

**Citizens Bank, N.A. v Home Tyles Inc**

2023 NY Slip Op 33411(U)

September 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 509454/2023

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 28<sup>th</sup> day of September 2023.

P R E S E N T:  
Honorable Reginald A. Boddie  
Justice, Supreme Court

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CITIZENS BANK, N.A.,

Plaintiff,

Index No. 509454/2023

-against-

Cal. No. 6, 7 MS 1, 2

HOME TYLES INC; MAYER BERKOWITZ; AND  
JOEL M. FISCHBEIN,

Defendants.

**Decision & Order**

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The following e-filed papers read herein:

MS 1  
MS 2

NYSCEF Doc Nos.  
16-22, 44-50  
23-40

Upon the foregoing papers, the motion by defendants Home Tyles Inc and Joel M. Fischbein (“defendants”) to dismiss the complaint and the motion by plaintiff for default judgment against defendant Mayer Berkowitz (“non-answering defendant”), are decided as follows:

Plaintiff commenced this action on March 28, 2023 seeking to enforce a commercial loan agreement and a credit card agreement. The agreements are personally guaranteed by the two individual defendants Mayer Berkowitz and Joel M. Fischbein. On May 5, 2023, defendants filed a motion to dismiss the complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). On August 3, 2023, plaintiff moved for default judgment against non-answering defendant Mayer Berkowitz.

In support of their motion to dismiss, defendants submit an affidavit from Joel M. Fischbein (“Fischbein”), who is also the manager of Home Tyles Inc. Fischbein argues that the process server claims to have spoken to his wife at their home on April 5, 2023, but only their teenage children were home at that time. Fischbein asserts that they were not home and never spoke with the process server. Additionally, Fischbein avers that the process server also attempted to serve Home Tyles Inc. at an address that turns out to be a postal service box, which is not authorized for service of process. Moreover, Fischbein contends that the correct process of service should be conducted on the Secretary of State. Defendants further submit a copy of the birth certificate of Fischbein’s daughter and information from the Secretary of State to support their claims.

In opposition, plaintiff asserts that it made multiple attempts to make sure defendants received the legal documents, as shown in multiple affidavits of service. In addition, plaintiff contends that defendants fail to allege that the papers given to Fischbein's teenage daughter was not passed on to Fischbein or that Fischbein never received the papers. Plaintiff submits that service was made at both Fischbein’s actual dwelling place and actual place of business, and defendants fail to rebut that Fischbein was served at his workplace on April 17, 2023. Moreover, plaintiff argues that defendants admit that serving Home Tyles Inc. through the Secretary of State is proper and fail to rebut that Home Tyles Inc. was served through the Secretary of State on April 6, 2023.

In support of its default judgment motion, plaintiff argues that it properly served Mayer Berkowitz on April 18, 2023, both at his home and workplace, as evidenced by the filed affidavits of service. Plaintiff alleges that although Berkowitz had twenty days to respond, he failed to do so even after more than thirty days. Plaintiff also alleges that Berkowitz is not a minor, mentally incapacitated, absent, or in the military. Because Berkowitz guaranteed the loan for Home Tyles,

Inc., who defaulted on the loan, plaintiff contends that a judgment of \$1,650,941.70, plus additional accruing costs should be entered against Berkowitz. Berkowitz failed to file opposition to plaintiff's motion.

### Discussion

An affidavit of service is prima facie evidence of proper service, and it is the burden of the party challenging service to rebut it (see *Citimortgage, Inc. v Bustamante*, 107 AD3d 752,753 [2d Dept 2013]; *Deutsche Bank Nat'l Trust Co. v Dixon*, 93 AD3d 630 [2d Dept 2012]; *Deutsche Nat'l Trust Co. v Hussain*, 78 AD3d 989 [2d Dept 2010]).

Here, defendants insufficiently rebut the presumption of proper service. Plaintiff effectuated service on Fischbein. Pursuant to CPLR 308, "personal service upon a natural person can be made by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his or her last known residence." Plaintiff attempted service upon Fischbein both at his dwelling and actual place of business. Fischbein submits his daughter's birth certificate but fails to explain how the certificate supports his claim of improper service. Fischbein also asserts that service at his home by delivering the papers to his wife was impossible, because he and his wife were not at home and that only their teenage daughter was at home. Presuming the truth of such statement, Fischbein fails to rebut the presumption of proper service at his actual place of business. Moreover, defendants admit that service was proper upon Home Tyles Inc. via Secretary of State. Based on the foregoing, defendants' motion to dismiss the complaint based on lack of proper service is denied.

With respect to plaintiff's motion for a default judgment, a movant must establish proper service of the motion, defaults by those parties, and the facts constituting movant's claim (CPLR 3215). Here, plaintiff demonstrated its entitlement to default judgment and Mayer Berkowitz failed to appear or oppose the motion. Accordingly, plaintiff's default judgment motion is granted. Inquest shall be held at the time of trial.

ENTER:



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Honorable Reginald A. Boddie  
Justice, Supreme Court