

F Enters. I, LLC v TSR Design Corp.

2022 NY Slip Op 34259(U)

December 15, 2022

Supreme Court, New York County

Docket Number: Index No. 655250/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

F ENTERPRISE I, LLC. and G BUILDERS, LLC,

Plaintiffs,

- v -

TSR DESIGN CORP., SYLVIA FLORIAN, ELVIO FLORIAN,
and RICCARDO POGETTI,

Defendants.

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INDEX NO. 655250/2018

MOTION DATE 10/18/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 31, 32, 39, 40, 41, 42, 43, 44, 45, 46, 74

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for DISCOVERY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant Elvio Florian to dismiss the complaint against him for lack of personal jurisdiction is granted and the complaint is dismissed against him; and it is further

ORDERED that the complaint against defendant Elvio Florian is severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Elvio Florian dismissing the claims made against

him in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the motion of plaintiff to strike the pleadings of defendants for failure to comply with discovery orders is denied; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed status conference order or proposed competing status conference orders at least two days before January 16, 2023, on which date counsel shall appear via Microsoft Teams unless such appearance be waived by the court; and it is further

ORDERED any such proposed status conference order must append a privilege type log/table that sets forth (1) in one column, categories of documents, as well as the particularized documents, sought (e.g., promotional materials sales receipts and invoices) and that sets forth (2) in the second column description (title and date) of documents produced and that sets forth (3) in the third column the basis of any objection to disclosure (for e.g., attorney work product; confidential; immaterial; affidavit of person with knowledge of detailed diligent search and determination that sought records not in party's possession pursuant to Jackson v City of New York [185 AD2d 768 (1st Dept 1992)]), which log(s) must be created jointly or severally by defendants counsel and plaintiff's counsel.

DECISION

The affidavit of substituted service service on defendant Elvio Florian does not prima facie establish proper service upon such defendant, as it does not state that the process was affixed to a conspicuous place and subsequently mailed to "the last known residence" or the "actual place of business" of such defendant in an envelope bearing the legend "personal and confidential", pursuant to CPLR § 308(4). Moreover, the statements of defendant Elvio Florian in support of dismissal of the complaint are that "I do not and have never maintained a business office in New York or anywhere else in the United

States. I do not currently reside and have never resided at 155 W. 13th Street, New York, New York 10011 and it has never been my dwelling place or usual place of abode." Neither the affidavit of the process server nor the affidavit of plaintiffs' principal raises an issue of fact with respect to same as neither such affidavit asserts that 155 W. 13th Street, New York, New York 10011, i.e., "the premises" the entrance door of which process was affixed was of defendant Elvio Florian's "actual place of business, dwelling place or usual place of abode", as set forth in CPLR § 308(4). See Feinstein v Bergner, 48 NY2d 234 (1979).

As for plaintiffs' motion for sanctions, the court agrees with defendants that such motion itself lacks merit. See Biggio v Biggio, 21 AD3d 920 (2nd Dept 2005). This court likewise agrees with defendants that a party cannot be compelled to produce records, documents or information that were not in its possession, or did not exist. See Smith v County of Nassau, 138 AD3d 726, 728 (2d Dept 2016).

Debra A. James

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<u>12/15/2022</u> DATE					<hr/> DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE