Madison Mut. Ins. Co. v Caniff
2023 NY Slip Op 33336(U)
September 28, 2023
Supreme Court, Broome County
Docket Number: Index No. EFCA2022001039
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 14th day of July 2023.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

MADISON MUTUAL INSURANCE COMPANY
A/S/O TAREK ALAHAIM,

Plaintiff,

vs.

ELIZABETH CANIFF,

Defendant.

DECISION AND ORDER

Index No. EFCA2022001039

EUGENE D. FAUGHNAN, J.S.C.

Plaintiff has filed an *ex parte* motion for a default judgment pursuant to CPLR § 3215 in regard to the above matter. The summons and complaint were filed on June 7, 2022 and Plaintiff has submitted an affidavit of service sworn to on September 22, 2022 stating that service was effected by "nail and mail" service on that date. Plaintiff has also submitted proof of the additional mailing required under CPLR § 3215, and an attorney affirmation averring that Defendant has not interposed an Answer and the time for doing so has passed.

"'On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing.'" *Dupps v. Betancourt*, 99 AD3d 855, 855 (2nd Dept. 2012), *quoting Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 AD3d 649, 651 (2nd Dept. 2011); *see* CPLR 3215 (f). The plaintiff "bears the burden of establishing that personal jurisdiction over the defendant was acquired." *Greene*

Major Holdings, LLC v. Trailside at Hunter, LLC, 148 AD3d 1317, 1321 (3rd Dept. 2017) (citation omitted); *Eastern Sav. Bank, FSB v. Campbell*, 167 AD3d 712 (2nd Dept. 2018).

In this case, Plaintiff relies upon "nail and mail" service. As relevant here, CPLR § 308 permits personal service by 1) personal delivery, 2) delivery to a person of suitable age and discretion and follow up mail, or by "nail and mail" service. CPLR § 308(4) provides that:

> where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other.

Before resorting to nail and mail service, a plaintiff must show that service could not be made with due diligence under CPLR § 308(1) or (2). *Janko Pool Service, Inc. v. Berelson*, 145 AD2d 897 (3rd Dept. 1988); *see, Wilmington Sav. Fund Socy., FSB v. Zabrowsky,* 212 AD3d 866 (2nd Dept. 2023); *Estate of Waterman v. Jones*, 46 AD3d 63 (2nd Dept. 2007). "While the precise manner in which due diligence is to be accomplished is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed, given the reduced likelihood that a summons served pursuant to CPLR 308 (4) will be received. What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality." *Greene Major Holdings, LLC*, 148 AD3d at 1320-1321 (internal quotation marks and citations omitted). The facts of this case convince the Court that "due diligence" was not satisfied.

Plaintiff is an insurance company and issued a policy of insurance to Tarek Algahain for a multi-family residential building in Johnson City, New York. Defendant was a tenant in apartment 4 of the building and allegedly caused a kitchen fire to break out on February 15, 2021. Plaintiff paid $18,100.42 for damages caused by the fire, and then brought this action pursuant to its subrogation rights under the policy. In this motion, Plaintiff also included estimates and copies of checks issued for repair costs.

The affidavit of service from Dawn Kelsey indicates that she first attempted service on June 9, 2022, but there was no answer at the door and no vehicles were observed. Since this was

a multi-family building, it is curious that there were no vehicles, and no additional details were provided as to whether the building has off-street parking, or whether other tenants' vehicles might have been observed and identified. A second attempt at service was made on the following day, June 10, 2022 and the affidavit revealed that the current occupant, Ali, stated that the defendant <u>does not live at this location and moved one year ago</u>. Further, the process server indicated that Ali, is the building owner's son. Plaintiff made three more attempts in September 2022 to serve the summons and complaint. When service was unable to be effectuated, the process server resorted to nail and mail service, and mailed the summons and complaint to the Johnson City apartment address. The process server also stated that Defendant's residency was confirmed with USPS.

In this case, even after being advised that Defendant did not live at that location, Plaintiff continued efforts to serve at the same place. It is relevant to the Court that the person who provided the information that Defendant did not live there was the "owner's son." That would suggest that it was Mr. Algahaim's son, but it is possible that ownership of the building changed, such that the "owner's son" was not Mr. Algahaim's son. In any event, it does not appear to be a situation where the person was just saying that Defendant did not live there in an effort to assist Defendant in evading service.

"For the purpose of satisfying the 'due diligence' requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment." *Estate of Waterman v. Jones*, 46 AD3d at 66 (citation omitted); *Greene Major Holdings, LLC v. Trailside at Hunter, LLC*, 148 AD3d 1317. There is no indication that any efforts were made in that regard, such as inquiring of the current tenant or neighbors, or anyone else, if they know where Defendant could be located, if she was employed, or to determine Defendant's "home habits, comings and goings, whereabouts or ... place of work." *Bank of Am., N.A. v. Camacho*, 2023 NY Misc LEXIS 2746 (Sup. Ct., Kings County 2023). There is also no indication that the process server checked other easily available resources such as telephone listings, a Department of Motor Vehicle search (*see, e.g. Estate of Waterman, supra*), real property records in the County Clerk's Office, internet or social media searches, professional search companies, or other online resources, whether free and public, or paid subscription services. While the affidavit of service does state that a post office search was obtained (no documentation was submitted to confirm that), the Court finds that to be of limited

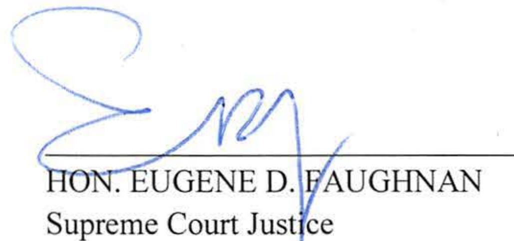
value in light of the affirmative, and contrary, evidence from the current tenant that Defendant does not live there. Therefore, the Court concludes that Plaintiff has not established due diligence permitting the use of nail and mail service and that the attempted service was defective as a matter of law.

Nail and mail service also requires that the summons and complaint be affixed to the door of the Defendant's actual place of business, dwelling place or usual place of abode. In light of the statement from the current tenant, Defendant did not live there, so the apartment was not Defendant's dwelling place or usual place of abode.

In light of Plaintiff's failure to provide valid proof of service, the Court has not obtained personal jurisdiction over Defendant. Therefore, default judgment cannot be granted to Defendant. The Court cannot dismiss the Complaint, *sua sponte*, against the Defendant, but the motion for default judgment must be DENIED.

IT IS SO ORDERED.

Dated: September 28, 2023
Binghamton, NY



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

cc: Judith Osburn, Chief Clerk, Supreme and County Court