| **New York Times Co. v Bourbon** |
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| 2018 NY Slip Op 31012(U) |
| May 22, 2018 |
| Supreme Court, New York County |
| Docket Number: 656843/2017 |
| Judge: Robert D. Kalish |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

**THE NEW YORK TIMES COMPANY,**

**Plaintiff,**

**- v -**

**CONTESSA BOURBON,**

**Defendant.**

**INDEX NO. 656843/2017**

**MOTION DATE 4/25/18**

**MOTION SEQ. NO. 001**

**NYSCEF Doc Nos. 6–12 were read on this motion for an order directing the entry of a default judgment.**

Motion by Plaintiff The New York Times Company ("The Times") pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of The Times and against Defendant Contessa Bourbon ("Bourbon") is denied.

## BACKGROUND

The Times commenced the instant action on November 9, 2017, by e-filing a summons and complaint ("Complaint"). The Complaint alleges that Bourbon is not, and has never been, employed by The Times and has never had any professional or business relationship with The Times. The Complaint then alleges, in sum and substance, that Bourbon nevertheless used the The New York Times™ trademark and service mark in connection with a physical impersonation of a New York Times reporter and in representing herself online on social media as a New York Times journalist. The Times brings its sole cause of action pursuant to General Business Law § 360-L and the common law and alleges injury to its business reputation and dilution of its marks as a result of Bourbon's fake news persona.

As Bourbon has not answered the Complaint or appeared in the instant action, The Times now moves for an order directing the entry of a default judgment in favor of The Times and against Bourbon, providing The Times with permanent injunctive relief restraining and enjoining Bourbon pursuant to General Business Law § 360-L, and awarding The Times its costs and attorneys' fees.[1]

[1] As a preliminary matter, the Court notes that Plaintiff has failed to follow the Court's rules regarding the formatting of motion papers and working copies as stated in section II.D of the Court's rules, available at http://www.nycourts.gov/courts/1jd/supctmanh/uniform_rules.pdf. NYSCEF Doc No. 8, Affidavit of David McCraw, is a single 136-page PDF, the first seven pages of which are the affidavit and the remaining pages of which are a series of thirteen exhibits (numbered i–xiii) annexed thereto. Similarly, NYSCEF Doc No. 9, Affirmation of Steven Lieberman, is a single 75-page PDF, the first six pages of which are the affirmation and the remaining pages of which are a series of thirteen exhibits (numbered 1–13) annexed thereto. The exhibits should

The Times submits an affidavit of service, dated January 8, 2018, stating that a Ligno Sanchez, employed by Keating & Walker Attorney Service, Inc., served Bourbon with process by: (1) on January 3, 2018, at approximately 6:56 a.m., affixing a copy of process at 94-26 57th Avenue, 2nd Floor, Elmhurst, New York 11373 (the "Elmhurst Address"), in a conspicuous place on the entrance to the premises, allegedly Bourbon's last known residence; and (2) on January 5, 2018, mailing a copy of process to the Elmhurst Address. (Affirmation of Lieberman, exhibit 10 [the "Sanchez Affidavit"].) The Sanchez Affidavit states that at the first attempt to serve Bourbon, on December 16, 2017, at approximately 12:16 p.m., the affiant spoke to the occupant of the Elmhurst Address who claimed that Bourbon had moved. The Sanchez Affidavit then states that the affiant conducted a skip-trace search and determined that the Elmhurst Address is Bourbon's last known/reported address. The Sanchez Affidavit further states that one other attempt to serve Bourbon at the Elmhurst Address was made on December 30, 2017, at approximately 7:05 p.m.

A second affidavit of service, dated March 13, 2018, indicates that a complete copy of the instant motion was mailed to Bourbon on March 13, 2018, at the Elmhurst Address. (Affirmation of Lieberman, exhibit 11.)

The Times submits an affidavit of merit, dated March 6, 2018, by David McCraw, which, among other things, reiterates The Times' allegations from the Complaint. Specifically, the affidavit catalogs various instances beginning in March 2013 when Bourbon falsely represented herself as a journalist employed by The Times, most commonly at the Brookings Institution. (Aff of McCraw ¶¶ 10–15, 22.) The affidavit states that Mr. McGraw sent Bourbon cease-and-desist letters in May 2015 and March 2017.

The Times submits copies of email correspondence allegedly between Bourbon[2] and The Times. Mr. McCraw allegedly sent emails to Bourbon on May 18, 2015, and March 29, 2017, directing her attention to copies of the cease-and-desist letters. On November 10, 2017, at 8:54 a.m., Bourbon allegedly replied to the March 29, 2017 email and stated, among other things, that she would be appealing to Arthur Sulzburger directly for the case against her to be withdrawn, that she hoped Mr. McGraw could withdraw it, and "I am based in DC. I can't go to NYC." (Affirmation of Lieberman, exhibit 3.)

Further alleged correspondence between The Times and Bourbon indicates that The Times attempted to settle with Bourbon. Bourbon appears to have provided The Times with her phone number and set up a call on November 10, 2017, at 11:15 a.m., with Mr. Lieberman, The Times' outside counsel, about coming to terms. On November 10, 2017, at 11:49 a.m., Mr. Lieberman allegedly sent an email to Bourbon which begins as follows:

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have been uploaded to NYSCEF as separate documents, and the working copies of the exhibits should have been bound together and separated by protruding exhibit tabs. Nevertheless, in the instant motion, the Court will consider the entirety of movant's unopposed submission and the merits of the relief requested therein.

[2] Bourbon's email address was allegedly vritzy@aol.com. Emails from vritzy@aol.com were allegedly signed "Contessa Bourbon."

> "This will confirm our discussion on the telephone just a few minutes ago. At your request, I am emailing you a service copy of the Complaint (and attendant documents), which you requested that we serve on you by email rather than by in-person delivery to you or to your residence. (You declined to share with me your current residence.) Please confirm, by return email, that you have received service of this Complaint."

(*Id.* exhibit 5.)

Mr. Lieberman sent follow-up emails but did not receive a reply until a week later. On November 17, 2017, Bourbon allegedly replied and said, among other things, that she "was informed by allies from [the] White House that there was no case against [her] anywhere, including in NYC." Bourbon then said that "[a] [c]ourt case is served by court and not on Internet. Your letter is confusing. I have not been informed by court. Allies say, documents could be fake on Internet as well as fake news." (*Id.* exhibit 8.) Bourbon closes by saying that she would speak with her lawyer on Sunday and would email after consulting with "allies." (*Id.*)

The Times submits no further correspondence allegedly from Bourbon.

## 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].)

The Court finds based upon The Times' submission that Bourbon has failed to appear or to answer the Complaint. The Court finds further that The Times has for the purposes of the instant motion submitted adequate proof of the facts constituting its claims by means of the affirmation of Mr. Lieberman and the affidavit of merit of Mr. McCraw. As such, The Times is entitled to a default judgment against Bourbon, provided it submits valid proof of service of process upon her.

In the instant motion, the Court finds that The Times has failed to show prima facie that Bourbon was served with process. "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; . . . ; . . .

"6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business."

Ordinarily, a "process server's affidavit constitutes prima facie evidence of proper service." (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; *see also Nazarian v Monaco Imports, Ltd.*, 355 AD2d 265, 266 [1st Dept 1998].) The Sanchez Affidavit appears to indicate that the process server attempted to serve Bourbon pursuant to CPLR 308 (4), commonly referred to as "nail and mail" service. CPLR 308 (4) "may only be used where service under CPLR 308 (1) or (2) cannot be made with 'due diligence.'" (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007], citing *Rossetti v DeLaGarza*, 117 AD2d 793, 793–794 [2d Dept 1986].) The Sanchez Affidavit indicates that the process server made two attempts to serve process on Bourbon at the Elmhurst Address before attempting nail-and-mail delivery, with the "nailing" allegedly being made at Bourbon's "last known residence."

"[Usual place of abode] may [not] be equated with the 'last known residence' of the defendant." (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979] [internal citations omitted].) This distinction is no "mere redundancy." (*Id.* at 241.) To "blur the distinction between [usual place of

abode] and last known residence . . . would be to diminish the likelihood that actual notice will be received by potential defendants" (*id.* at 240), contrary to the legislature's intent.

In *Feinstein*, a process server attempted to complete the "nail" prong of CPLR 308 (4) at Bergner's last known residence. As a result,

> "the purported service was ineffective, since the plaintiff failed to comply with the specific mandates of CPLR 308 [(4)]. The summons here was affixed to the door of defendant's last known residence rather than his actual [or usual place of] abode. That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court."

(*Id.* at 241 [internal citation omitted].) As such, the plaintiff in *Feinstein* failed to meet its burden of proof that it had satisfied the "nail" prong of CPLR 308 (4). Similarly, in *Washington* (at 1174), "the plaintiff failed to meet its burden of proof that its mailing of copies of the summons and complaint satisfied the mailing requirement of CPLR 308 (2)," which is analogous to the "mail" prong of CPLR 308 (4), by failing to mail the summons to Murphy's last known residence.

Here, the statement in the Sanchez Affidavit wherein the occupant of the Elmhurst Address claimed that Bourbon had moved creates an issue of fact as to whether the Elmhurst Address was Bourbon's dwelling place. Further, Bourbon's own alleged November 10, 2017 statement submitted with the moving papers, "I am based in DC. I can't go to NYC," indicates to the Court that, in fact, Bourbon did not at all "dwell" at the Elmhurst Address on December 16, 2017, or at any time thereafter when service of process was attempted there. Further, there can be no degree of the "permanence and stability that is necessarily implied by the term 'usual place of abode'" where Bourbon appears by all indications to have "moved" from the Elmhurst Address, and where there is no indication that she intends to return there. (*Feinstein* 48 NY2d at 239, n. 3.)

Further, even if the Court had found that the Elmhurst Address was Bourbon's usual place of abode—which it has not—service under CPLR 308 (4) would likely have been unavailable because service under CPLR 308 (2) would have been possible where the occupant of the Elmhurst Address on December 16, 2017, was a person of suitable age and discretion at Defendant's dwelling place/usual place of abode.

Moreover, Bourbon has not accepted service of process electronically, nor has she consented to the jurisdiction of this court.

Based upon the foregoing, the Court has found that The Times has failed to show prima facie that Bourbon was served with process. As such, her time to answer or appear in the instant action has not begun to run, she is not in default, and the court has no jurisdiction over her.

## CONCLUSION

Accordingly, it is

ORDERED that the motion by plaintiff The New York Times Company pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of The New York Times Company and against Defendant Contessa Bourbon is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 22, 2018
New York, New York

Robert D. Kalish J.S.C.
HON. ROBERT D. KALISH

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