

Investors Bank v SISS 1468 Corp.
2022 NY Slip Op 32442(U)
July 21, 2022
Supreme Court, New York County
Docket Number: Index No. 656623/2020
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X INDEX NO. 656623/2020

INVESTORS BANK, MOTION DATE 08/09/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

SISS 1468 CORP., EDNA ARONOFF

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for EXTEND – TIME/JUDGMENT - DEFAULT

Upon the foregoing documents, the motion is denied per the following memorandum decision.

With regard to defendant Edna Aronoff (“Aronoff”), according to an affidavit of service filed with the motion, plaintiff Investors Bank (“Plaintiff”) attempted to serve defendant by affix and mail service pursuant to CPLR 308(4), which, as an initial matter was untimely. 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.*).

Here, plaintiff’s process server attests that they made five attempts to serve defendant Aronoff in person, at 9:47 AM and 6:21 P.M. on April 26, 2021, at 2:12 P.M. on April 27, 2021, at 1:23 PM on May 3, 2021, and at 10:06 A.M. on May 4, 2021 (NYSCEF Doc. No. 14). All four days were weekdays, and the process server made no attempt to serve defendant on the weekend or 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 her place of business prior to affixing the summons to the door of defendant Aronoff’s residence. 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”]). Since service of the summons and complaint was defective in two respects, plaintiff cannot satisfy its burden to submit proof of service before entry of a default judgment (CPLR 3215).

With regard to defendant SISS 1468 Corp. (“SISS”), plaintiff asserts six causes of action, all of which ultimately derive from defendants’ alleged breach of the promissory note and personal guaranty between the parties. A breach of contract claim requires evidence of the contract, plaintiff’s performance, defendant’s breach, and damages (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). “CPLR 3215 does not contemplate that default

judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Plaintiff submits the affidavit of Stephen Schwarz, its Assistant Vice President, who avers that he “personally reviewed the books of original entry of the plaintiff, [and] verified that a default has taken place under the applicable provisions of the loan agreement” (NYSCEF Doc. No. 7 at 1). However, the promissory note lists ten separate events of default, and neither the complaint nor Schwarz’s affidavit explain what SISS’s default was or when it took place. Further, and assuming that plaintiff means to allege that SISS defaulted on paying back the loan, for which Aronoff would be liable under the guaranty, plaintiff does not provide a payment ledger or any other evidence establishing the amount of defendants’ indebtedness. Accordingly, the motion must be denied against SISS as well.

Finally, plaintiff seeks an extension of time pursuant to CPLR 306-b to serve Aronoff, and to retroactively bless plaintiff’s attempted service on Aronoff by affix and mail service. While such service was defective, as set forth above, plaintiff establishes that it has made diligent efforts to serve Aronoff (NYSCEF Doc. No. 8, ¶¶ 6-7), and thus has shown good cause for an extension of time to serve her.

Accordingly, it is hereby

ORDERED that so much of plaintiff’s motion seeking entry of a default judgment is denied; and it is further

ORDERED that so much of plaintiff's motion for an extension of time to serve defendant Edna Aronoff is granted, and plaintiff's time to serve the summons, complaint, and any other necessary papers in this action is extended to September 19, 2022.

This constitutes the Decision and Order of the Court.

7/21/2022
DATE

Louis L. Nock
LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: