

**Douglas Elliman, LLC v Ballard**

2025 NY Slip Op 34620(U)

December 1, 2025

Supreme Court, New York County

Docket Number: Index No. 160063/2024

Judge: Phaedra F. Perry-Bond

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND PART 35

Justice

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DOUGLAS ELLIMAN, LLC,

Plaintiff,

- v -

KATE BALLARD,

Defendant.

INDEX NO. 160063/2024

MOTION DATE 01/28/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for JUDGMENT - DEFAULT

In this action, plaintiff seeks the \$42,000 commission defendant allegedly owes to plaintiff for procuring the buyer of defendant's property, which is located at 741 Beach Avenue in the Bronx (see NYSCEF Doc. No. 16). Plaintiff alleges that it procured the buyer on January 21, 2022, and that ultimately the buyer purchased the property on August 9, 2023. Plaintiff's October 24, 2024 complaint included a copy of its exclusivity agreement with defendant, which was in effect on January 21, 2022 (NYSCEF Doc. No. 17). The current motion seeks an order of default judgment against defendant. The affidavit of service indicates that plaintiff served "Veronica," purportedly the doorman at defendant's building, on November 6, 2024 and mailed a copy to her at her address on November 7, 2024 (NYSCEF Doc. No. 22).<sup>1</sup>

Defendant opposes the motion and cross-moves for dismissal of the complaint for lack of proper service and personal jurisdiction or, alternatively, for leave to serve a copy of her answer with counterclaims (NYSCEF Doc. No. 25). For one thing, she contends that she was not properly served with the complaint because, by the date of service, she had relocated to Ghana (NYSCEF Doc. No. 15). Her affidavit explains that she and her husband had intended to move to Ghana, and that she carried out this plan after her husband's death in September 2022. In support, she submits a copy of her flight receipt, which shows that she flew to Accra, Ghana's capital, on July 3-July 4, 2024 (NYSCEF Doc. No. 23). Defendant states that she did not receive notice of this lawsuit by alternate service or by mail until she learned of the current motion for default judgment. Accordingly, she asserts lack of personal jurisdiction as a defense. Purportedly quoting SFR

<sup>1</sup> Plaintiff also did not support its motion with copies of the complaint, the affidavit of service, or the exclusivity agreement. However, defendant has submitted copies of these documents.

*Funding, Inc. v Studio Fifty Corp.* (36 AD3d 604 [2d Dept. 2005]),<sup>2</sup> she states that a defendant may rebut a plaintiff's affidavit of service "with a detailed and specific contradiction of the allegations in the process server's affidavit sufficient to create a question of fact warranting a hearing." Here, she claims, defendant has successfully rebutted the affidavit of service, warranting a hearing. Counsel's statement that her client did not know of a doorman named Veronica or anyone fitting that description is not of evidentiary value; although defendant may have stated this in her affidavit, the copy of her affidavit cuts off in the middle of paragraph 14, the pertinent paragraph.

As alternative relief, defendant argues that she should be allowed to answer the complaint. She contends that the fact that she resided in Ghana when the pleadings purportedly were served on her in New York constitutes an excusable reason for the default. She argues that she would not have defaulted when \$44,000 was in dispute and she points to her current cross-motion; she asserts that this shows that her default was not deliberate. Additionally, as plaintiff has just moved for default judgment, there is no prejudice to plaintiff if the court allows her to answer.

As for the merits of her case, defendant first points out that the invoice plaintiff sent to her – on April 1, 2022, 16 months before the sale – was for \$39,000 rather than the amount plaintiff seeks in the complaint, and that it was based on the incorrect sales price. Plaintiff did not send a further, corrected invoice after the sale. She further notes that after her husband's passing, the buyer canceled the sale. As a result, defendant hired a new attorney, who later closed the deal with the same buyer, this time through his company YV Beach Bronx LLC, for a different amount. She asserts that she has valid defenses based on "lack of standing, failure to mitigate damages, defense found on documentary evidence, waiver, failure to state a proper claim, and lack of jurisdiction" (NYSCEF Doc. No. 15, ¶ 23).

The affirmation of her counsel expands on these arguments. She asserts that plaintiff did not procure the Mr. Vakil as purchaser, as his company, YV Beach Bronx LLC, was the actual purchaser on August 9, 2023. Further, as plaintiff did not finalize the transaction, she claims that plaintiff has no right to the commission. She points to plaintiff's demand for the commission of \$39,000 and states that this underscores that plaintiff based it on the original offer, which was not consummated and was for \$650,000 rather than \$700,000. Defendant's affidavit notes that the exclusivity agreement expired on June 22, 2022, and counsel's affirmation stresses that plaintiff did not institute this lawsuit until November 2024. Accordingly, she argues, defendant had no expectation that plaintiff would sue for the commission it alleges was due to it. As such, she contends that waiver and laches apply. Defendant's proposed answer includes these defenses, and further seeks a declaration that plaintiff is not entitled to a commission (NYSCEF Doc. No. 25). Defendant also seeks monetary relief for her purported financial damages.

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<sup>2</sup> Although the court does not challenge the underlying principle, the quoted language does not appear in that decision, which rejected defendant's claim of improper service.

In opposition, plaintiff reasserts that service on defendant was proper because it served her at the address where it believed she resided. It further asserts that “Veronica” was a person of suitable age and discretion and therefore service upon her was proper. It contends that defendant’s arguments about service are only relevant to personal service, which is not at issue here. As service allegedly was proper, plaintiff argues that the cross-motion should be denied in its entirety.

After considering the matter and all the documents submitted, the court denies the motion for dismissal and grants the cross-motion to dismiss to the extent of scheduling a traverse on the issue of service. Although the process server’s properly executed affidavit of service is prima facie evidence of proper service (*see Amcojor Realty Corp. v Butter Mgt. LLC*, 232 AD3d 404, 405 [1st Dept 2024]), defendant raised a triable issue of fact through her sworn statement that she does not live at the subject address, along with a copy of her airline ticket to Ghana. Under the pertinent statute, a plaintiff must perform substituted service “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” (CPLR § 308 [2]; *see HSBC Bank USA, N.A. v Proctor*, 232 AD3d 439, 439 [1st Dept 2024]). Further, in response to defendant’s argument, plaintiff did not “prove by a preponderance of the evidence that jurisdiction over [the] defendant was obtained” (*Legal Servicing, LLC v Carty*, 229 A.D.3d 533, 535 [2d Dept 2024]). The process server’s statement that he was denied access to the apartment is insufficient, by itself, to satisfy this burden (*see LCS Capital, LLC v Hatlestad*, 77 Misc 3d 402 [Sup Ct, Monroe County 2022]), in light of plaintiff’s statement that plaintiff did not serve her at her dwelling place or usual abode.<sup>3</sup> Additionally, based on the affidavit of service, it is unclear whether, as defendant suggests, “Veronica” did not give the process server access because defendant no longer resided in the building. It also is not clear how plaintiff determined where to serve defendant, particularly given the length of time between the April 1, 2022 demand for a commission, which plaintiff sent to defendant through her then-counsel in Jamaica, Queens, and the service of the complaint on her on November 6, 2024. The court determines that the most prudent course of action is a traverse hearing on the issue of service, given that defendant’s evidence about service also is not conclusive – that is, although she submits evidence that she traveled to Ghana, and her sworn statement that she lives there is compelling, it is still unclear whether, during the critical period, defendant maintained the apartment as an additional residence.

The court further notes that, if the traverse hearing results in a ruling that service was proper, it would grant the portion of the cross-motion that asks that the court accept the proposed answer with counterclaims, which defendant files as NYSCEF Doc. No. 25. There is a “strong public policy in this state to dispose of cases on their merits” (*HSBC Bank USA v Lugo*, 127 AD3d 502, 503 [1st Dept 2015] [*Lugo*]; *see Wang v Marano*, 238 AD3d 497, 497 [1st Dept 2025] [citing *Lugo*]). Additionally, courts have “broad discretion” to decide whether a defendant has provided an adequate excuse for its delay in answering the complaint (*Gantt v North Shore-LIJ Health Sys.*,

<sup>3</sup> It also appears that plaintiff did not perform a proper military service search. However, defendant, who alleges that she lives in Ghana and who, according to her plane ticket, may need a wheelchair, implicitly acknowledges that she is not in the military.

140 AD3d 418, 418 [1st Dept 2016]). Here, the facts that defendant was in Ghana at the time of the attempted service of the complaint and that she allegedly was unaware of the lawsuit until the filing of this motion constitute reasonable excuses for her delay, regardless of whether she had given up the Bronx apartment. Moreover, plaintiff does not argue that the delay has prejudiced it (see *Hertz Vehs., LLC v Mollo*, 171 AD3d 651, 651 [1st Dept 2019]). Finally, without addressing the merits of the answer in its entirety, defendant raises a question regarding the amount that plaintiff seeks in its commission, among other issues, and the court finds that this should be resolved through litigation and/or mediation. The parties may avoid a traverse hearing if they stipulate that plaintiff shall accept defendant’s answer and move forward with the litigation.

Accordingly, it is

ORDERED that plaintiff’s motion for a default judgment is **denied**; and it is further

ORDERED that defendant’s cross-motion for relief is granted to the extent of directing that a traverse be held on the issue of service; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,<sup>4</sup> upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date to hear and report or, upon stipulation of the parties, to hear and determine; and it is further

ORDERED that, if, within 30 days from the date of this order, the parties provide the court with a stipulation indicating that plaintiff shall accept the answer of defendant and the parties shall proceed with the lawsuit, there will be no need for the traverse hearing. The parties shall email the stipulation to the Part Clerk and e-file the stipulation in NYSCEF.

This constitutes the decision of the Court.

12/1/25  
DATE

  
PHAEDRA F. PERRY-BOND, J.S.C.

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

<sup>4</sup> Copies are available in Rm. 119M at 60 Centre Street and on the Court’s website at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) under the “References” section of the “Courthouse Procedures” link).