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| <b>Lopez v Nations Lending Corp.</b>   |
| 2024 NY Slip Op 35109(U)   |
| August 21, 2024  |
| Supreme Court, Westchester County  |
| Docket Number: Index No: 57987/2023  |
| Judge: Paul I. Marx  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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FANNY LOPEZ and ROBERTO LOPEZ,

Plaintiffs,

**DECISION AND ORDER**

-against-

Index No. 57987/2023

NATIONS LENDING CORPORATION and  
JOSE F. CANALES,

Motion Seq #1, 2, & 3

Defendants.  
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The papers filed electronically on NYSCEF numbered 2 to 38 were read on (1) Plaintiff's motion for default judgment pursuant to CPLR § 3215 (motion seq #1),<sup>1</sup> (2) Defendant Nations Lending Corporation's motion to dismiss Plaintiff's complaint for failure to properly serve the Summons and Complaint (motion seq #2) and (3) Defendant Jose F. Canales' motion to dismiss for failure to properly complete service (motion seq #3).

Upon reading the foregoing papers, it is ORDERED that motions are disposed as follows.

**BACKGROUND**

Plaintiffs, Fanny and Roberto Lopez ("Plaintiffs"), commenced this action seeking to recover damages in the amount of \$39,500<sup>2</sup> allegedly sustained as a result of the actions of Defendant Nations Lending Corporation ("Nations") and Jose F. Canales ("Canales") in connection with a purchase money mortgage application submitted by them. Plaintiffs allege in their complaint that they were under contract to purchase a property located in Mount Vernon, NY for the sum of \$790,000.<sup>3</sup> They allege that the contract of sale required them to obtain financing

<sup>1</sup> The Court notes that Plaintiff uploaded all papers (including multiple exhibits) in support of their motion as one NYSCEF document (#5). Proper filing of a motion requires that each exhibit be uploaded and identified separately to allow easy access by the Court and opposing counsel. Here, the Court has had to search through all 53 pages of Plaintiffs' submission to locate exhibits as needed to review and decide the motion.

<sup>2</sup> The amount sought by Plaintiffs is unclear. Plaintiffs' complaint sets out the amount sought as \$39,000 in ¶1 and as \$25,750 in ¶ 22 and in the "Wherefore Clause" and throughout the motion.

<sup>3</sup> The Court notes that the Loan Approval issued by Nations (p. 40 of 53 of Plaintiffs' motion, NYSCEF #5), recites the purchase price as \$785,000. If this is accurate, the purchase was to be 95% financed. The contract of sale states the purchase price as \$790,000 (NYSCEF #5, p. 23 of 53).

via a mortgage commitment in the amount of \$758,800 (96% of the purchase price) within 35 days of the contract date (January 31, 2022) and to close by March 31, 2022. Plaintiffs claim that on February 11, 2022, they met with Canales, a loan processor of Nations, to discuss their mortgage application and were informed by him, falsely, that payment of “upfront fees” of \$12,000<sup>4</sup> was required. Plaintiffs contend that payment of the upfront monies was, in fact, not required. Plaintiffs contend that Nations knew that Canales falsely informed them of the requirement of the upfront fees even though it, and Canales, knew that Plaintiffs would not qualify for the loan sought.

According to Plaintiffs’ joint affidavit (NYSCEF #5, p. 48 of 53), Plaintiffs were informed that their application had been approved subject to provision of additional information. Plaintiffs state that they provided the additional information to Canales but that they had no further communication with, or from, him or Nations, resulting in their defaulting on the contract of sale. Plaintiffs assert that they learned after the closing date that Nations had denied their application.

In addition, Plaintiffs contend that Canales failed to make necessary disclosures to them concerning the loan. Plaintiffs assert that because of the untimely notice of denial, they forfeited \$13,750 of the \$27,650 down payment they made on the contract. Plaintiffs’ complaint sets forth causes of action identified as “Breach of Fiduciary Duty”, “Fraud”, “Negligence”, “Negligent Misrepresentation”, and [violation of] “New York General Business Law § 349 Deceptive Acts and Practices”. Plaintiffs also seek punitive and exemplary damages “as allowed by law”.

### **THE INSTANT MOTIONS**

Plaintiffs now move for default judgment against Defendants, asserting that service was properly made and completed on March 15, 2023, pursuant to CPLR § 311 (Nations) and § 308(2) (Canales), and that the Defendants failed to timely answer, appear, or move against the complaint.

Defendants Nations and Canales separately cross move to dismiss, asserting that service was not properly or timely completed.

#### *Plaintiffs’ Motion (Seq #1)*

In support of their motion for default against Nations, Plaintiffs submit an affidavit of Sean La Fleur who attests to service of the Summons and Complaint on Nations by delivering a copy to Alfonso Mazzoni on March 15, 2023, at 22-05 Maple Avenue, Fair Lawn, New Jersey (NYSCEF

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<sup>4</sup> Plaintiffs attach to their moving papers an invoice (without letterhead) for \$11,775. The invoice states that it is for “Bank Fee on Mortgage Purchase” (NYSCEF #5, p. 53 of 53).

#5, p. 44 of 53). Mr. Mazzone is described as a “Loan Officer for Nations and agent authorized to accept Legal Docs”.

In support of their motion for default against Canales, Plaintiffs submit an affidavit of Mr. La Fleur who attests to service on Canales under CPLR § 308(2) on the same date by serving Mr. Mazzone, an alleged co-worker, followed by mailing a copy of the Summons and Complaint by First Class Mail to his place of business marked “Personal and Confidential” on March 16, 2023 (NYSCEF #5, p. 46 of 53). Plaintiffs allege that Defendants have failed to timely answer the Complaint and that, therefore, they are in default. Plaintiffs request that judgment by default be entered in their favor.

*Nations Lending Corporation's Cross-Motion (Seq #2)*

Nations opposes Plaintiffs' motion for default and cross moves for an order dismissing Plaintiffs' complaint, asserting that Plaintiffs failed to comply with CPLR § 306-b by “failing to make service of the summons and complaint within one hundred and twenty days after the commencement of the action.” Nations asserts that Plaintiffs' affidavit of service which attests to service on Alfonso Marmoni<sup>5</sup> on March 15, 2023 is inadequate to confer jurisdiction over it because (1) the affidavit of service was never filed with the court as required by CPLR § 306-b and (2) Marmoni did not work for Nations on the date of the alleged service such that he was not a proper person to serve under CPLR § 311. Nations contends further that the address where service was allegedly made was not a principal place of business or that of a registered agent.

In support of their cross motion, Nations submits an affidavit from Jeff Goshert, its Chief Compliance Officer, in which he states that the Maple Avenue location where service was allegedly made was not a proper address for service on Nations. Nations also submits the affidavit of Christopher Baker, Esq. who states that he is the General Counsel for Nations. Baker attests that Nations is an Ohio Corporation and that its principal office is in Independence, Ohio. Baker also attests that the first notification of this action came when he received a mail packet containing Plaintiffs' motion for default. Finally, Nations submits the affidavit of its Chief Administrative Officer, Cheryl Lieber, who attests that Canales was employed by Nations from May 29, 2020, through February 13, 2023, and that Mazzone was employed by the company from July 6, 2020

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<sup>5</sup> Plaintiffs' affidavits of service refer to this individual as Alfonso Mazzone. Nations refers to this individual as Alfonso Marmoni.

through February 13, 2023.<sup>6</sup> She further attests that neither Mazzoni nor Canales held a position for which CPLR § 311 authorizes service on a corporation and that neither had any other authority to accept service for Nations.

Nations recites that under CPLR § 311, service must be made on “an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by law to receive service”. Since Marmoni was none of these, Nations asserts, it was not properly served, and the action must be dismissed.

As an additional ground warranting dismissal, Nations contends that service was not made within the 120 days allotted by CPLR § 306-b because service on Mazzoni was not proper service. *Canales’ Cross Motion (Seq #3)*

Canales cross moves to dismiss the action, asserting that service on him was never completed. Canales asserts that CPLR § 306-b requires service to be completed within 120 days of filing of the Summons and Complaint and that CPLR § 308(2) permits service on a person of suitable age and discretion at the intended defendant’s actual place of business, followed by mailing a copy of the summons and complaint within 20 days. Canales adds that CPLR § 308(2) also requires that “[p]roof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either [within twenty days of either] [sic] such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing.”

Canales states that Plaintiff failed to file the affidavit of service such that service was not complete, resulting in his time to answer never having begun to run. Canales cites to *Rosato v Ricciardi*, 174 AD2d 937 [3<sup>rd</sup> Dept 1991] for the proposition that the failure to file the affidavit of service cannot be cured on a motion for default. Consequently, Canales argues, default judgment against him is improper and the action must be dismissed.

*Plaintiffs’ Opposition to the Cross Motions and Reply in Further Support of Their Motion*

Plaintiffs submit their attorney’s affirmation in Reply and Opposition to Cross Motion for Dismissal (NYSCEF #21), along with exhibits to oppose the cross motions. These papers, largely, miss the point that compliance with the CPLR is required to secure jurisdiction.

First, counsel states that shortly after service, she received a call from Canales who advised her that he “was not culpable”. Counsel states that she advised Canales to speak with his employer. Counsel also submits some telephone messages received by her on March 20 and 22, 2023, from

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<sup>6</sup> Their employment, therefore, ended one month prior to the claimed service on March 15, 2023.

a representative of Nations. Largely ignoring the service requirements of the CPLR, counsel asserts that “the Defendants were served at the branch and location where the incident occurred and judging by the number of contacts made to Plaintiff after service of the Summons and Complaint there is absolutely no viable excuse that can be made by the Defendants as to why an answer was not interposed before the filing of the Default Motion.”

Similarly, with respect to Canales, Plaintiffs submit extraneous information while not addressing their failure to timely file the affidavit of service as required.<sup>7</sup>

### **DISCUSSION**

Discussion on these motions can be brief.

Plaintiff has failed to demonstrate that the individual served for Nations Bank was one of those individuals authorized to accept service by it or which the CPLR designates as a proper individual to serve. Consequently, as to Nations Bank, Plaintiffs’ motion for default is denied. For the same reasons, Nations’ motion to dismiss must be granted for the failure to properly serve a party deprives the Court of jurisdiction over it.

As to Canales, Plaintiff has also failed to demonstrate compliance with CPLR § 308(2). No evidence that the affidavit of service was filed has been submitted. Rather, Plaintiffs seem to think that conversations which occurred at or around the time of service supplants the requirements of the CPLR. Such is not the case, however. Thus, Plaintiffs’ motion for default judgment against Canales must be denied. For the same reasons, Canales’ motion to dismiss Plaintiffs’ complaint against him must be granted.

### **CONCLUSION**

It is hereby ORDERED that Plaintiff’s motion for default judgment pursuant to CPLR §3215 is Denied; and it is further

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<sup>7</sup> Canales makes this point in his Reply on the cross motion. (NYSCEF #39). The Court has not considered these papers, as Reply papers on a cross motion are not permitted by the Part Rules or the CPLR.

ORDERED that Nations' motion to dismiss the Complaint against it is Granted; and it is further


ORDERED that Canales' motion to dismiss the Complaint against him is Granted

The foregoing constitutes the Decision and Order of the Court.

Dated: August 21, 2024

ENTER

White Plains, New York



HON. PAUL I. MARX, J.S.C.