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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Realty Executives International, Inc.

Plaintiff,

vs.

Otto E. Lugo, et al.,

Defendants.

No. CV-15-01225-PHX-PGR

ORDER

Pending before the Court is Defendants' Motion (1) to Set Aside Clerk's Entry of Default and (2) to Dismiss this Action for Insufficient Service of Process, Improper Venue and for Lack of Personal Jurisdiction (Doc. 26). Having reviewed the parties' memoranda and the relevant record, the Court finds that the defendants were not properly served with process and that the plaintiff should be given leave to properly re-serve the defendants.¹

Background

According to the Complaint, this action for trademark infringement, false

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The plaintiff states in its response (Doc. 30) that it does not contest setting aside the Entry of Default (Doc. 19) so that portion of the defendants' motion is no longer at issue.

1 designation of origin, and breach of contract arose from a Regional Development
2 Agreement and a Franchise Agreement between plaintiff Realty Executives
3 International, Inc. and the four named defendants, Otto E. Lugo, Linda Bonarelli
4 Lugo, Long Island Partners, Inc. dba Realty Executives West, and Huntington
5 Homes, Inc. dba Realty Executives Northshore. The Lugos are a married couple
6 residing in New York; Mr. Lugo is the president of Long Island Partners, a New York
7 corporation, and Mrs. Lugo is the president of Huntington Homes, a New York
8 corporation. The Complaint alleges that the defendants entered into franchise or
9 subfranchise agreements which permitted them to use the plaintiff's Realty
10 Executives logotypes, service marks, trademarks, and business information in order
11 to operate Realty Executives franchises within specific geographic regions. The
12 Complaint further alleges that the defendants have continued to use the plaintiff's
13 intellectual property notwithstanding that the plaintiff terminated their right to do so.

14 Motion to Dismiss for Insufficient Service of Process²

15 The defendants have moved in part to dismiss this action pursuant to
16 Fed.R.Civ.P. 12(b)(5) on the ground that none of the defendants were properly
17 served pursuant to federal and/or New York state law. Since the defendants have
18 challenged the sufficiency of service, the plaintiff bears the burden of demonstrating
19 that proper service was made. Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir.2004).

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21 Although the defendants' motion is captioned as being in part a motion
22 to dismiss for lack of personal jurisdiction, the Court construes this as referring solely
23 to a contention that the Court did not acquire personal jurisdiction over the
24 defendants because they were not properly served with process. The Court does
25 not construe the motion as arguing that there is no general or specific personal
26 jurisdiction over the defendants in the District of Arizona since the defendants make
no such argument in their memoranda. For that reason, the Court does not reach
the plaintiff's argument in its response that there is personal jurisdiction in this
District over the defendants pursuant to the principle of purposeful direction.

1 Pursuant to Fed.R.Civ.P. 4(e), service of process may be made in conformity with
2 federal law, the law of the forum state, or the law of the state where service is made.
3 Since the plaintiff argues that the defendants were properly served with process in
4 New York in compliance with New York's Civil Practice Law Rules ("CPLR"), the
5 Court will resolve the service issues solely under New York law. The Court
6 concludes that none of the defendants were properly served in the manner required
7 by the CPLR and that the deficiencies in the manner of service are apparent from
8 the face of the plaintiff's affidavits of service without reference to the defendants'
9 submitted controverting evidence.

10 A. Otto Lugo

11 All four of the plaintiff's affidavits of service were signed by Rick Amatulli, the
12 plaintiff's New York process server. According to the affidavit of service (Doc. 12)
13 regarding Otto Lugo, Mr. Amatulli served Mr. Lugo with a copy of the summons and
14 complaint on July 15, 2015 at 2:27 p.m. at the address of Long Island Partners Inc.-
15 Realty Executives West in West Hempstead, New York, Mr. Lugo's place of work,
16 through a "suitable age person" named Noreen Khan. The affidavit states in relevant
17 part that Ms. Khan is 30 years old and that she is an agent of the defendant's
18 company who accepted service for Mr. Lugo personally. The affidavit further states
19 that Mr. Amatulli completed service by mailing a copy of the summons and complaint
20 on July 15, 2015 by first class mail in an envelope marked "Personal and
21 Confidential" that was addressed to Long Islands Partners Inc.-Realty Executives
22 West at its West Hempstead, New York address.

23 In a controverting affidavit submitted by the defendants (Exhibit E to Doc. 26-
24 1), Noreen Khan states in part that she is employed as a part-time secretary for
25 Realty Executives West, that Mr. Amatulli never asked her about her employment
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1 status or whether she was authorized to accept any documents for Mr. Lugo
2 personally at the corporate address, that she told him that she was not authorized
3 to sign for any documents or packages on behalf of Mr. Lugo personally, and that
4 he dropped an envelope on her desk after asking her how to spell her name. Ms.
5 Khan does not state anything about her age in her affidavit.³

6 The issue here is whether Mr. Lugo was properly served pursuant to CPLR
7 308, which governs personal service on a natural person. CPLR 308(2), which is the
8 subsection applicable here, provides in relevant part that service on an individual
9 may be made

10 by delivering the summons within the state to a person of suitable age
11 and discretion at the actual place of business... of the person to be
12 served and by ... mailing the summons by first class mail to the person
13 to be served at his or her actual place of business in an envelope
14 bearing the legend “personal and confidential[.]”... [P]roof of service
15 shall identify such person of suitable age and discretion and state the
16 date, time and place of service[.] ...

16 The Court concludes, based solely on the face of the affidavit of service, that
17 Mr. Lupo was not properly served pursuant to CPLR 308(2). New York law
18 recognizes that service pursuant to CPLR 308(2) is a two-step process in which a
19 proper delivery and a proper mailing are both essential. See Zarcone v. Condie, 62
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22 The defendants submitted with their reply a declaration from Otto Lugo
23 that states in part that he has never appointed Noreen Khan to be a designated
24 agent to receive service of process on behalf of either him personally or for Long
25 Island Partners. The Court has not considered this declaration because it was
26 improperly submitted with the defendants’ reply, given that could have been and
should have been submitted with their motion, and because the declaration is in any case
not necessary to the Court’s resolution of the service issues, which is based solely
on the face of the affidavits of service.

1 F.R.D. 563, 567 (S.D.N.Y.1974) (Court ruled that service under CPLR 308(2) was
2 defective because the plaintiff “complied with only one prong of the two prong
3 requirement contained in Section 308(2).”); Phillip v. City of New York, 2012
4 WL1598082, at *2 (E.D.N.Y. May 7, 2012) (“The first two steps of personal service
5 pursuant to § 308(2), delivery and mailing of the summons, are jurisdictional
6 requirements, and failure to properly perform either of them results in dismissal of
7 the action.”); Gay v. Carlson, 1992WL309819, at *4 (S.D.N.Y. Oct. 15, 1992) (“In
8 order for service to be effected under New York law, both prongs of Section 308(2)
9 must be satisfied.”) Service on Mr. Lugo was deficient because the plaintiff has not
10 established that the mailing component of CPLR 308(2) was strictly complied with
11 inasmuch as the affidavit of service does not specify that a copy of the summons
12 and complaint addressed to Mr. Lupo was mailed to him - the affidavit merely states
13 that a copy addressed to Long Island Partners Inc.-Realty Executives West was
14 mailed.

15 B. Long Island Partners

16 According to the affidavit of service (Doc. 13) regarding Long Island Partners,
17 Inc. dba Realty Executives West, Mr. Amatulli also served it on July 15, 2015 at 2:27
18 p.m. at its West Hempstead, New York address by service on Noreen Khan as its
19 “authorized agent.” Mr. Amatulli states that he informed Ms. Khan of the contents of
20 the service documents in compliance with state statutes. In her controverting
21 affidavit, Ms. Khan states that Amatulli never told her what document he was
22 delivering to her, that she told him that she was not authorized to sign for any
23 documents or packages on behalf of the company, and that she is not and never has
24 been an authorized agent to accept service on behalf of Long Island Partners.

25 CPLR 311(a)(1) provides that personal service on a domestic corporation
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1 must be made by delivering the summons “to an officer, director, managing or
2 general agent, or cashier or assistant cashier or to any other agent authorized by
3 appointment or by law to receive service.”

4 The Court cannot conclude that Long Island Partners was properly served
5 because, even without consideration of Ms. Khan’s controverting affidavit, the
6 plaintiff has not provided any evidence establishing that Ms. Khan was in fact an
7 authorized corporate agent for service of process purposes. Mr. Amatulli’s mere
8 conclusory and unsupported statement in his affidavit of service that she was an
9 authorized agent is simply not sufficient to meet the plaintiff’s burden of proof. See
10 Global Connect Strategic Voice of Broadcasting Corp. v. Oxford Collection Agency,
11 Inc., 856 N.Y.S.2d 635, 636 (N.Y.App.Div.2008) (Court affirmed that no proper
12 service on a corporation was made under CPLR 311(a)(1) because there was no
13 evidence that the process server made any “inquiry of the person to whom the
14 summons and complaint were personally delivered regarding the authority of that
15 person to accept process pursuant to CLPR 311(a)(1), nor was there any indication
16 that the recipient of the summons and complaint made any representation to the
17 process server of having authority to receive service on behalf of the defendant
18 corporation[.]”)

19 C. Linda Lugo

20 According to the affidavit of service (Doc. 15) regarding Linda Lugo, Mr.
21 Amatulli served Mrs. Lugo with the summons and complaint on July 20, 2015, at
22 either 1:10 p.m. or 1:50 p.m. (the affidavit sets forth both times without an
23 explanation), at the address of Huntington Homes, Inc., Realty Executives North
24 Shore in Huntington, N.Y., her place of work. Although Mr. Amatulli states in one
25 place in his affidavit that he “affixed” the documents to the door of the business, he
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1 later, contradictorily, states that on July 20th, after three earlier service attempts, the
2 service “papers were finally slipped under the door.” Mr. Amatulli further states that
3 he completed service by mailing a copy of the summons and complaint to the
4 address of Huntington Homes, Realty Executives North Shore in Huntington, N.Y.

5 The defendants have submitted the affidavit (Exhibit F to Doc. 26) of Melanie
6 Nici, an administrative assistant for Realty Executives Northshore, who states that
7 she found “legal papers” on her desk when she came to work on July 22, 2015, that
8 she immediately telephoned Mrs. Lugo to advise her of the paperwork, and that she
9 was advised by a sales agent for Realty Executives Northshore that the agent had
10 found the “legal papers” lying on the floor just past the front door when the agent
11 came to the office on the evening of July 21, 2015.

12 The plaintiff contends that this service, which it describes as Mr. Amatulli
13 “slipp[ing] the papers under the door directly into the office,” was sufficient because
14 it complied with the so-called “nail and mail” service procedure of CPLR 308(4).
15 Under the relevant portion of this provision, service of process on an individual may
16 be made

17 where service under paragraphs one [personal delivery to the person
18 to be served] and two [delivery to a person of suitable age and
19 discretion] cannot be made with due diligence, by affixing the summons
20 to the door of ... the actual place of business ... of the person to be
21 served and by ... mailing the summons by first class mail to the person
22 to be served at his or her actual place of business in an envelope
bearing the legend ‘personal and confidential[.]’

23 The Court concludes that Linda Lugo was not properly served. First, the
24 affidavit of service does not establish that the mailing component of § 308(4) was
25 strictly met because Mr. Amatulli does not state that the service documents he
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1 mailed were addressed to Mrs. Lugo, the person to be served; rather, he merely
2 states that he mailed the service documents to the address of Huntington Homes.

3 Second, as the plaintiff concedes in its response, the service “documents
4 admittedly were not ‘affixed to’ the glass door” of Mrs. Lugo’s place of work, and the
5 plaintiff has not cited the Court to any case law establishing that slipping service
6 documents under a door comports with the “nail” component of § 308(4). See
7 Empire Ins. Co. v. Marquez, 564 N.Y.S.2d 232 (N.Y.App.Div.1990) (Court concluded
8 that wedging the service documents in the door frame of a locked screen door
9 without taping, tacking or nailing the summons to the locked door was not an
10 affixation within the meaning of CPLR § 308(4).); accord, Pacamor Bearings, Inc. v.
11 Foley, 460 N.Y.S.2d 662, 664 (N.Y. App.Div.1983) (Court concluded that “the
12 wedging of the summons between the screen door and the door jamb is not an
13 ‘affixation’ within the meaning of [CPLR 308(4)]. The affixing of a summons to the
14 door is to be accomplished by the use of a nail, tack, tape, rubber band or some
15 other device[.]”)

16 D. Huntington Homes, Inc.

17 The affidavit of service (Doc. 14) regarding Huntington Homes, Inc. dba Realty
18 Executives Northshore is an exact duplicate of the affidavit of service on Linda Lugo,
19 which means that Mr. Amatulli also used the “nail and mail” procedure of CLPR
20 308(4) on this corporate defendant. This manner of service on Huntington Homes
21 is insufficient because it clearly fails to comply with the requirement of CPLR
22 311(a)(1) that a domestic corporation be served by delivering the summons to “an
23 officer, director, managing or general agent, or cashier or assistant cashier or to any
24 other agent authorized by appointment or by law to receive service.” See Lakeside
25 Concrete Corp. v. Pine Hollow Building Corp., 479 N.Y.S.2d 256 (N.Y.

1 App.Div.1984) (Court held that service on a corporation pursuant to CPLR 308,
2 which is only applicable to service on a natural person, does not constitute proper
3 service on a corporate defendant.), *aff'd without op.*, 493 N.Y.S.2d 309 (1985).

4 Although the Court does not disagree with the plaintiff's contention that all of
5 the defendants actually received notice of this action, actual notice does not excuse
6 the lack of proper service of process under New York law since that law requires
7 strict compliance with statutory methods for completing service. See National
8 Development Co. v. Triad Holding Corp., 930 F.2d 253, 256 (2d Cir.1991) ("We
9 reject the notion that 'actual notice' suffices to cure a void service."); Macchia v.
10 Russo, 496 N.E.2d. 680, 682 (NY 1986) ("In a challenge to service of process, the
11 fact that a defendant has received prompt notice of the action is of no moment[.]
12 Notice received by means other than those authorized by statute does not bring a
13 defendant within the jurisdiction of the court.") (internal citation omitted); Pierce v.
14 Village of Horseheads Police Dept., 970 N.Y.S.2d 95, 97 (NY App.Div.2013)
15 ("Plaintiff failed to serve process on defendants in accordance with the CPLR.
16 Because service of process is necessary to obtain personal jurisdiction over
17 defendants, courts require strict compliance with the statutory methods of service.
18 When the requirements of service of process have not been met, it is irrelevant that
19 the defendant may have actually received the documents, because notice received
20 by means other than those authorized by statute does not bring a defendant within
21 the jurisdiction of the court.") (internal quotation marks and brackets omitted.)

22 Motion to Dismiss for Improper Venue

23 The defendants also assert in their motion that this action should be dismissed
24 pursuant to Fed.R.Civ.P.12(b)(3) for improper venue. Their basic contention is that
25 venue is patently improper in the District of Arizona because "the defendants' Realty
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1 Executives franchise agreements all include 'choice of law,' 'forum selection' and
2 'arbitration provisions,' all of which be 'venued' in state and/or federal court located
3 in New York State (i.e. Nassau County)[.]” The plaintiff alleges in ¶ 14 of its
4 Complaint that “[v]enue is proper in this judicial district pursuant to 28 U.S.C. § 1391
5 and pursuant to the contracts between the parties, specifically the RDA, wherein the
6 defendants waived venue objections.”

7 The Court declines to make any substantive ruling on the issue of appropriate
8 venue at this time due to the failure of both sides to provide the Court with the proper
9 argument and record necessary for such a determination. By way of brief example,
10 the Court notes the following basic deficiencies. First, the plaintiff has submitted with
11 its response a copy of a Regional Development Agreement (“RDA”) (Exhibit 1 to
12 Doc. 30). The plaintiff’s contention that the defendants have contractually waived
13 any objections to jurisdiction or venue in this District is based on the provisions of
14 this RDA. However, the Court cannot conclude that the RDA binds all, or any, of the
15 defendants because the RDA, which contains no effective date but which was
16 signed by the parties in August of 2007, was signed on the part of the franchisees
17 only by defendant Otto Lugo and non-party Steve Lagoudis in their capacity as
18 “Regional Developer;” the plaintiff has also submitted an addendum to the RDA
19 which is only between the plaintiff, as franchisor, and non-party New York
20 Executives, Inc., as franchisee, which was also signed only by Otto Lugo and Steve
21 Lagoudis. Although the Complaint alleges that the defendants are alter egos and
22 agents of each other, the plaintiff makes no cogent argument in its response
23 supporting that allegation. Furthermore, the plaintiff also makes no argument as to
24 why the choice of law, jurisdiction and venue provisions of the RDA survive the
25 plaintiff’s pre-litigation termination of the RDA.

1 Second, the defendants' contention that New York law governs this action and
2 that the venue of this action is contractually-required to be in Nassau County, New
3 York is based on two Realty Executives subfranchise agreements, both of which
4 have an effective date of February 6, 2013, which they have submitted as exhibits
5 to their motion; the plaintiff's choice of law and choice of forum-related arguments
6 do not include any cogent discussion of these agreements. These agreements are
7 between non-party subfranchisor New York Executives Inc., a regional developer for
8 the plaintiff, which Otto Lugo signed as president, and subfranchisee Long Island
9 Partners, Inc., which Otto Lugo also signed as president (Exhibit G to Doc. 26-2),
10 and subfranchisee Huntington Homes, Inc., which Linda Lugo signed as president
11 (Exhibit H to Doc. 26-2). The plaintiff is not a named party to the agreements,
12 although it is made an intended third party beneficiary to them with the right to
13 enforce the provisions of the agreements against Long Island Partners and
14 Huntington Homes with respect to the provisions of the agreements pertaining to the
15 plaintiff's intellectual property. Notwithstanding the defendants' reliance on these
16 agreements for their venue-related assertions, their memoranda are bereft of any
17 cogent argument as to whether the forum selection provision of the subfranchise
18 agreements, which on its face only states, in a provision dealing with mediation and
19 arbitration, that the plaintiff "may" bring an action for preliminary injunctive or other
20 preliminary judicial relief in a Nassau County court, constitutes a mandatory forum
21 selection clause, *i.e.*, one requiring this litigation to be brought solely in the selected
22 forum, or is a permissive one, *i.e.*, one permitting this litigation to be brought either
23 in the designated forum or another appropriate forum. The same issue applies to
24 the forum selection clause in the RDA.

25 Third, while the defendants assert in their motion and reply that the "interests
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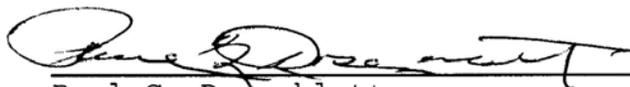
1 of justice” would be better served if this action were to be transferred to the Eastern
2 District of New York pursuant to 28 U.S.C. § 1404(a) and §1406(a) if the Court
3 declines to dismiss the action, their mere contention that access to evidence is more
4 readily available in New York and the defendants have greater contacts there is
5 simply too cursory and conclusory to be a basis for a transfer of venue. If the
6 defendants believe that a transfer to New York is appropriate pursuant to 28 U.S.C.
7 § 1404(a) and/or § 1406(a), they must file a separate motion to do so that is properly
8 argued and supported. Therefore,

9 IT IS ORDERED that Defendant’s Motion to Set Aside Clerk’s Entry of Default
10 (part of Doc. 26) is granted as unopposed and the Clerk of the Court’s Entry of
11 Default (Doc. 19) as to all of the defendants is vacated in its entirety.

12 IT IS FURTHER ORDERED that Defendant’s Motion to Dismiss this Action for
13 Insufficient Service of Process and for Lack of Personal Jurisdiction (part of Doc. 26)
14 is granted pursuant to Fed.R.Civ.P. 12(b)(5) to the extent that service of process on
15 all of the defendants is quashed and that the plaintiff shall properly effectuate service
16 of process on the defendants no later than **April 29, 2016**.⁴

17 IT IS FURTHER ORDERED that Defendant’s Motion to Dismiss for Improper
18 Venue (part of Doc. 26) is denied without prejudice.

19 DATED this 31st day of March, 2016.

20
21 
22 Paul G. Rosenblatt
23 United States District Judge

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26 Given the defendants’ participation in this action, the Court expects
them to consider having their counsel accept service on their behalf in order
to reduce the costs of this action.