SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SHOSH NEW YORK LLC,

Index No.
158422/2015

Plaintiff,

- v -

DECISION and ORDER

25 PARK BRIDGEHAMPTON, LLC and ALISON BRETTSCHNEIDER,

Mot. Seq. #001

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Shosh New York, a fashion designer and manufacturer of women's clothing, brings this action against defendants, 25 Park Bridgehampton, LLC ("25 Park"), a women's clothing store with three locations, and its principal, Alison Brettschneider ("Brettschneider" and collectively, "defendants"), for failure to pay plaintiff for 139 blouses.

Plaintiff commenced this action on August 14, 2015, by summons and verified complaint. Plaintiff now moves for an order, pursuant to CPLR § 3215, granting default judgment in favor of plaintiff and against defendants in the amount of $16,345 plus interest from November 15, 2014. In support, Plaintiff submits the attorney affirmation of James B. Fishman, Esq., annexing the summons and verified complaint, dated July 31, 2015, and affidavits of service on 25 Park and Brettschneider, dated September 15, 2015, and December 1, 2015, respectively.

In opposition, defendants submit the affidavit of Brettschneider and the attorney affirmation of Deborah A. Conquest, Esq., annexing (a) defendants' proposed answer to the verified complaint, (b) the summons and verified complaint, (c) a copy of 25 Park's listing in NYS Department of State's online database of corporations, and (d) a copy of the purchase order for 139 blouses, listing Shosh New York as the vendor, Brettschneider as the buyer, and 25 Park as the "ship to" and "bill to" address.

In her affidavit, Brettschneider avers that defendants first learned of plaintiff's action on January 13, 2016, when defendants received plaintiff's motion seeking

default judgment. The affidavit of service for the summons and complaint states that process was served on 25 Park by delivery to the Secretary of State. Brettschneider states that the address on file for 25 Park is the address of defendants' former attorney, Hugh Janow, Esq., who is now deceased and whose obituary was published in the New York Times on May 5, 2013. The second affidavit of service states that process was served on Brettschneider by delivery to a doorman at her building. Brettschneider avers that she was not informed of the delivery, did not receive the summons, and did not receive the required additional mailing by first class mail at her residence or place of business in an envelope marked "personal and confidential."

Brettschneider further avers that within a few weeks of delivery of the goods, defendants notified plaintiff that the goods were "defective and unmerchantable," and thereafter rejected those goods sold to defendants as "defective." Plaintiff purportedly agreed to take the goods back or have them exchanged for goods that were not defective, but plaintiff never provided an address for return of the defective goods despite defendants' repeated requests.

"A process server's affidavit of service constitutes prima facie evidence of proper service." (*U.S. Bank v. Arias*, 85 A.D.3d 1014, 1015 [2d Dep't 2011]). A defendant's "mere denial" of service is insufficient, without more, to rebut the presumption of proper service; however, a defendant's "sworn non-conclusory denial" of service is sufficient to dispute the veracity or content of a process server's affidavit. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]; *Hinds v. 2461 Realty Corp.,* 169 A.D.2d 629 [1st Dep't 1991]). No hearing is required where the defendant fails to swear to "specific facts to rebut the statements in the process server's affidavits." (*NYCTL 1998-1 Trust v. Rabinowitz,* 7 A.D. 3d 459 [1st Dept. 2004]).

Section 301 of the Limited Liability Company Law ("LLCL") requires a limited liability company to designate the secretary of state as an agent upon which process may be served. (LLCL § 301). Upon service of duplicate copies with any person authorized by the secretary of state to receive service, LLCL section 303 directs the secretary of state to "promptly send one of such copies by certified mail, return receipt requested, to [the] limited liability company at the post office address on file in the department of state specified for that purpose." (LLCL § 303[a]).

Service of process on a corporation is complete when the Secretary of State is served irrespective of whether the process subsequently reaches the corporate defendant. (*Micarelli v. Regal Apparel Ltd.,* 52 A.D.2d 524 [1st Dep't 1976]; *Associated Imports. Inc. v. Leon Amiel Publisher. Inc.*. 168 A.D.2d 354 [1st Dept.

1990] ["Service of the summons and complaint on the Secretary of State is valid even though defendant did not receive such from the Secretary of State due to the failure to change the address on file."]). A corporate defendant's failure to keep a current address of an agent on file with the Secretary of State does not constitute a reasonable excuse for the default. (*See Baker v. E.W. Howell Co.*, 216 A.D.2d 242, 244 [1st Dep't 1995].

Here, the affidavit of service states that Steven C. Avery "served the summons and verified complaint" on "25 Park Bridgehampton, LLC" on September 15, 2015 "by delivering two true copies to Sue Zouky, legal clerk, personally," pursuant to section 303 of the LLCL. Defendants' contention that the address for service of process on file with the Secretary of State was an incorrect address does not constitute a reasonable excuse for the defendants' delay in appearing or answering the complaint.

CPLR § 308 authorizes personal service upon a natural person, "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business ... of the person to be served and ... by mailing the summons by first class mail to the person to be served at his or her actual place of business[.]" (CPLR § 308[2]).

A doorman may qualify as "a person of suitable age and discretion" at the intended party's place of residence such that a summons may be delivered to him for purposes of alternate service under CPLR 308(2) so long as the record does not reveal that the duties of the particular doorman in question varied from the usual duties of such an individual, i.e., "to screen callers, to announce visitors and to accept messages and packages for delivery to the tenants." *Charnin v. Cogan*, 250 A.D.2d 513, 517 [1st Dep't 1998]; *F.I. duPont, Glore Forgan & Co. v. Chen,* 41 N.Y.2d 794 [1998]). Where a process server has not been permitted access to the specified apartment or is advised that the intended party is not home, a doorman has been found to be such a person of suitable age and discretion within the contemplation of CPLR section 308(2). (*See Bank of Am., N.A. v. Grufferman*, 117 A.D.3d 508 [1st Dep't 2014] ["Service upon the doorman of defendants' apartment building was proper under CPLR 308(2), given that the process server was denied access to defendants' apartment."]; *Rosenberg v. Haddad,* 208 A.D.2d 468 [1st Dep't 1994]).

The affidavit of service states that Andre Meisel served the summons and verified complaint on "Alison Brettschneider" by delivering a true copy of each to Manny "Smith," a person of suitable age and discretion, at defendant's dwelling house at "433 East 74th Street, #1B, New York NY, 10021" on December 1, 2015. Meisel states that Manny "Smith" identified himself as the doorman of the

defendant, refused to state his true last name, and refused to allow Meisel access into the building. Meisel also mailed a copy of the summons and verified complaint to defendant's last known residence at the same address by "Regular First Class Mail" in an enveloped marked "Personal and Confidential." Although Brettschneider alleges that she never received a copy of the summons and complaint, either by personal delivery or by mail, she confirms that her address is 433 East 74th Street, #1B, New York, NY 10021 in her affidavit. Brettschneider's denial of service, without more, is insufficient to rebut the presumption of proper service.

Notwithstanding the absence of a reasonable excuse for the defendants' delay, there is no indication that defendants' default was willful or that plaintiff was prejudiced. In light of the relatively short delay, defendants' willingness to participate in the matter, and in the interest of resolving this dispute on the merits, defendants should be permitted to serve a late answer. (*See e.g., Gonzalez v Seejattan*, 123 A.D.3d 762, 762 [2d Dep't 2014] [granting leave to serve late answer based on, *inter alia*, lack of prejudice, two-month delay, and lack of willful default]). Because no default judgment has been entered against defendant, the court need not address whether defendant has set forth a meritorious defense. (*See Arrington v Bronx Jean Co., Inc.*, 76 A.D.3d 461, 462 [1st Dep't 2010] [no affidavit of merit required if default judgment has not yet been entered]).

Wherefore, it is hereby,

ORDERED that plaintiff's motion for a default judgment against defendants, 25 Park Bridgehampton, LLC and Alison Brettschneider, is denied; and it is further

ORDERED that defendants' proposed answer to the verified complaint annexed to the moving papers shall be deemed served upon service of a copy of this Order with a notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: APRIL 25, 2016

APR 25 2016

EILEEN A. RAKOWER, J.S.C.