

**Maiden Lane Asset Mgr. LLC v Wall St. Psychologists
PLLC**

2023 NY Slip Op 33530(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 653921/2022

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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MAIDEN LANE ASSET MANAGER LLC, AS AGENT FOR
NK 80 MAIDEN OWNER LLC, WASSCO, LLC, AND MAPLE
80 MAIDEN MINORITY OWNER LLC,

Plaintiff,

INDEX NO. 653921/2022

MOTION DATE 04/28/2023

MOTION SEQ. NO. 001

- v -

WALL STREET PSYCHOLOGISTS PLLC, JOHN G.
GUINAN, CHEE CHAN

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the motion is denied for the reasons set forth in the opposition memorandum of law (NYSCEF Doc. No. 17) and the exhibits attached thereto, in which the court concurs, as summarized herein.

The proponent of a motion for default judgment must submit proof of the facts of the case, proof of proper service, and proof of the defendants' default in responding to the complaint (CPLR 3215[f]). 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]). Here, plaintiff has failed to provide proof of proper service, as service on all three defendants is defective. An affidavit of service upon defendant Wall Street Psychologists PLLC attests to what appears to be affix and mail substituted service (amended affidavits of service, NYSCEF Doc. No. 4 at 1). CPLR 311-a, which governs service on limited liability companies, provides for service by delivery to a member, manager, any other agent of

the LLC, and any other person authorized to accept service on the LLC (CPLR 311-a[a]). The statute does not provide for nail-and-mail service on an LLC.

As to defendants John G. Guinan and Chee Chan, affidavits of service filed by plaintiff attest 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, bearing the legend "personal and confidential." "[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 defendants Guinan and Chan on November 18, 2022, at 6:13 and 6:46 AM, and November 21, 2022, at 7:05 PM and 8:38 PM, respectively, before affixing the papers to the door of said defendants' purported residences on November 22, 2022, at 10:23 AM and 12:42 PM (amended affidavits of service, NYSCEF Doc. No. 4 at 2-3). None of the attempts at service were made on a weekend. The process server's affidavit also does 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”]). The court notes that defendants make this argument only on behalf of Chan, but the failure of due diligence is obvious from the face of the affidavit of service on Guinan

The court also notes further defects in service on the individual defendants. Guinan submits photographs of the front and back of the follow-up mailing he received, which show that the envelopes did not bear the legend “personal and confidential” (Guinan aff., NYSCEF Doc. No. 18, Exhibit B). Such omission is a jurisdictional defect (*Olsen v Haddad*, 187 AD2d 375, 376 [1st Dept 1992]). As to Chan, he attests that he sold the house at the address where plaintiff attempted service more than a year and a half beforehand, in January 2021 (Chan aff., NYSCEF Doc. No. 19, ¶ 8). He also states that he changed his address with both the United States Postal Service and the Department of Motor Vehicles (*id.*, ¶¶ 9-10). It is settled law that affixing process to the defendant’s last known residence does not satisfy the statutory requirement to affix process at defendant’s dwelling place or usual place of abode (*Feinstein v Bergner*, 48 NY2d 234, 239-240 [1979]). In view of the fact that plaintiff made no attempt to controvert these facts by submitting a reply brief, and the above discussed lack of due diligence prior to attempting affix and mail service, the court sees no need for a traverse hearing to confirm these facts.

The court also grants the individual defendants’ application to dismiss the complaint for failure to timely serve them. CPLR 306-b provides that “[i]f service is not made upon a

defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant.” Plaintiff filed its complaint on October 20, 2022, and its time to serve defendants expired on February 17, 2023, roughly seven and a half months ago. While defendant did not make a formal cross-motion pursuant to CPLR 2215 for such relief, instead including the request in its opposition memorandum, courts “retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215” (*Nelson v New York State Dept. of Motor Vehicles*, 188 AD3d 692, 694 [2d Dept 2020]; *accord Fox Wander W. Neighborhood Ass'n Inc. v Luther Forest Community Ass'n Inc.*, 178 AD2d 871, 872 [3d Dept 1991]). Plaintiff has plainly failed to timely serve the individual defendants, was on notice of the application, and made no attempt, either by opposition to the individual defendants’ application in a reply brief or by separate motion, to obtain an extension of time to serve. Under the circumstances, and in the interests of judicial economy, the court considers and grants the request.

Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the application to dismiss the complaint against defendant John G.

Guinan and Chee Chan pursuant to COLR 306-b is granted without opposition; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of said defendants dismissing the action; and it is further

ORDERED that the action is severed and continued as to defendant Wall Street Psychologists PLLC.

This constitutes the decision and order of the court.

Louis L. Nock

<u>10/5/2023</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE