

MBC Ventures LLC v Golden Apple Intl., Inc.

2025 NY Slip Op 31596(U)

April 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 503959/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 23rd day of April 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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MBC VENTURES LLC, ASSIGNEE OF
BANK OF AMERICA, N.A. f/k/a
FLEET NATIONAL BANK,

Index No.: 503959/2021

Plaintiff,

ORDER
Motion Seq. No. 3

-against-

GOLDEN APPLE INTERNATIONAL, INC.
and MUMTAZ YORUK,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Order to Show Cause/Affirmation/Exhibits Annexed..... 31 – 38; 41 – 42

Plaintiff MBC Ventures LLC, assignee of Bank of America, N.A. f/k/a Fleet National Bank (“Plaintiff”) moves by order to show cause, for an order (i) extending the Notices of Levy filed under Index No. 500124/2009 on October 6, 2021 pursuant to CPLR § 5235; (2) granting the Plaintiff’s motion to reargue pursuant to CPLR § 2221(d) and/or renew pursuant to CPLR § 2221(e); (3) or, in the alternative, granting the Plaintiff’s application to extend time for service of process upon defendant Mumtaz Yoruk (“Yoruk”), pursuant to CPLR § 2004 and CPLR § 306-b; and (4) granting each other and different relief as the Court may deem just and proper (Mot. Seq. No. 3).

On or about September 11, 2009, judgment was entered against defendants Golden Apple International, Inc. and Yoruk (collectively, “Defendants”), in the amount of \$115,538.16 (the “judgment”). This judgment was entered under index no. 500124/2009. Thereafter, Plaintiff commenced this action seeking to renew the lien of the judgment. Plaintiff served Yoruk by nail and mail and filed the affidavit of service on June 16, 2021. Plaintiff’s affidavit of service reflecting service upon Defendants’ counsel was filed on June 23, 2021. In motion sequence no. 2, Plaintiff moved, inter alia, for an order deeming its late service on Yoruk timely. By order dated December

14, 2021, this Court found that pursuant to CPLR 308 (4), service is not complete until ten days after filing proof of service. Since service was required before June 18, 2021, the Court found that service on Yoruk was untimely. The Court denied Plaintiff's motion without prejudice since Plaintiff did not file a motion requesting an extension of time to serve Yoruk.

The Court will first address the portion of Plaintiff's argument seeking to renew and reargue its prior motion. The decision to grant leave to renew or reargue is at the sound discretion of the court (*see Rodney v New York Pyrotechnic Prod. Co.*, 112 AD2d 410, 411 [2d Dept 1985] [internal citation omitted]; *Gold v Gold*, 53 AD3d 485, 487 [2d Dept 2008]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). However, a motion for leave to reargue is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999] [internal citations omitted]).

In moving to reargue, Plaintiff asserts that this Court "overlooked the legal import of the defendants' Notice of Appearance." Plaintiff argues that under CPLR 320 (b), "an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction . . . is asserted by motion or in the answer." Since counsel appeared for Defendants by Notice of Appearance filed on June 9, 2021, Plaintiff contends that "personal service was complete upon such appearance."

The Court finds Plaintiff's argument unavailing. While Plaintiff did assert that Defendants' counsel had filed a Notice of Appearance, this was all it did in its prior motion. There were no law or rule presented, which Plaintiff acknowledges in the portion of its motion seeking to renew. It is not the Court's obligation to guess the legal import of any fact, nor is it appropriate for the Court to usurp counsel's role in presenting cogent arguments. Accordingly, Plaintiff's motion seeking leave to reargue is denied (*see People v D'Alessandro*, 13 NY3d 216, 219 [2009] ["where a new argument is presented on the motion, that argument could not have been 'overlooked or misapprehended' by the [court] in the first instance"]).

In moving to renew, Plaintiff acknowledges that while service on Yoruk was physically made within 120 days from filing, service would not be complete pursuant to CPLR 308 (4). Nonetheless, Plaintiff argues that CPLR 308 (4) only applies to personal service upon the defendants, and not where personal jurisdiction was obtained by the filing of a notice of appearance by Defendants' counsel under CPLR 320 (b). According to counsel, Plaintiff did not "specifically highlight this rule earlier as the Motion for summary judgment in lieu of Complaint was filed many months prior to the appearance of counsel . . . and, the plaintiff did not want to prompt counsel to cross-move to dismiss the application upon jurisdictional grounds."

The Court finds Plaintiff's arguments in favor of renewal equally unavailing. While the Notice of Appearance was filed after the motion for summary judgment in lieu of complaint was filed, Plaintiff ignores the fact that it made a second motion in which it explicitly requested that service upon Yoruk be deemed complete, timely and good and sufficient service. Other than reciting that a Notice of Appearance was filed, Plaintiff presented no argument that CPLR 320 applied to render service complete. The fact that Plaintiff did not want to prompt the filing of a cross-motion to dismiss is unpersuasive. Even if a cross-motion was filed, Plaintiff would have had the opportunity to present facts and legal arguments in its opposition.

The Court lastly considers Plaintiff's request for an extension of time to serve Yoruk. Under CPLR 306-b, "[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, or upon good cause shown or in the interest of justice, extend the time for service." CPLR 2004 provides that "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." "An extension of time for service is a matter within the court's discretion" (*Leader v Maroney*, 97 NY2d 95, 101 [2001]).

"To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service" (*Bumpus v NY City Tr. Auth.*, 66 AD3d 26, 31-32 [2d Dept 2009]). In deciding to grant a motion for an extension of time to serve under the "interest of justice" category, "a court may consider diligence or lack thereof, along with any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness

of a plaintiff's request for the extension of time, and prejudice to defendant" (*Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d 742, 743 [2d Dept 2018]).

The Court finds that Plaintiff has established good cause. Plaintiff's process server served Yoruk by "nail and mail." This demonstrates at least three prior attempts to serve Plaintiff personally. It is inconsequential that service occurred within the requisite 120-day period since service is not complete under CPLR 308 (4) until ten days after filing of proof of service. This is not a situation in which Plaintiff made no attempts to serve Yoruk. Instead, but for service being made through "nail and mail," Yoruk would have been timely served.

Even if Plaintiff had not shown good cause, there are several factors that weigh in favor of granting Plaintiff's motion for an extension. Had Plaintiff made a timely argument with respect to the applicability of CPLR 320, the Court would have likely deemed service complete upon the filing of the Notice of Appearance.¹ In addition, Plaintiff has already obtained a judgment against Defendants and in this action, is seeking merely to renew the lien of the judgment, evincing a potentially meritorious cause of action.

Accordingly, it is

ORDERED, that the portion of Plaintiff's motion for leave to renew is denied; and it is further

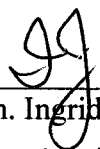
ORDERED, that the portion of Plaintiff's motion for leave to reargue is granted; and upon reargument, the Court adhered to its original determination; and it is further

ORDERED, that the portion of Plaintiff's motion for an extension of time to serve Defendant Mumtaz Yoruk is granted; and it is further

ORDERED, that Plaintiff shall have thirty (30) days from the date of Notice of Entry of this Order to serve Yoruk with the initiatory papers by a statutorily-authorized method.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**

¹ Pursuant to CPLR 320 (b), "an appearance of the defendant is equivalent to personal service of the summons upon him." CPLR 320 (a) explains that a "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." Here, counsel filed a Notice of Appearance on behalf of *both* Defendants on June 9, 2021.