

Rockfence Baseball LLC v German
2025 NY Slip Op 35530(U)
March 5, 2025
Supreme Court, Bronx County
Docket Number: Index No. 817255/2024E
Judge: Fidel E. Gomez
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
ROCKFENCE BASEBALL LLC,

Plaintiff,

Index No. **817255/2024E**

- against -

Hon. **FIDEL E. GOMEZ**
Justice

DOMINGO GERMAN,

Defendants.

-----X

The following papers numbered 1 to 1, read on this *ex parte* application, submitted on 11/20/2024.

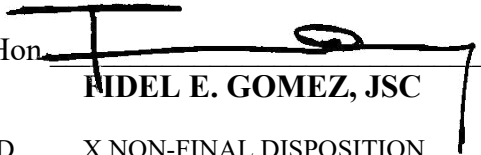
	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers- Order of Reference		
Memorandum of Law		

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:

3/5/25

Hon.


FIDEL E. GOMEZ, JSC

1. CHECK ONE

2. MOTION/CROSS-MOTION IS

3. CHECK IF APPROPRIATE.

☐ CASE DISPOSED

☐ GRANTED (MOTION)

☐ GRANTED IN PART

☐ SETTLE ORDER

☐ SUBMIT ORDER

☐ DO NOT POST

☒ NON-FINAL DISPOSITION

☒ DENIED (MOTION)

☐ OTHER

☐ FIDUCIARY APPOINTMENT

☐ REFEREE APPOINTMENT

☐ NEXT APPEARANCE DATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X
ROCKFENCE BASEBALL LLC,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 817255/2024E

DOMINGO GERMAN,
Defendants.

-----X

In the instant action for breached of a loan agreement, plaintiff moves *ex parte* for an Order permitting it to serve defendant with a summons, notice for motion for summary judgment in lieu of complaint, and supporting papers by alternative means pursuant to CPLR § 308(b).

For the reasons that follow hereinafter, plaintiff's motion is **denied**.

In the instant action, plaintiff alleges that defendant breached a loan agreement by failing to pay amounts due in accordance with a repayment schedule.

Plaintiff seeks an Order pursuant to CPLR § 308(5) permitting alternate service of the summons, motion for summary judgment in lieu of complaint, and supporting papers via email to defendant and first class mail to defendant's attorney.

CPLR § 308(5) provides for service in a manner directed by the court, upon motion without notice, if service is impracticable under paragraphs one, two and four of § 308. Alternative methods pursuant to CPLR § 308(5) may only be directed if it has been shown that such service is actually impracticable (*Fontanez v PV Holding Corp.*, 182 AD3d 423, 423-424 [1st Dept 2020] "A showing of impracticability under 308(5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to Subdivisions (1), (2) or (4) of CPLR 308" (*Franklin v Winard*, 189 AD2d 717, 727 [1st Dept 1993] ["In this case, the evidence demonstrates that plaintiff had information regarding the appellant's last known residence, which is not equivalent to the actual dwelling place or usual place of abode so as to allow for service pursuant to Subdivisions (2) or (4) of CPLR 308. Further, plaintiff has

demonstrated that her efforts to obtain information regarding the appellant's current residence or place of abode through ordinary means, such as a motor vehicle registration search, had proven ineffectual. This sufficiently demonstrates that service under the other methods provided would be 'impracticable'.'). Service in a foreign jurisdiction must be accomplished in accordance with applicable law, and alternative methods pursuant to CPLR § 308(5) may only be directed if it has been shown that such service is actually impracticable (*Fontanez* at 423-424 [1st Dept 2020] ["[P]laintiff's attempts to serve through the Chinese Central Authority in accordance with the Hague convention would have been futile because she did not have defendant's correct address.']; *Born to Build, LLC v Saleh*, 139 AD3d 654, 655-656 [2d Dept 2016] ["[T]he plaintiff demonstrated that it had been unable to serve the defendant at the addresses available to it. The defendant stated that she lived and worked in China, but did not disclose either her business or residence address in that country, thereby preventing the plaintiff from attempting international service pursuant to the Hague convention.']; *Solomon v Horie Karate Dojo*, 283 AD2d 479, 479-480 [2d Dept 2001] ["[T]he plaintiffs demonstrated that Tigre left the country when his visa expired and returned to South America, without leaving a forwarding address. Under these circumstances, the Supreme Court properly determined that service upon Tigre was impracticable under the other relevant subsections of CPLR 308, and that expedient service was appropriate.']; *Kyoko Yamamoto v Hidenhiko Yamamoto*, 43 AD3d 372, 373 [1st Dept 2007] ["In view of the procedures in place for effectuating service upon defendant in Japan, and the absence of any evidence that service in that manner is 'impracticable,' the court properly denied plaintiff's request, pursuant to CPLR § 308(5), for an order directing that service on defendant be effectuated by personal delivery of process upon his attorneys.']; cf. *LTD Trading Enters. v Vignatelli*, 176 AD2d 571, 571 [1st Dept 1991] ["However, with respect to the individual defendant, Alberto Vignatelli, a resident of Forli, Italy, the IAS court properly directed such service. The record indicates that at considerable expense plaintiff employed the services of an international service company, which was unable to serve this defendant despite many attempts. Considering the facts and circumstances of this case, authorization of service pursuant to CPLR 308(5) was warranted.']).

While service of process by email is not directly authorized by the CPLR, it is not prohibited under New York state law, federal law or the Hague Convention, given appropriate circumstances (*Dixon v New York City Health and Hospitals Corporation*, 222 AD3d 553, 554 [1st Dept 2023])[“Plaintiff attempted service at an Ohio address obtained through investigation, which turned out to be the home of Dr. Hanandeh’s parents and brother, and also attempted service at Dr. Hanandeh’s last known New York address as provided by his former employer, defendant New York City Health and Hospitals Corporation. . . . Under the circumstances presented, plaintiff is also entitled to effectuate service by alternative means, as she made a showing that service on Dr. Hanandeh was impracticable, and that service by email was reasonably calculated to apprise him of this action.”]; *Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141 [1st Dept 2010][“We observe that while service of process by e-mail is not directly authorized by either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention, given appropriate circumstances. Indeed, both New York Courts and federal courts have, upon application by plaintiffs, authorized e-mail service of process as an appropriate alternative method when the statutory methods have proven ineffective. Service by e-mail on foreign defendants covered by the Hague Convention has also been approved upon a proper showing.”][internal citations omitted]).

Moreover, the kind of notice given under *ex parte* orders must be reasonably calculated, under all the circumstances, to apprise the defendant of the action brought against him (*Dobkin v Chapman*, 22 NY2d 490, 505 [1968] citing *Mallone v Central Hanover Bank & Trust.*, 339 U.S. 306, 314 [1950])[“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”)].

Here, in support of the instant application, plaintiff’s attorney submitted his affirmation, wherein he states as follows: On or around September 2024, defendant “removed their presence” from the United States by flying to and remaining in the Dominican Republic. “While

there is a home address in Florida, we e-mailed the attorney, Benjamin Levine, [who] informed us [that he was] working with Domingo German on September 4, 2024 [in connection with] the Summons and Motion [for] Summary Judgment in Lieu of Complaint.” Defendant’s counsel’s email address is belevine@grsm.com. Defendant’s counsel communicated with plaintiff by email as recently as September 4, 2024. “Due to the recency of this communication in which Mr. Levine presented himself as representing Domingo German, the Order to Show Cause and Affirmation in Support of the Order to Show Cause was mailed via first class mail service to Mr. Levine’s office” in New York. Plaintiff’s last email correspondence to defendant’s attorney was sent on October 30, 2024. Mr. Levine has not responded to that email nor the first class mailing sent to him. On November 11, 2024, plaintiff attempted to serve defendant “personally via his last known email,” Domingog55@hotmail.com, attaching the Summons, Motion for Summary Judgment in Lieu of Complaint and supporting Affirmation, Order to Show Cause, and Affirmation in Support of the Order to Show Cause. That email address is the last known email address recorded by plaintiff and is also “confirmed by Domingo German’s adviser.” “Accordingly, email service and first class mail service to Mr. Levine’s office is reasonably calculated under the circumstances to apprise Defendant of this action.”

In his affirmation, counsel references several exhibits to his affirmation, including a printout from defendant’s Instagram account showing that his “last known presence,” was in the Dominican Republic, two email communications between plaintiff and defendant’s counsel dated September 4, 2024 and October 30, 2024, and plaintiff’s email to defendant himself. However, none of those exhibits were attached to his affirmation or otherwise submitted by plaintiff.

Notably, CPLR § 313 provides that “[a] person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302 . . . may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person

authorized to make service by the laws of the state . . . in which service is made . . . or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.”¹

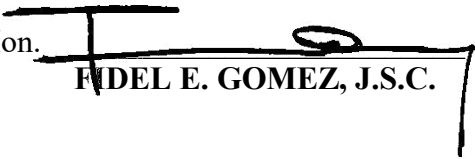
Here, plaintiff has not demonstrated that the statutory methods for service of process have proven ineffective. Indeed, by counsel’s own account it appears that no attempt was made to effect service upon defendant at his Florida address under the methods promulgated by CPLR § 308 (1) [delivering the summons to the person to be served], (2) [delivering the summons to a person of suitable age and discretion and mailing to person to be served], or (4) [affixing summons to door and mailing to person to be served]. Nor has plaintiff provided any evidence that defendant is presently in the Dominican Republic or that Levine is representing him in this matter. The Court also notes that, if plaintiff resides in the Dominican Republic, service upon him in the Dominican Republic should be effected in accordance with the Hague Convention if his address is known.

Based on the foregoing, plaintiff has not demonstrated that alternative service is appropriate. Accordingly, it is Ordered that plaintiff’s application is denied.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
March 5 , 2025

Hon.


FIDEL E. GOMEZ, J.S.C.

¹For purposes of this motion, the Court will assume that defendant is subject to the jurisdiction of the courts of New York pursuant to CPLR § 302 since the loan agreement involves, in part, his employment by the New York Yankees, notwithstanding that the loan agreement lists a Florida address for defendant and a Massachusetts address for plaintiff. Pursuant to CPLR § 302(a)(1), a court of this state may exercise personal jurisdiction over a non-domiciliary who transacts any business within the state, or contracts anywhere to supply goods or services in the state, so long as the cause of action arises from those acts.