

**Sulke v Muller**

2023 NY Slip Op 33536(U)

October 10, 2023

Supreme Court, New York County

Docket Number: Index No. 150023/2021

Judge: Eric Schumacher

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT: <u>HON. ERIC SCHUMACHER</u></b></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>PHILLIP SULKE,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>MARLON MULLER,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <span style="float: right;"><b>23M</b></span></p> <p><b>INDEX NO.</b> <u>150023/2021</u></p> <p><b>MOTION DATE</b> <u>10/10/2023</u></p> <p><b>MOTION SEQ. NO.</b> <u>002</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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**NYSCEF doc nos. 15-22 were read on this motion for an order directing the entry of a default judgment.**

Motion by plaintiff pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of plaintiff and against defendant denied.

**BACKGROUND**

Plaintiff commenced this action on January 4, 2021, by filing a summons and complaint. The complaint alleges that plaintiff is the owner of unit PH2 located at 142 Duane Street, New York, NY 10013 (hereinafter the unit) (NYSCEF doc no. 1 at 1). The complaint further alleges that defendant entered into a sublease agreement to rent the unit for a one-year period starting on September 15, 2019, and ending on September 30, 2020, at a rate of \$17,000.00 a month (*id.* at 3). The complaint further alleges that defendant was responsible for paying maintenance and utility fees and, in the event of a breach of the sublease agreement, attorney's fees (*id.* at 10-34). The complaint further alleges that when defendant timely vacated the unit, defendant owed plaintiff outstanding rent and additional fees (*id.* at 5).

The complaint sets forth three causes of action: (1) \$2,500.00 in outstanding rent for September 2020; (2) \$20,713.25 in additional maintenance and utility fees; and (3) no less than \$10,000.00 in attorney's fees (*id.* at 15, 30, 34).

On June 4, 2021, plaintiff moved in motion seq. no. 001 pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of plaintiff and against defendant. In support of that motion, plaintiff submitted an affidavit of merit, by Sulke, bearing the signature of a notary public registered in Salzburg, Germany<sup>1</sup> (NYSCEF doc no. 6 at 3-4). Plaintiff further submitted an affidavit of service stating that, on January 26, 2021, after the deponent was unable to find the recipient or a person of suitable age and discretion with due diligence, defendant was served with the summons and complaint by "nail and mail" service at 9901 Meriden Rd. Potomac, MD 20854, defendant's alleged residence (hereinafter the residence) (NYSCEF doc

<sup>1</sup> A portion of the signature block and most of the certification included are in German.

no. 3). The affidavit also stated that an additional copy of the summons and complaint was mailed to the residence.

Plaintiff further submitted affidavits of service stating that the notice of motion was mailed to the residence on: (1) March 1, 2021, by “mail” (NYSCEF doc no. 9); and (2) June 4, 2021, by “first-class mail” (NYSCEF doc no. 12).

In an order dated October 13, 2021, the prior motion court denied the motion for an order directing the entry of a default judgment in favor of plaintiff and against defendant (NYSCEF doc no. 13). The court found that plaintiff failed to submit: (1) a certificate of conformity pursuant to CPLR 2309(c); and (2) proof that defendant was served with an additional copy of the summons by first-class mail pursuant to CPLR 3215(g)(3)(i) (*id.*).

Now, plaintiff again moves in seq. no. 002 for the same relief and annexes an affidavit of merit, dated June 19, 2023, by Sulke. The affidavit states that Sulke is fully familiar with the facts and circumstances that gave rise to this lawsuit (aff of Sulke at 1). The affidavit bears the signature of a notary public qualified in Richmond County, New York (*id.* at 5). Plaintiff further submits an affidavit of service indicating that the notice of motion was mailed to the residence.

Plaintiff argues, in sum and substance, that defendant has failed to answer, appear, or otherwise respond to the complaint, and that the time to do so has expired.

## DISCUSSION

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against them.” On a motion pursuant to CPLR 3215, a plaintiff demonstrates entitlement to a default judgment by submitting proof of: (1) service of the summons and complaint; (2) the defendant’s default in answering, appearing, or otherwise responding to the complaint; (3) the facts constituting the claim; and (4) the amount due (see CPLR 3215[f]; Gordon Law Firm, P.C. v Premier DNA Corp., 205 AD3d 416, 417 [1st Dept 2022]; Gantt v N. Shore-LIJ Health Sys., 140 AD3d 418, 418 [1st Dept 2016]; Merchants Mut. Ins. Co. v Dunham Piping & Heating Corp., 203 AD3d 543, 544 [1st Dept 2022]).

The court finds based on the papers submitted that defendant has failed to answer, appear, or otherwise respond to the complaint. The court finds further that plaintiff has submitted adequate proof of the facts constituting the claims by means of the affidavit of merit. The court finds further that the “nail and mail” service on defendant was proper under CPLR 308(4).<sup>2</sup>

Where, as here, a default judgment based on nonappearance is sought against a natural person in an action based on nonpayment of a contractual obligation, CPLR 3215(g)(3)(i) provides that “an affidavit shall be submitted that additional notice has been given by or on

<sup>2</sup> “Nail and mail” service requires a showing that service pursuant to CPLR 308(1) or (2) was attempted with “due diligence” (see Brafman & Assoc., P.C. v Balkany, 190 AD3d 453, 453 [1st Dept 2021]). Here, the deponent attempted personal service at the residence on January 20, 22, and 26 of 2021, before resorting to “nail and mail” service, thus demonstrating the requisite due diligence (NYSCEF doc no. 18).

behalf of the plaintiff . . . by mailing a copy of the summons by first-class mail to the defendant at his place of residence . . .” (Bank of Am., N.A. v Diaz, 160 AD3d 457, 460 [1st Dept 2018]).

The court notes that the prior motion court cited to the March 1, 2021 affidavit of service for the proposition that plaintiff failed to establish that an additional copy of the summons was mailed to defendant by “first-class” mail (NYSCEF doc no. 13 at 3, citing NYSCEF doc no. 9). The court notes further that the prior motion court overlooked the June 4, 2021 affidavit of service, which states that an additional copy of the summons was mailed to defendant by “first-class” mail (NYSCEF doc no. 12). Here, plaintiff does not address whether either affidavit complies with CPLR 3215(g)(3)(i).<sup>3</sup>

The court holds that, under the current United States Postal Service (hereinafter USPS) mail scheme, an affidavit of service indicating that an additional copy of a summons was mailed to a defendant by letter or envelope through USPS, without more, nonetheless satisfies the notice requirement of CPLR 3215(g)(3)(i). USPS offers five types of mail services: (1) Priority Mail Express; (2) Priority Mail; (3) USPS Ground Advantage; (4) Media Mail; and (5) First-Class Mail (see USPS.com Mail & Shipping Services, <https://www.usps.com/ship/mail-shipping-services.htm> [last accessed October 3, 2023]). First-Class Mail is the default option for sending letters and envelopes and costs from \$0.66 for letters and from \$1.35 for large envelopes (see *id.*). Each of the other two letter and envelope mail services offered, Priority Mail Express and Priority Mail, are faster and more expensive than First-Class Mail (see *id.*). As the priority mail offerings are as fast or faster than First-Class Mail, the court holds that an affiant need not specify that a USPS mailing of a letter or envelope was sent “first-class” to satisfy the statute.

On review, the court finds that both the March 1, 2021 and the June 4, 2021 affidavits of service establish that an additional mailing of the moving papers, which include the summons, was sent by first-class mail to defendant (NYSCEF doc nos. 9, 12). The June 4, 2021 affidavit overlooked by the prior motion court explicitly references a “first-class” mailing, while the March 1, 2021 affidavit satisfies the “first-class” mailing requirement by indicating that an additional copy of the summons was mailed to defendant by USPS. As such, the court finds that plaintiff has established for the purposes of this motion that defendant was served by first-class mail in accordance with CPLR 3215(g)(3)(i).

Yet not all requirements of CPLR 3215(g)(3)(i) have been satisfied on the papers submitted. Pursuant to CPLR 3215(g)(3)(i), the additional copy of the summons must be mailed “in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt.” A plaintiff is not entitled to a default judgment where the plaintiff does not submit an affidavit indicating that the additional notice was mailed in an envelope marked personal and confidential (see 231st Riverdale LLC v 7 Star Home Furniture Inc., 198 AD3d 524, 525 [1st Dept 2021]).

<sup>3</sup> Plaintiff now submits updated affidavits along with New York-based notarizations. This court notes, contrary to the finding of the prior motion court, that the absence of a certificate of conformity is not a fatal defect (see Wager Estate of Cordaro v Rao, 178 AD3d 434, 435 [1st Dept 2019]). “As long as the oath is duly given, authentication of the oathgiver’s authority can be secured later, and given nunc pro tunc effect if necessary” (Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda., 68 AD3d 672, 673 [1st Dept 2009]). The time for this correction would be upon a party raising the issue, not the court sua sponte (see Midfirst Bank v Agho, 121 AD3d 343, 352 [2d Dept 2014]).

Here, none of the affidavits of service pertaining to the notices of motion in seq. nos. 001 and 002 indicate that an additional copy of the summons was mailed to the residence in an envelope marked personal and confidential (see NYSCEF doc nos. 9, 12, 22). In contrast, the affidavit of service of process pursuant to CPLR 308(4) indicates that the summons was mailed to the residence in an envelope bearing “the [l]egend ‘Personal & Confidential’ and did not indicate on the outside thereof, by return address or otherwise, that the communication was from an attorney or concerned an action against the defendant” (NYSCEF doc no. 3 at 1).

As this mailing was part of the original service of process under CPLR 308(4), it cannot constitute an additional mailing pursuant to CPLR 3215(g)(3)(i)<sup>4</sup> and thus cannot save what is otherwise a satisfactory default judgment application. Rather, plaintiff has failed again to establish that an additional mailing of the summons was sent to defendant by means of strict compliance with CPLR 3215(g)(3)(i).


**CONCLUSION**

Accordingly, it is

ORDERED that the motion by plaintiff pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of plaintiff and against defendant is denied.

The foregoing constitutes the decision and order of the court.

10/10/2023  
DATE

  
ERIC SCHUMACHER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT

<sup>4</sup> In the context of a CPLR 3215(g)(3)(i) analysis, the additional copy of the summons submitted in satisfaction of that requirement may never be the mailing component of service of process pursuant to CPLR 308(2) or (4) or the like, but rather must be a separate, subsequent mailing (see Hon. Mark C. Dillon, Supplementary Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3215:25; see also *Orix Fin. Servs., Inc. v Baker*, 1 Misc 3d 288, 292 [Sup Ct, NY County 2003, Solomon, J.] [opining that notice pursuant to CPLR 3215[g][3][i] is not a substitute for proper service but is intended to be an additional notice before default judgment is entered]).