SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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AMK CAPITAL CORP., AS AGENT, OF KAPCO INDUSTRIES, INC.,

Plaintiff(s),

- against -

CIFRE REALTY CORP., AS MORTGAGOR; ADAM PLOTCH, AS RECORD OWNER BY REFEREE'S DEED RECORDED IN CRFN 2011000318280 UNDER CONDOMINIUM ASSOCIATION FORECLOSURE ACTION BRONX CO. INDEX NO. 381425/09; BOARD OF MANAGERS OF THE PARKCHESTER NORTH CONDOMINIUM ASSOCIATION; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE; DOMONIQUE MORRISON,

Defendant(s).

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DECISION AND ORDER

Index No: 32374/17E

In this action to foreclose a mortgage and sell the real property which it encumbers, defendant ADAM PLOTCH (Plotch) moved for an order pursuant to CPLR § 5015(a)(4) vacating the Court's judgment of foreclosure and sale dated November 26, 2018 and dismissing this action pursuant to CPLR § 3211(a)(8). On November 27, 2023, this Court granted the foregoing application solely to the extent of ordering a traverse hearing to resolve the issue of service of the summons and complaint in this action upon Plotch.

After a traverse hearing held on February 26, 2024, Plotch's application seeking vacatur of the foregoing judgment pursuant to CPLR § 5015(a)(4) for want of personal jurisdiction and dismissing the complaint pursuant to CPLR § 3211(a)(8) for the same reason, is denied.

According to the complaint, filed on June 23, 2017, this action is for foreclosure on a mortgage and the sale of the property which secures the corresponding promissory note. The complaint alleges that on May 12, 2005, defendant CIFRE REALTY CORP. (Cifre) executed a note wherein it agreed to repay a loan totaling $50,000 to plaintiff AMK CAPITAL CORP. (AMK). In order to secure the note Cifre executed a mortgage, wherein Cifre pledged the premises located at 1651 Metropolitan Avenue, Unit #3C, Bronx, NY (3C), as security for the note. AMK assigned the note and mortgage to plaintiff Kapco Industries. On May 7, 2007, in connection with refinancing the note, Cifre executed a gap mortgage note, wherein Cifre agreed to repay a new loan totaling $75,000. In connection with the gap mortgage note, Cifre executed a gap mortgage, wherein it pledged 3C as security for the gap mortgage note. On the same day, the parties executed a consolidation and extension agreement wherein the notes and mortgages were combined to evince a single loan totaling $125,000. On July 6, 2009, the Board of Managers of the Condominium Association (Board of Managers), a condominium board at 3C elected to foreclose a lien

for unpaid common charges due from Cifre and totaling $5,253.20. On July 28, 2010, a final judgment of foreclosure and sale totaling $15,043.67 was entered in favor of the Board of Managers, which indicated that when 3C was sold, such sale would be subject to the mortgage given to plaintiff. On March 7, 2011, 3C was sold at auction to Plotch for $10,000. Plotch executed a memorandum of sale, which indicated that the sale to Plotch was subject to plaintiff's mortgage, converted to a lien by virtue of the sale, and totaled $125,000. On August 9, 2011, Plotch accepted title to 3C by referee's deed, which indicated that the sale to Plotch was subject to plaintiff's mortgage, converted to a lien by virtue of the sale, and totaling $125,000. On September 26, 2011, Plotch commenced an action seeking to quiet title to 3C thereby barring plaintiff from foreclosing on its mortgage lien. The foregoing action was dismissed. The mortgage to Cifre has matured, remains unpaid, Cifre has been dissolved by the New York State Secretary of State, and plaintiff holds and owns both the note and mortgage. Based on the foregoing, plaintiff interposes a cause of action seeking to foreclose on the mortgage and sell 3C.

On May 21, 2018, the Court (Thompson, J.) granted plaintiff's application seeking the entry of default judgment against all defendants since they had failed to appear and/or interpose answers. The Court also issued an order of reference.

On November 27, 2018, the Court (Gonzalez, J.) granted plaintiff's application seeking the entry of a judgment of foreclosure and sale, authorizing the sale of 3C.

On March 28, 2019, Sergio Marquez created and filed a report, evincing that 3C was sold at auction to nonparty Jingli Qu (Qu) for $175,000. Thereafter, on August 20, 2019, Qu sold 3C to defendants[1] MAGDY MIKHAIL (MM) and OLGA GARCIA-MIKHAIL (OGM).

Standard of Review

It is well settled that "in a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]; *see Ning Xiang Liu v Al Ming Chen*, 133 AD3d 644, 644 [2d Dept 2015]). Moreover,

> [a] judicial factfinder should make credibility determinations on the basis of demeanor, forthrightness in answering, consistency or lack thereof in the account being given, interest in the outcome and other relevant considerations

(*Gass v Gass*, 42 AD3d 393, 401 [1st Dept 2007]). Absent conclusions that cannot be supported by any fair interpretation of

[1] On May 16, 2023, the Court (Gonzalez, J.) granted MM and OGM's application to intervene as defendants in this action and on November 27, 2023, this Court amended the caption to reflect the same.

the evidence, a judgment rendered after a bench trial should not be disturbed (*Saperstein v Lewenberg*, 11 AD3d 289, 289 [1st Dept 2004]).

Applicable Law

CPLR § 5015(a)(4) authorizes a court to vacate a judgment when the same is obtained despite a "lack of jurisdiction to render the judgment or order" (CPLR § 5015[a][4]). The proponent of a motion to vacate a judgment for want of jurisdiction must establish either that the party to whom a judgment was granted failed to obtain personal jurisdiction over him or her (*Toyota Motor Credit Corp. v Hardware Lam*, 93 AD3d 713, 713 [2d Dept 2012]; *Hossain v Fab Cab Corp.*, 57 AD3d 484, 485 [2d Dept 2008]), or that the court lacked the requisite subject matter jurisdiction to render judgment (*Lacks v Lacks*, 41 NY2d 71, 77 [1976]; *HSBC Bank USA, N.A. v Ashley*, 104 AD3d 975, 976 [2d Dept 2013]).

It is well settled that a motion to dismiss for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) will be granted when it is established that service of process upon a defendant was improper (*Feinstein v Bergner*, 48 NY2d 234, 234-235 [1979] [Court dismissed complaint for lack of personal jurisdiction when defendant was served with process by nail and mail service at an address where defendant no longer resided.]; *West v Doctor's Hospital*, 198 AD2d 92, 92 [1st Dept 1993] [Court granted motion to

dismiss for want of personal jurisdiction, holding that service was improper when summons and complaint were left with someone on the 14th floor, rather than the 8th floor - the floor where defendant maintained his office.]; *O'Connell v Post*, 27 AD3d 630, 630-631[2d Dept 2006] [Court granted motion to dismiss for lack of personal jurisdiction holding that service was improper when plaintiff resorted to nail and mail service without attempting to serve defendant at his place of business]), or where the evidence establishes that defendant was never served at all (*Cooper v Bao Thao*, 162 AD3d 980, 981 [2d Dept 2018] ["Furthermore, insofar as the plaintiff acknowledges that Thao was never served with process, that branch of the defendants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against Thao for lack of personal jurisdiction was properly granted" (internal citations omitted).]; *DeCurzio v T.S.S. Seedman's Inc.*, 115 AD2d 585 [2d Dept 1985] ["Since plaintiff has never claimed to have effected service upon or acquired personal jurisdiction over defendant DiMasi, the complaint insofar as it is asserted against him should have been dismissed."]). The burden of establishing personal jurisdiction and proper service rests with the plaintiff (*Frankel* at 659; *Torres* at 464).

At a traverse hearing, plaintiff bears the burden of establishing service upon the defendant (*Chaudry Const. Corp. v James G. Kalpakis & Assoc.*, 60 AD3d 544, 545 [1st Dept 2009];

Schorr v Persaud, 51 AD3d 519, 519–20 [1st Dept 2008]). Moreover, at the hearing, the trial court can resolve issues of credibility, such resolution is accorded great deference, and absent a determination that it is against the weight of the evidence, cannot be disturbed on appeal (*McCray v Petrini*, 212 AD2d 676, 676 [2d Dept 1995]; *Avakian v De Los Santos*, 183 AD2d 687, 688 [2d Dept 1992]).

In New York City, all process servers who engage in service of process on five or more occasions must be licensed by the New York City Department of Consumer Affairs (New York City, N.Y., Code § 20-404). § 20-404(a) defines a process server as

> a person engaged in the business of serving or one who purports to serve or one who serves personally or by substituted service upon any person, corporation, governmental or political subdivision or agency, a summons, subpoena, notice, citation or other process, directing an appearance or response to a legal action, legal proceeding or administrative proceedings.

In addition, New York City, N.Y., Code § 20-403 imposes a licensing requirement upon process servers and states that "[i]t shall be unlawful for any person to be employed as or perform the services of process server without a license therefor."

General Business Law (GBL) § 89-cc mandates that all process servers keep a record of the process they serve and in New York City Civil Court, 22 NYCRR 208.29 mandates that when a process

server is called to testify at a traverse hearing he/she is required to bring all records in his/her possession related to service. Notably, the Uniform Court Rules impose no corresponding mandate upon process servers testifying at a traverse hearing in Supreme Court. Thus, in Supreme Court, a process server is only required to keep the records prescribed by GBL § 89-cc and there is no rule requiring that the records be brought to court. Significantly, in Supreme Court, case law, which will be discussed below does require the proffer of a process server's records at a hearing in the absence of the process server's independent recollection of service.

Pursuant to GBL § 89-cc a process server is required to maintain a logbook (GBL § 89cc[1]) and such logbook must include

> the title of the action or a reasonable abbreviation thereof . . . the name of the person served, if known . . . the date and approximate time service was effected . . . the address where service was effected . . . the nature of the papers served . . . the court in which the action has been commenced . . . the index number of the action, if known . . . if service is effectuated pursuant to subdivision four of section three hundred eight of the civil practice law and rules or subdivision one of section seven hundred thirty-five of the real property actions and proceedings law, a description of the color of the door to which the summons is affixed . . . the process serving agency from whom the process served was received, if any . . . type of service effected whether personal, substituted or conspicuous . .

> . if service is effected pursuant to subdivision one, two or three of section three hundred eight of the civil practice law and rules, the record shall also include the description of the person served, including, but not limited to sex, color of skin, hair color, approximate age, height and weight and other identifying features . . . if service is effected pursuant to subdivision four of section three hundred eight of the civil practice law and rules, the record shall also include the dates, addresses and time of attempted service pursuant to subdivision one, two or three of such section . . . if the process server files an affidavit of service with the court, his record shall include the date of such filing

(GBL 89-cc[2][a]-[m]).

The foregoing rules

> were designed to combat a continuing and pervasive problem of unscrupulous service practices by licensed process servers. These practices deprive defendants of their day in court and lead to fraudulent default judgments. Often associated with consumer debt collection and landlord-tenant litigation, questionable service practices have their greatest impact on those who are poor and least capable of obtaining relief from the consequences of an improperly imposed default judgment. Accordingly, the Department of Consumer Affairs must depend on the accurate record-keeping practices of its licensees as a means of monitoring the industry and uncovering wrongful practices. Petitioner's repeated disregard for the strictures of the agency's record-keeping provisions was a direct violation of the terms of his license and, further, was antithetical to the regulatory goal of assuring honest service practices

(*Barr v Dept. of Consumer Affairs of City of New York*, 70 NY2d 821, 822-823 [1987]).

Generally, as a matter of law, a process server who lacks an independent recollection of effectuating service upon the defendant at issue and where the same's logbook evincing such service is neither brought to the hearing or introduced into evidence fails to establish service upon a defendant (*Sperry Assoc. Fed. Credit Union v John*, 160 AD3d 1007, 1009 [2d Dept 2018 ["At a hearing on the validity of service of process, the plaintiff bears the burden of proving personal jurisdiction by a preponderance of the evidence. The plaintiff failed to meet that burden. Where a process server has no independent recollection of events, a process server's logbook may be admitted in evidence as a business record. Here, however, the logbook was not produced in court or introduced in evidence. Thus, there was no evidence—other than the process server's description of a business record not before the court, which the process server claimed he was unable to locate—to support the claim that service occurred at 7:05 p.m., when the person who allegedly received the papers was present to receive them" (internal citations omitted).] *cf. Gilmore v Tindel*, 210 AD2d 1, 1 [1st Dept 1994] ["Moreover, the process server's log book was properly admitted into evidence as a business record, despite his failure to recall the specific events which occurred on the date that process was served."]).

Significantly, however, since the lynchpin to personal jurisdiction is due service in accordance with the CPLR, the failure to strictly comply with rules governing the service of process by process servers is not, by itself, sufficient to find the absence of personal jurisdiction so as to warrant dismissal of the complaint (*AMB Fund III New York III & IV, LLC v WWTL Logistics, Inc.*, 35 Misc 3d 8, 11 [App Term 2012] ["In the instant case, tenant's general manager conceded that the subject papers were delivered to him by the process server. Thus, the sole factual issue to be determined at this traverse hearing, as discussed above, was whether delivery of the notice of petition and petition to tenant's general manager constituted personal service upon tenant pursuant to CPLR 311(a)(1). The information that General Business Law § 89-cc (2) requires a process server's records to contain, such as the date and time of service, the nature of the papers served and the name and physical description of the individual served, would not have aided in resolving that issue. Consequently, we find no basis, under the circumstances presented, to dismiss the petition on the ground that the process server had failed to comply with Uniform Rules for New York City Civil Court (22 NYCRR) § 208.29, and, thus, we need not reach the larger question of whether a process server's failure to comply with section 208.29 is ever, standing alone, a proper ground to dismiss a complaint or petition."]).

Nevertheless, trial courts have routinely declined to credit a process server's testimony regarding service when the witness fails to keep records in accordance with the statutory requirements (*Barr* at 822-823), fails to bring all papers - such as his logbook - related to the service at issue to a traverse hearing (*First Commercial Bank of Memphis, N.A. v Ndiaye*, 189 Misc 2d 523, 526 [Sup Ct 2001]; *Masaryk Towers Corp. v Vance*, 12 Misc 3d 1172(A), *9 [Civ Ct 2006]; *Borges v Entra Am., Inc.*, 7 Misc 3d 1032(A) [Civ Ct 2005]), or fails to demonstrate that he was properly licensed (*Borges* at *6).

The rationale underpinning the decision not to credit a process server who fails to comply with the statutory record keeping requirement is simply one of memory - which is lost over time. It is a recognition that memory fades with time and, as such, reliance upon proper records is paramount. This is particularly true of process servers who normally engage in the service of many items in their day-to-day employment and for whom there exist many months between service and being called upon to testify regarding a particular instance of service (*Masaryk* at *9). Accordingly, proper record keeping is essential to ensure accuracy (*id.*). In *First Commercial of Memphis*, the court stated that

> [m]any months passed between the time of alleged service and the traverse hearing. The unaided memory of the process server, who may have served hundreds of people in the interim, is unreliable. The plaintiff has the burden of proving jurisdiction by

> a preponderance of credible evidence. In this case, the plaintiff has not met this burden in producing a process server whose records do not conform with statutory requirements

(*id.* at 526).

Nevertheless, even in New York City Civil Court, where the rules impose a requirement upon the process server as it relates to his records, pursuant to 22 NYCRR 208.1(b), the court can waive compliance with any of the Uniform Rules for the New York State Trial Courts when good cause is shown. However, to the extent that there exists strong public policy to support the rules and regulations governing service of process, strict compliance with said rules is required. As such, the court shall not waive the documentary requirements imposed upon process servers by 22 NYCRR 208.29 (*Inter-Ocean Realty Assoc. v JSA Realty Corp.*, 152 Misc 2d 901, 903 [Civ Ct 1991] [Court declined to credit process server's testimony when he failed to bring his logbook to the traverse hearing. Court concluded that his excuse for failure to bring logbook, namely, that it had been stolen, was unsubstantiated with corroborating evidence.]).

While this Court is not subject to rules imposing an obligation upon a process server and his records at a hearing, this Court nevertheless imposes the same burdens promulgated by 22 NYCRR 208.29. Indeed, as noted above, in the absence of contemporaneous records evincing service, how can a process server, who serves

hundreds of people per year, credibly establish an instance of service years after the fact.

Discussion

Upon consideration of all the evidence offered at the traverse hearing, the Court finds that plaintiff credibly established that Plotch was duly served with the summons and complaint in this action pursuant to CPLR § 308(2), when the same was left at his home with someone of suitable age and discretion.

At the hearing, MM and OGM elicited testimony from Gerard Scully (Scully), a licensed process server, who testified, in pertinent part as follows. Scully is employed by Alstate Process Service, Inc. (Alstate), as a process server, and has been in Alstate's employ since 1999. Scully is licensed to serve process in New York City and in his career has served legal documents upon individuals approximately 80,000 - to 100,000 times. Since 1999, Scully has worked six days per week and performs service several times each day; on some days, serving as many as 50 people. In 2017, he was retained to serve the summons and complaint in this action upon Plotch, who he had served with process in other cases. On August 2, 2017, he reported to 95 West 95th Street, New York, NY (95), the address that he understood to be Plotch's home. Upon arriving at 95, he realized that he was not provided with Plotch's apartment number, which given the number of apartments at 95, he would need to effectuate service. Scully performed a search on

Google and ascertained that Plotch resided in apartment 29E (29E). Scully also took a photograph of the outside of 95 prior to entering which contained information such as the date, time and GPS coordinates. Upon entering 95, Scully informed the doorman that he was there to serve Plotch with legal papers and was allowed to go upstairs. Scully then went to 29E, which had a green door and which he believes must have had the apartment number displayed thereon, and knocked on the door. A lady answered and when Scully told her that he was looking for Plotch to serve papers upon him, the lady took the papers and acknowledged that she was Plotch's wife. Scully could not recall whether the lady had an accent but to the extent he communicated with her, Scully testified that the person spoke English. After he served the papers upon Plotch, as he was leaving, Scully memorialized the details of the service he had just performed by making notes about the same on his work sheet. At some point thereafter, Scully imputed the same information into his logbook. If the person upon whom he served the papers for Plotch was wearing glasses, it was his custom and practice to note the same in his notes and logbook. Similarly, while he cannot recall if the person served actually represented that she was Plotch's wife, if he wrote it down after the fact, per his custom and practice, such information must have been conveyed to him. The details of his service were then uploaded to a third-party service and Alstate used the information to create an

affidavit of service. Alstate then provided a pre-addressed envelope with Plotch's address, into which Scully inserted the summons and complaint, and thereafter, Sculy took the same to the post office for mailing. Thereafter, Scully, after being sworn, signed the affidavit of service upon Plotch, along with others, in front of a notary. Scully testified that he was certain that he served a person who opened the door to 29E and not someone in the hallway.

MM and OGM submitted several items into evidence, three upon Plotch's consent and one over his objection.

Exhibit 1 is a copy of Scully's licenses to serve process, whose admission into evidence was on consent of the parties. One license evinces that it was set to expire on February 28, 2018 and the other was to expire on February 28, 2024. Both licenses were issued by the New York City Department of Consumer Affairs.

Exhibit 2 is a multi-page exhibit comprised of six pages, which was admitted into evidence over Plotch's objection[2]. The

[2] Generally, records are admissible as business records for consideration at trial or on a motion upon a proper foundation that the same are business records - namely, that (1) the record were made in the regular course of business; (2) it is the regular course of business to make said record; and (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). As the Court noted, MM and OGM failed to lay a business foundation for the instant documents. However, Plotch specifically objected to the admission of these records because the records could not be admitted absent a corresponding set of records, which the Court declined to admit. The proper objection was the failure by the proponent to lay an adequate business

first page is a worksheet, which indicates that Scully was to serve Plotch with the summons and complaint in this action at 95. The worksheet contains several handwritten notes, which Scully testified he made as he was leaving 95, including that service was made on upon Mrs Plotch on August 2 at 11:48am, that Mrs. Potch, who was Plotch's wife, was a white female wearing a head covering, was 55 years old, weighed 125lbs, and was 5'4" tall. The notes also indicate that the door at which service was effectuated was green, and that the apartment number was ascertained via the internet. The second page is the affidavit of service filed with

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records foundation. As such, this Court properly admitted the documents and Plotch has waived any right to appeal on this issue (*In re Budziejko's Will*, 277 AD 829, 829 [4th Dept 1950] ["The court asked upon what ground counsel objected and counsel said it was upon the ground that the witness was not competent to testify as a physician. He then conducted a preliminary examination as to the qualifications of the witness after which he renewed his objection stating no further ground. The objection was overruled and after the opinion was stated counsel proceeded to cross-examine upon it. There was no objection to the form of the question or as to the testimony itself being incompetent, nor was any exception taken nor motion to strike out made. Having restricted the objection to the competency of the witness to testify as an expert and give an opinion, the appellant may not, on appeal, rely on the claimed incompetency of the testimony itself as no such objection was raised at the trial. Had such objection been."]; *see People v Fleming*, 70 NY2d 947, 948 [1988] ["When the arresting officer later testified at trial, counsel entered objections as "objection" or "leading", but failed to advise the trial court that the present claimed error was the basis for any of his objections. The word "objection" alone was insufficient to preserve the issue for our review."]; *People v Cruz*, 177 AD2d 363, 363 [1st Dept 1991] ["For the most part, defendant never objected on the basis that the prosecutor improperly referred to defendant's post-arrest silence, thereby waiving the claim for review as a matter of law."]).

the Court, dated August 9, 2017, wherein Scully swears that on August 2, 2017, at 11:48am, he served Plotch with the summons and complaint in this action, by delivering a copy of the same to 29E within 95 and leaving it with Mrs. Plotch, Plotch's wife, who was a white female, wore a head covering, was 55 years old, weighed between 125-149lbs, and was between 5'4" - 5'7" tall. The affidavit further evinces that on August 9, 2017, a copy of the summons and complaint were mailed to Plotch at the same address upon which physical service was effectuated. The third page is a photograph depicting the exterior of 95. The photograph contains a legion of printed information such as that it was taken on August 2, 2017 at 11:37am. The fourth page is a certificate of mailing evincing that on August 9, 2017, something was mailed to Plotch at 95. The last two pages are copies of a portion of Scully's logbook. They evince that on August 2, 2017, Scully effectuated service upon several individuals at several different addresses. With respect to Plotch, the log book contains the same information found within the affidavit of service and Scully's worksheet.

Exhibit 3, admitted into evidence on consent of the parties, is an affirmation by Plotch, submitted in support of his application to vacate the judgment of foreclosure and sale and dismiss this action.

Exhibit 4, admitted into evidence on consent of the parties, is a document wherein Batia Plotch advertises trips to Cuba, which

she and her husband organize. The document contains a color photograph of Mrs. Plotch, a light skinned woman wearing glasses.

At the hearing, Plotch testified in support of his application, in pertinent part, as follows. Although Plotch primarily resides at premises located on Riverside Drive, he conducts business and sleeps, on occasion, at 95. His mother Batia Plotch and father reside at 95 and also conduct business at 95. Because Plotch is routinely the subject of litigation, there is a dresser at 95, where if Plotch is not there when papers are delivered, any papers delivered to 95 are to be left for his review. Plotch never received the summons and complaint that were alleged to have been physically served upon him at 95, but did receive the copy of the same that were mailed to him at 95. No one matching the description of the person alleged to have been served at 95 resides within 29E. Specifically, Plotch has never been married, unlike Plotch who is light-skinned, his mother is brown-skinned and only 4'11" tall. In 2017 his mother was not 55 years old, but was 69 years old. While he has a sister, she did not reside at 29E. A cleaning lady did report to 29E every Friday, but she was not authorized to open the door thereat. Despite speaking to his mother on a regular basis and being frequently present at 29E, he was never told that the summons and complaint had been physically delivered. With respect to the door at 29E, the same did not bear any identifying information and, in fact, most doors

at 95 did not bear such information. In his case, beyond a Mezuzah on the door to 29E, Plotch purposely declined to provide any identifying information on the door to 29E, since given his line of work, it posed to safety risk. Plotch testified that there is a person on his floor of the Islamic faith, who fits the description of the person Scully states he served with the summons and complaint in this action.

Based on the foregoing, this Court holds that MM and OGM established that Plotch was duly served with the summons and complaint in this action pursuant to CPLR § 308(2), such that the judgment entered on November 26, 2018 cannot be vacated pursuant to CPLR § 5015(a)(4) and therefore, cannot be dismissed pursuant to CPLR § 3211(a)(8).

As noted above, at a traverse hearing, the plaintiff bears the burden of establishing service upon the defendant (*Chaudry Const. Corp.* at 545; *Schorr* at 519-20) and at the hearing, the trial judge is tasked with resolving issues of credibility, such resolution is accorded great deference, which absent a determination that such resolution is against the weight of the evidence, cannot be disturbed on appeal (*McCray* at 676; *Avakian* at 688).

In this case, Scully, a licensed process server, credibly established, by relying on his contemporaneous records of the service in this case, that he served Plotch with the summons and complaint pursuant to CPLR § 308(2) ("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 either mailing the summons to the person to be served 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."). Significantly, although Scully did not have independent recollection of effectuating service, his records, namely his logbook, worksheet, and a geotagged photograph, which were in evidence, establish that on August 2, 2017, Plotch was served at 95 when the summons and complaint were delivered to Mrs. Plotch, who agreed to accept service on Plotch's behalf and purported to be his wife (G*ilmore* at 1). Thereafter, on August 9, 2017, the records evince the summons and complaint were mailed to Plotch at 95.

To the extent that Plotch testified that he is not and was never married and never received the summons and complaint from anyone residing within 29E, the Court declines to credit his testimony.

Significantly, the only evidence offered to controvert the contents of the affidavit of service was Plotch's own testimony. This is not to suggest that this Court would never find the absence of personal jurisdiction based on the testimony of a single witness. Here, however, despite the fact that he was given four-month's notice of the instant hearing, Plotch failed to procure his

mother's attendance at the hearing, leading this Court to conclude that her appearance would not have availed him. Accordingly, charting his defense of personal jurisdiction by, *inter alia*, attempting to dissuade the Court that his mother looked nothing like the person alleged to have been served, Plotch's failure to procure her appearance proved fatal[3]. Indeed, Plotch testified that while he was not married, assuming, as intimated by Scully, that the person upon whom process was served was his mother, his mother did not match the description of the person served. To be sure, Plotch testified that his mother was brown-skinned, 69 years old, only 4'1" tall, and always wore glasses; the latter being a feature Scully testified he would have noted. Here, then, the person who was in the best position to controvert Scully's testimony - by establishing that Plotch's mother was not the person alleged to have been served with process - was, of course, Mrs. Plotch. At a bare minimum, if indeed Mrs. Plotch did not resemble the person alleged to have been served, in order to effectively assail Scully's testimony, Mrs. Plotch should have appeared in Court in order for this Court to, at the very least, see and

[3] Apparently realizing the quagmire caused by the failure to produce Mrs. Plotch, at the end of this hearing, which had been scheduled four months prior, Plotch sought a three-day continuance to produce Mrs. Plotch. Given that Plotch testified that Mrs. Plotch was in Florida and in the months preceding the hearing had been traveling to Mexico and the Bahamas, the record is bereft of any compelling evidence to support Plotch's eleventh-hour attempt to cure what proved to be a shortcoming fatal to his case.

compare her to the description given by Scully.

Perhaps the most troubling aspect of Plotch's testimony and another blow to his credibility was his testimony that his mother was brown-skinned rather than white, as alleged by Scully. To be sure, the picture of Mrs. Plotch within Exhibit 3 depicts a very fair skinned woman, who could accurately be described as white. Thus, Plotch's insistence, despite the photograph, that no one would ever call his mother white is incredible[4].

It bears noting that although Plotch, by counsel, cross-

[4]In a bench trial, the Court is free to apply PJI 1:22, which reads "[i]f you find that any witness has willfully testified falsely as to any important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one important matter is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of the witness' testimony as you deem true and disregard what you deem is false" (*Tower Ins. Co. of New York v Mike's Pipe Yard and Bldg. Supply Corp.*, 18 Misc 3d 1120[A], *2 [Sup Ct 2007] ["The payroll records are suspect because inter alia there is no explanation for the gap in the relevant week, nor any explanation as to why that week's entries are handwritten as opposed to the others being in computerized business format, leading the Court to find them unworthy of belief and leading to the imposition of the doctrine of Falsus in Uno."]; *see J & K Parris Const., Inc. v Roe Ave., Assoc., Ltd.*, 47 Misc 3d 1227[A], *6 [Sup Ct 2015], *judgment entered sub nom.* J & K Parris Const., Inc. v Roe Ave., Assoc, Ltd. [N.Y. Sup Ct 2015]; *Ryan v Prescott*, 38 Misc 3d 1234[A], *2 [Sup Ct 2013]). Here, while this Court, as noted, found Plotch incredible for additional reasons, his insistence that his mother's skin tone was at variance with what this Court could clearly see with its own eyes, at best a difference of opinion and at worst, an outright lie, presents ample grounds to disregard all of Plotch's testimony.

examined Mr. Scully about a prior action[5] where he was not found credible by the court at a traverse hearing and a consent order[6] executed by him, this did not dissuade the Court from finding Mr. Scully credible, since his testimony, candor, body language and delivery, militated against a any conclusion that he was being less than truthful. Based on the foregoing, after the instant hearing, Plotch's motion is denied. It is hereby

ORDERED that MM and OGM serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : 2/28/24

FIDEL E. GOMEZ, JSC

[5] *See Cadlerock Joint Venture, LP v Kierstedt*, 37 Misc 3d 1212(A), *2 (Sup Ct 2012), *affd sub nom. Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627 [2d Dept 2014] ("The process server was not credible in his testimony of due diligence since he failed to put his attempts in the log book.")

[6] Mr. Scully testified that he agreed to admit that he failed to report all the traverse hearings at which he testified and the outcome of the same.