SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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BESEN PARTNERS LLC

Plaintiff,

- v -

36 WEST 128TH, LLC,

Defendant.

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INDEX NO. 652043/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL.

The branch of defendant's motion to dismiss is denied and plaintiff's cross-motion for default judgment is denied. However, the branch of defendant's motion for leave to file a late answer is granted.

Background

Plaintiff is a real estate broker and claims it had a contract with defendant, introduced a buyer to defendant, the buyer bought the building located at 36 West 128th Street in Manhattan and defendant cheated plaintiff out of a commission. Defendant claims various defenses that, if true, might defeat plaintiff's claims.

The merits are not before this Court at this time. Rather, defendant challenges jurisdiction and demands a traverse hearing, or in the alternative, seeks leave to file a late answer. Plaintiff cross-moves for a default judgment.

It is uncontested that, at the relevant time, Sean Tyroler was the registered agent for defendant and defendant's sole member, and the registered place for service was 520 East 76th

Street, #14E, New York, New York 10021 ("520 East").

Plaintiff's licensed process server swears in his affidavit of service that on May 4, 2022, he served the summons and complaint upon on the concierge at 520 East 76th Street, that before accepting service, the concierge called Mr. Tyroler, that Mr. Tyroler spoke to the concierge and to the process server and that Mr. Tyroler authorized the concierge to accept service on his behalf (NYSCEF Doc. No. 9). Plaintiff subsequently mailed a second copy of the summons and complaint to Mr. Tyroler at the 520 East address on June 1, 2022.

On June 24, 2022, plaintiff served a subpoena on Mr. Tyroler seeking a deposition and the production of documents relating to plaintiff's claim. Plaintiff followed up on this subpoena on July 20, 2022 by emailing Mr. Tyroler. Defendant claims this email was the first time he learned of the pending action against him. Defendant's first filing in the matter was this motion to dismiss, filed on September 27, 2022.

Defendant contends that plaintiff's service was improper because it served the concierge at 520 East who was not an appropriate agent to accept service for defendant. Defendant further claims that the telephone conversation that supposedly occurred between the concierge and Mr. Tyroler did not take place at all. Defendant requests a traverse hearing regarding the affidavit of service. In the alternative, defendant requests permission to file a late answer.

In response, plaintiff asserts that service was proper because 520 East was and continues to be the registered address for defendant's place of business. Additionally, plaintiff asserts it served Mr. Tyroler at the same address on June 1, 2022—giving Mr. Tyroler a second notice of the pending action against him. Plaintiff also cross-moves for a default judgment, contending that even if July 20, 2022 was the first time that defendant learned of the lawsuit, he still waited

until the end of September to file a response to the complaint, and such a late response precludes defendant's request to file a late answer.

Discussion

"On a motion to dismiss, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Besen v Farhadian*, 195 AD3d 548, 549, 151 NYS3d 31 [1st Dept 2021] [internal quotations and citations omitted]).

New York law recognizes that service left with a doorman is valid where building access is prohibited (*see F.I. Du Pont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 369 NYS2d 343 [1977] [finding that service with the doorman was appropriate because the process server could not go further beyond the entryway of the apartment]; *see also Rosenberg v Haddad*, 208 AD2d 468, 617 NYS2d 330 [1st Dept 1994] [holding that service left with a doorman followed by a mailing is valid]; *Al Fayed v Barak*, 39 AD3d 371, 833 NYS2d 500 [1st Dept 2007] [finding that service left with a doorman constitutes proper service when the server cannot access the building when the defendant is not at home).

Defendant's contentions that service was improper because the concierge was not an appropriate agent to accept service on the defendant's behalf does not justify granting the branch of the motion that seeks dismissal. The affidavit of service is a prima facie showing of proper service, but even if the phone call did not take place, as defendant asserts, a process server may

serve the doorman if a process server cannot go further than the lobby. Here, according to the process server, there was no reason to go past the lobby because the concierge accepted service.

In other words, process servers routinely effectuate service by leaving papers with the doorman or concierge. Defendant does not dispute that the process server went to the correct address or that plaintiff later mailed a copy of the commencing papers to this address. Under these circumstances, the fact that defendant's principal claims he never got actual notice is beside the point. Service on the doorman constitutes permissible service on a person of suitable age and discretion. Moreover, the Court points out that a traverse hearing is not warranted under these circumstances because there is no dispute that plaintiff's process server had the correct address and there is nothing, such as an affidavit from the doorman himself, to contradict the process server's affidavit.

Defendant's Late Answer and Plaintiff's Cross-Motion for a Default Judgment

A court has broad discretion to accept the filing of a late answer and public policy generally favors resolution of cases on the merits (*see Jones v 414 Equities LLC*, 57 AD3d 65, 866 NYS2d 165 [1st Dept 2008]). In an attempt to balance the discretion of the court, the First Department adopted several factors to consider before accepting the filing of a late answer which include "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense," (*Emigrant Bank v Rosabianca,* 156 AD3d 468, 472-3, 67 NYS3d 175 [1st Dept 2017][internal quotations and citations omitted].

Defendant seeks leave to file an answer more than 5 months after the initial filing of the complaint and about two months after receiving the email which it claims first alerted it to the

case. And in all that time, plaintiff never moved for a default – it only moved as a cross-motion after defendant made this motion. Clearly, if plaintiff truly was prejudiced by any delay, it would have not delayed the bringing of its default motion.

In sum, this Court determines that the most equitable resolution is to permit defendant to appear and answer the complaint.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted only to the extent that leave to file a late answer is granted and defendant shall file an answer pursuant to the CPLR; and it is further

ORDERED that plaintiff's cross-motion for default judgment is denied.

Next Conference: January 24, 2023 at 11:30 a.m.

By January 17, 2023, the parties must upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement and the respective parties' positions on the items to which they do not agree or 3) letters explaining why no agreement about discovery could be reached at all.

The failure to upload something by January 17, 2023 will result in an adjournment of the conference.

10/21/2022
DATE

ARLENE P. BLUTH, J.S.C.

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