defective. Therefore, it is further

ORDERED that the motions of defendant Perry Crooke to dismiss the complaint herein are granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the defendant Tramar, Inc.; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

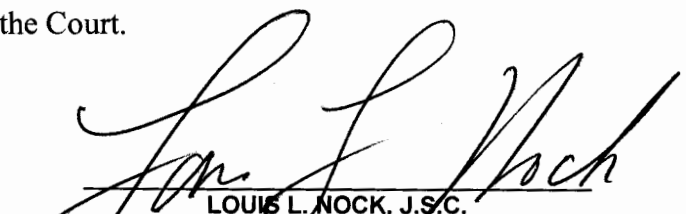
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)); and it is further

ORDERED that defendant Tramar Inc. shall serve an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel shall appear for a status conference in Room 1166, 111 Centre Street, on August 31, 2022 at 2:00 PM.

This constitutes the Decision and Order of the Court.

  
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LOUIS L. NOCK, J.S.C.

7/11/2022  
DATE

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