

W & W Grocery Store, Inc. v NMEE Realty Corp.

2024 NY Slip Op 30158(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 159817/2021

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 159817/2021

W & W GROCERY STORE, INC, U TWT, INC, ZHONG YI
WANG

MOTION DATE 04/07/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

NMEE REALTY CORP, GRAND PROPERTY
ACQUISITIONS LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

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

Upon the foregoing documents, and after oral argument which occurred on October 10, 2023 with Jie Tan, Ph.D, Esq. appearing for Plaintiffs W & W Grocery Store, Inc., U TWT, Inc., and Zhong Yi Wang (“Plaintiffs”), Richard A. Klass, Esq. appearing for Defendant NMEE Realty Corp. (“NMEE”), and Defendant Grand Property Acquisitions LLC (“Grand Property”) (together with NMEE, “Defendants”) failing to appear, Plaintiffs’ motion for entry of a default judgment in favor of Plaintiffs and against NMEE is denied. NMEE’s cross-motion for an Order dismissing Plaintiffs’ claims against NMEE for lack of personal jurisdiction, is granted.

I. Background

Plaintiffs commenced this action by filing a Summons and Complaint against Defendants on October 28, 2021 (NYSCEF Doc. 1) concerning a commercial lease dispute regarding 301 Grand Street, New York (the “Premises”). NMEE was Plaintiffs’ landlord at the Premises pursuant to a 10-year lease running from November 1, 2011 to October 31, 2021 (the “Lease”) (NYSCEF Doc. 47 at ¶ 2). On May 6, 2021, NMEE sold the Premises to Grand Property and

assigned Grand Property its rights under the Lease (NYSCEF Doc. 47 at ¶ 9). Defendant Grant Property filed an Answer to Plaintiffs' Complaint dated July 27, 2022 (NYSCEF Doc. 14).

On April 7, 2023, Plaintiffs brought the instant motion for entry of a default judgment in favor of Plaintiffs and against NMEE, alleging that NMEE has failed to appear in this action despite its time for doing so having expired (NSYCEF Doc. 47). In lieu of opposing Plaintiffs' motion for default judgment, on April 18, 2023 NMEE filed a cross-motion to dismiss Plaintiffs' action against NMEE on the ground that because Plaintiffs failed to effectuate service upon NMEE within the 120 day time limit imposed by CPLR 306(b), this Court lacks personal jurisdiction over NMEE.

NMEE's cross-motion to dismiss is not opposed.

II. Discussion

a. Plaintiffs' Claims against Defendant NMEE are Dismissed for Lack of Personal Jurisdiction

Pursuant to CPLR 3211(a)(8), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the court has not jurisdiction of the person of the defendant." CPLR 306(b) states that "[w]henver service is made pursuant to this article by delivery of the summons to an individual, proof of service shall also include, in addition to any other requirement, a description of the person to whom it was so delivered, including, but not limited to, sex, color of skin, hair color, approximate age, apriximate weight and height, and other identifying features."

It is well established that, pursuant to CPLR 306(b), a complaint should be dismissed for lack of personal jurisdiction where "plaintiff failed to serve defendant within 120 days after commencement of the action and failed to show that its time for service should be extended for

good cause or in the interests of justice” (*Goldstein Group Holding, Inc. v 310 E. 4th St. Hous. Dev. Fund Corp.*, 154 AD3d 458 [1st Dept 2017]).

As Plaintiffs commenced this action on October 28, 2021, pursuant to CPLR 306(b), Plaintiffs were required to prove service upon NMEE on or before February 25, 2022.

Here, Plaintiffs filed Affidavits of Due Diligence dated December 31, 2021 (NYSCEF Doc. 4) and November 23, 2021 (NYSCEF Doc. 5), evidencing attempted service upon NMEE. Additionally, on September 27, 2022, more than six months passed the deadline imposed by CPLR 306(b), Plaintiffs filed an Affidavit of Service evidencing service of the Notice of Electronic Filing, Summons, Complaint, Notice of Motion for Entry of Default Judgment, and Motion for Entry of Default Judgment upon NMEE via the Secretary of State on September 23, 2022 (NYSCEF Doc. 38).

As Plaintiffs failed to serve NMEE within 120 days after Plaintiffs’ commencement of this action, and, in declining to oppose NMEE’s cross-motion, failed to show that their time for service should be extended for good cause or in the interest of justice, dismissal of Plaintiffs’ claims against NMEE for lack of personal jurisdiction is proper.

As Plaintiffs’ claims against NMEE are dismissed for this Court’s lack of personal jurisdiction over NMEE, Plaintiffs’ motion for entry of a default judgment in favor of Plaintiffs and against NMEE is denied in its entirety.

Accordingly, it is hereby,

ORDERED that Plaintiffs W & W Grocery Store, Inc., U TWT, Inc., and Zhong Yi Wang’s motion for default judgment against Defendant NMEE Realty Corp. is denied; and it is further

ORDERED that Defendant NMEE Realty Corp.'s cross-motion to dismiss Plaintiffs' claims as against Defendant NMEE Realty Corp. is granted; and it is further

ORDERED that on or before March 5, 2024, the remaining parties in this case shall submit a proposed Preliminary Conference Order by e-mail to SFC-Part33-Clerk@nycourts.gov. In the event the parties are unable to agree to a proposed Preliminary Conference Order, the parties are directed to appear for a preliminary conference in person at 60 Centre Street, Room 442, New York, New York 10007, at 9:30 a.m. on March 6, 2024; and it is further

ORDERED that within ten (10) days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order with notice of entry on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

1/12/2024 DATE					<i>Mary V Rosado JSC</i> HON. MARY V. ROSADO, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input 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