CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

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BATHGATE 1 LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No. CV-15048-17

NOEL BRUNO,

Defendant.

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Hon. Brenda Rivera, J.C.C.:

The Plaintiff commenced this action against the Defendant seeking alleged damages in the amount of $3,711.04, plus interest from September 1, 2011, for unpaid use and occupancy of the subject premises at 2285 Bathgate Avenue, Apt. 2G, Bronx NY 10457, plus costs and disbursements. The Plaintiff moves, unopposed, for an order pursuant to CPLR § 3215 directing a default judgment in its favor.

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." A party who moves for an entry of a default judgment pursuant to CPLR § 3215 is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. *See* CPLR § 3215(f); *Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616 (1st Dept 2012); *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 A.D.3d 649 (2d Dept 2011).

In support of its motion, the Plaintiff submits an attorney affirmation, an affidavit by Mr.

Ben Reider, Plaintiff's managing agent, an illegible copy of a lease and riders, a copy of a lease renewal, a copy of the deed, a copy of Plaintiff's ledger indicating that Defendant has an outstanding balance, a copy of a notice of default, a copy of the summons and endorsed complaint, a copy of a Lexis Nexis Accurint search report, an affidavit of service of the summons and endorsed complaint, an affirmation of additional mailing, an affirmation of military investigation and an affirmation of service of the instant motion, intended to establish that the Defendant has failed to answer or appear in response to this action, despite service of process. *See* CPLR § 3215(f).

The affidavit of service of the summons and endorsed complaint indicates that on October 25, 2017, the Defendant was served by substituted service by affixing to the door at 545 St. Pauls Place, Apt. 5A, in Bronx County, a copy of the summons and endorsed complaint, with a first class post office mailing to the same address that followed on November 1, 2017. The process server alleged that the address listed on the affidavit of service is the Defendant's "dwelling house (usual place of abode)." Pursuant to CPLR § 3215(g)(3)(i), on November 13, 2017, an additional mailing was sent to the same address with the legend "PERSONAL & CONFIDENTIAL" on the envelope.

The court is authorized to issue a default judgment upon a defaulting Defendant where it has been established that the court has obtained jurisdiction over the party via proper service of process. CPLR § 3215(a). The plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction was obtained over the defendant by proper service of process. *Gottesman v. Friedman*, 90 A.D.3d 608 (2d Dept. 2011); *Frankel v. Schilling*, 149 A.D.2d 657 (2nd Dept. 1989). Where proper service of process cannot be established, the court may not issue

a default judgment. *Daniels v King Chicken & Stuff, Inc.,* 35 AD3d 345 (2nd Dept. 2006); *Widman v Turner,* 55 Misc.3d 131(A) (NY Sup App Term 2017).

Here, it is alleged that the Defendant moved from the subject premises in December 2011, the instant action was commenced in August 2017 and service is alleged to have been effected on October 25, 2017 and November 1, 2017. Given the issues with the overwhelming number of default judgments entered in Civil Court and the numerous instances of improper service, the court requires that a Plaintiff must provide the court with evidence that the address at which a Defendant was served is a proper address for service in accordance with CPLR § 308. *See generally, Feinstein v Bergner,* 48 NY2d 234 (1979)(statute amended to discourage "sewer service" and ensure that defendants receive actual notice of the pendency of litigation.)

It is well settled that a properly executed affidavit of a process server attesting to the service of process upon a defendant constitutes prima facie evidence of proper service. *Perskin v Bassaragh,* 73 AD3d (2nd Dept. 2010). The rebuttable presumption afforded to the affidavit of service is permissible only where the Plaintiff can establish that the address where the service was alleged is a Defendant's "actual place of business, dwelling place or usual place of abode" pursuant to CPLR §308(2). Thus, an affidavit of service is not entitled to the presumption of proper service where the affidavit of service is defective on its face or the address alleged is not a valid legal address. *Obrycki v Ryp et al,* 39 Misc3d 1220(A)(NY Sup Ct. Sullivan Co. 2014.)

In the instance where there has been no contact between a Plaintiff and a Defendant and/or a Plaintiff or process server does not have first hand knowledge of the Defendant's proper address for service, a Plaintiff must provide to the court evidence establishing Defendant's address, thereby also establishing that service at said address would provide proper notice of the

action. Here, Plaintiff provides the Lexis Nexis Accurint search report to establish Defendant's address in September 2017. The report, however, is insufficient to establish that the Defendant resided at the address listed on the Affidavit of Service in September 2017.

In the last two years, this Judge has declined to grant a significant number of motions for default judgment based upon the submission of an Accurint report, yet is still receiving numerous default motions supported with the similar documentation and can only speculate that there are a significant more amount of motions submitted to other judges in the civil court. Thus, it is appropriate to clarify the reasoning that the Accurint report is not sufficient.

The Accurint report is insufficient because it is not in admissible form and provides incomplete and redacted information. For example, the top right margin of the report states that there are three pages to the report, although only the first page is submitted to the court. In addition, the report states "Records 1 of 21." Thus, Plaintiff has only submitted one, out of the twenty-one records, which were found under the search for Defendant's name. Further, the report does not indicate the time period that the Defendant allegedly resided at 545 St. Pauls Place, Apt. 5A, Bronx NY 10456. In addition to the obvious redactions and incomplete information provided to the court, the Accurint report, containing hearsay information, is not in admissible form. Certain documents accompanied with affidavits, which are submitted in support of a motion for judgment, may be deemed admissible where the requirements of the business record exception to the rule against hearsay under CPLR §4518 are met. *See generally, Viviane Etinne Medical Care, PC as Assignee of Alem Cardenas v County-Wide Ins. Co.*, 25 NY3d 498 (2015)(the Court of Appeals found that the affidavit of a person with first hand knowledge of the billing procedures, submitted with the record of the bill, was sufficient to meet the business records

exception to the hearsay rule.)

The Plaintiff failed to establish the necessary foundation to admit the Accurint report, which contains information provided from a third party. The report does not provide nor was an affidavit submitted providing information to the court as to how the author of the record obtained the information, whether it was the duty of the author to obtain and maintain the information in the regular course of its business, whether the information was obtained in its regular course of business, the time frame that the information was collected, the time frame that it is alleged a Defendant resided at the subject address or any information for the court to assess the accuracy of the record.

Inasmuch as the Accruint report is insufficient to establish that the address alleged on the affidavit of service is a proper address for substituted service, the affidavit of service, which relies on information obtained from the Accurint report, is insufficient to establish that Defendant was properly served with notice of the instant case. As such, the Court finds that the Plaintiff has failed to meet its burden of proof for a default judgment. On a side note, although a credit report was not provided in the instant case, the same reasoning would apply to a credit report containing hearsay information collected by a third party credit bureau agency.

Accordingly, the Plaintiff's Motion for a Default Judgment is hereby DENIED.

Dated: June 13, 2018

Hon. Brenda L. Rivera, J.C.C.