

**State Farm Fire & Cas. Co. v Plasencia**

2023 NY Slip Op 32938(U)

August 23, 2023

Supreme Court, New York County

Docket Number: Index No. 154590/2022

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 L. NOCK **PART** **38M**

*Justice*

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STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

**INDEX NO.** 154590/2022

**MOTION DATE** 07/18/2023

**MOTION SEQ. NO.** 001

- v -

CHITARA PLASENCIA, DAVITA WASHINGTON, RAVEN JACKSON, WILRNEYES TORRES, AKE SERVICES, INC., ALTAI CORPORATION, BIG APPLE MEDICAL SERVICES, P.C., BIOMED PHARMACY, INC., COKA PHARMACY, LLC, EAST SIDE PT, P.C., FIVE STAR RX, INC., ORTHOSUPPLY 112 INC., PAIN RELIEF RX, INC., RX MASTERS, INC., SPINAL PAIN & REHAB MEDICAL, P.C., and WILKINS WILLIAMS MEDICAL, P.C.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, and 52

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

Upon the foregoing documents, it is ORDERED that the motion is denied as to defendants Chitara Plasencia and Wilrneyes Torres. An affidavit of service, originally filed on July 25, 2022, attests to attempted affix and mail service pursuant to CPLR 308(4) on said defendants. 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 avers that he made attempts to serve defendant Plasencia on July 11, 2022, at 5:45 PM and July 13, 2022, at 3:30 PM, before affixing the papers to the door of said defendant’s purported residence on July 14, 2022, at 2:15 PM (NYSCEF Doc. No. 18). Similarly, plaintiff’s process server avers that he made attempts to serve defendant Torres on July 9, 2022, at 2:30 PM and July 11, 2022, at 12:30 PM, before affixing the papers to the door of said defendant’s purported residence on July 13, 2022, at 12:30 PM (NYSCEF Doc. No. 19). None of these dates, save for the first attempt to serve defendant Torres, are on a weekend or outside normal business hours. Further, the process server’s affidavits do not set forth that they made any inquiries as to defendants’ then present whereabouts or their places of business prior to affixing the summons to the doors. 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”]). Proper service is necessary to establish personal jurisdiction, without which the Court cannot enter a default judgment (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 431 [1st Dept 2013]); and it is further

ORDERED that the motion is denied as to defendant Davita Washington. CPLR 308(2) provides that proof of service by delivery and mailing must be filed with the court within twenty days of the later of the two acts comprising service. Here, plaintiff served defendant Washington by delivery and mailing on June 16, 2022, but proof of service was filed on July 8, 2022, two days beyond the required date of July 6, 2022 (NYSCEF Doc. No. 8). The court, pursuant to CPLR 2004, deems such proof of service timely filed, *nunc pro tunc*. However, as the court may not retroactively place defendant Washington in default, she shall have 30 days to appear and answer the complaint in this action following service of a copy of this order with notice of entry (*First Fed. Sav. & Loan Assn. of Charleston v Tezzi*, 164 AD3d 758, 760 [2d Dept 2018]); and it is further

ORDERED that the motion is otherwise granted, on default and without opposition, for the reasons stated in the moving papers (NYSCEF Doc. Nos. 30, 35, 40) and the exhibits attached thereto, in which the court concurs; and it is further

ADJUDGED and DECLARED that STATE FARM FIRE AND CASUALTY COMPANY is not required to pay any No-Fault claims sums, monies, damages, awards and/or benefits to AKE SERVICES, INC, BIOMED PHARMACY, INC, COKA PHARMACY, LLC D/B/A MAYA PHARMACY, EAST SIDE PT, P.C., FIVE STAR RX, INC, RX MASTERS, INC, SPINAL PAIN & REHAB MEDICAL, P.C., and WILKINS WILLIAMS MEDICAL, P.C., arising from the September 20, 2021, collision under claim number 52-25Q8-04P, and any such lawsuits and/or arbitrations brought by said defendants are hereby dismissed in accordance with this order; and it is further

ORDERED that the action is severed and continued as to the remaining defendants.

This constitutes the decision and order of the court.



<u>8/23/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
<b>DATE</b>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE