Monnier v Robinson
2017 NY Slip Op 32759(U)
December 19, 2017
Supreme Court, New York County
Docket Number: 154674/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH *Justice* **PART 29**

JOANNA MONNIER,

Plaintiff,

- v -

MICHELLE JANINE ROBINSON
"John Doe" and Jane Doe"

Defendants.

INDEX NO. 154674/2017

MOTION DATE 12/18/17

MOTION SEQ. NO. 001

The following papers, numbered 4–16, were read on this motion for entry of a default judgment.

Notice of Motion—Affirmation in Support—Exhibits A–C—RJI—Proposed Judgment—Affidavits of Service	**Nos. 4–16**

Motion by Plaintiff Joanna Monnier pursuant to CPLR 3215 for entry of a default judgment against Defendants Michelle Janine Robinson ("Robinson"), "John Doe," and "Jane Doe" is denied, with leave to renew.

BACKGROUND

Plaintiff brought this action to recover possession of an apartment she allegedly owns, and to obtain $22,550 in back rent and holdover rent allegedly due and owing, from Defendants. Plaintiff alleges that she owns 14 Jumel Terrace, New York, New York 10032 (the "Premises"), a three-family dwelling, pursuant to a deed dated October 9, 2002. (Brewster affirmation, exhibit A, ¶¶ 2, 5–6.) Plaintiff further alleges that Robinson is a month-to-month tenant in apartment 1 of the Premises (the "Unit"), which appears to the Court to be in the basement. (*Id.* ¶ 3.) Prior to the commencement of the instant action, Plaintiff discontinued a non-payment proceeding in civil court under index No. 84424/2016 "due to non-compliance with the [Premises'] Certificate of Occupancy. (*Id.* ¶ 8.)

Plaintiff alleges that Robinson leased the Unit for a two-year period beginning November 1, 2014, and ending October 31, 2016 (the "Lease"). (*Id.* ¶ 7, 10.) Plaintiff further alleges that Defendants have not paid rent of $2050.00/mo.

under the lease since June 2017, are now in a holdover tenancy, and owe $22,550.00 in back rent and holdover rent as of May 2017. (*Id.* ¶¶ 11, 14–15.)

Plaintiff commenced the instant action against Defendants on May 20, 2017, by e-filing a summons and verified complaint. (*Id.*) Plaintiff alleges that a licensed New York City process server served process upon Defendants by: (1) on June 8, 2017, at 11:55 a.m., affixing a copy of the summons and verified complaint to the door of the Unit; and (2) on June 13, 2017, mailing a copy of the same to the Unit. (Brewster affirmation, exhibit B.) The process server's affidavit indicates the process server made three attempts to deliver the same personally to Defendants—on Monday, June 5, 2017, at 9:32 p.m., Tuesday, June 6, 2017, at 12:55 p.m., and Thursday, June 8, 2017, at 11:55 a.m.

As Defendants have not appeared in this action, Plaintiff now moves for entry of a default judgment for the complete relief sought in the complaint. Plaintiff seeks ejectment of Robinson and any sub-tenant or other occupant in the Unit on the first cause of action and a money judgment in the sum of $22,500.00 for the use and occupancy of the Unit on the second cause of action.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)[1]

On the instant motion, Plaintiff fails to show prima facie that process was served upon Robinson in this action.

[1] Plaintiff need not notice Defendants pursuant to CPLR 3215 (g) (3) (i) to obtain a default judgment as to the first cause of action, but Plaintiff must, in addition to all other requirements pursuant to the CPLR and otherwise, show prima facie that Defendants were noticed pursuant to CPLR 3215 (g) (3) (i) before the Court shall grant leave for entry of a default judgment as to the second cause of action.

"Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308." (*Washington Mut. Bank v Murphy* (127 AD3d 1167, 1175 [2d Dept 2015] [internal quotation mark and citations omitted].) CPLR 308 provides:

> "Personal service upon a natural person shall be made by any of the following methods:
>
> "1. by delivering the summons within the state to the person to be served; or
>
> "2. 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 and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, . . . ; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, . . . ; or . . .
>
> "4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; . . .

The affidavit of service of process upon Robinson suggests that the process server attempted to serve Robinson pursuant to CPLR 308 (4), commonly known as "nail and mail" service.

To reach CPLR 308 (4), a plaintiff must first have attempted service under CPLR 308 (1) and (2) "with due diligence." (CPLR 308 [4].) "The requirement of due diligence must be strictly observed because there is a reduced likelihood that a defendant will actually receive the summons when it is served pursuant to CPLR 308 (4)." (*Serraro v Staropoli*, 94 AD3d 1083, 1084 [2d Dept 2012].) "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality." (*Id.*)

The Appellate Division, Second Department has held that "[f]or the purpose of satisfying the due diligence requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment." (*Serraro* at 1085; *see also McSorley v Spear*, 50 AD3d 652 [2d Dept 2008].) Further, "[a] mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the "due diligence" requirement before resort to nail and mail service." (*Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007].) Further, "'due diligence' may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such." (*Id.*) "For the purpose of satisfying the 'due diligence' requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment. (*Id.*)

The Appellate Division, First Department held in *Ayala v Bassett* (57 AD3d 387 [1st Dept 2008]) that a process server exercised due diligence where three different attempts were made to serve a defendant at the defendant's residence on three different days, at times of day that were in the morning, the afternoon, and the evening, over a 22-day period. The Appellate Division, First Department has also held that attempts at service were not diligent where two attempts were made at times when it was likely the defendant was in transit to or from work and where no attempt to serve defendant by personal delivery was made at his known place of business. (*Wood v Balick*, 197 AD2d 438 [1st Dept 1993].)

Here, the affidavit of service of process indicates that the process server made attempts to serve Robinson in the middle of the workday on two of the three visits to the Unit—the last two visits, on Tuesday, June 6, 2017, at 12:55 p.m., and on Thursday, June 8, 2017, at 11:55 a.m. At oral argument on the motion on December 18, 2017, Plaintiff stated that Robinson is known to Plaintiff to live at the Unit at her actual residence. Plaintiff further stated that Robinson is known to Plaintiff to work at Simon and Schuster during business days and that Plaintiff at

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times sees Robinson leave for work at 9:00 a.m. in the morning on weekdays. Plaintiff further stated that she lives in the same building as Robinson and had seen her as recently as one week prior to the oral argument.

Based upon the foregoing, the Court finds that Plaintiff has not shown prima facie that the attempts at service of process at Robinson's residence were diligent because: (1) Robinson could not reasonably be expected to be found at the Unit during business hours; (2) the last two attempts were made around midday during business hours; (3) all three attempts were made during the same week; (4) no attempt was made to serve Robinson personally at the Unit in the morning before she left for work, on a weekend, or at a time when Robinson was known to be home; and (5) no attempt was made to serve Robinson at her actual place of business, which is known to Plaintiff, or to otherwise ascertain her whereabouts to effectuate personal service.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff Joanna Monnier's motion pursuant to CPLR 3215 for entry of a default judgment against Defendants Michelle Janine Robinson, "John Doe," and "Jane Doe" is denied, with leave to renew.

The foregoing constitutes the decision and order of the Court.

Dated: December 19, 2017
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE