JPMorgan v Moskovits
2019 NY Slip Op 31879(U)
June 19, 2019
Supreme Court, Kings County
Docket Number: 510616/14
Judge: Noach Dear
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of June 2019.

PRESENT:

HON. NOACH DEAR,
J.S.C.

Index No.: 510616/14

x

JPMORGAN,

Plaintiff,

MS 5+6

DECISION AND ORDER

-against-

PNINA MOSKOVITS et al,

Defendant,

x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion (MS 5)	1
Opposition/Cross (MS 6)	2
Reply/Opp to Cross	3
Cross-Reply	4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for an order of reference. Defendants Tomas and Agness Moskovits oppose and cross-move for dismissal arguing that they were not properly served with the summons and complaint and that Plaintiff failed to timely move for a default.

"A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service ... A defendant can rebut a process server's affidavit by a detailed and specific contradiction of the allegations in the process server's affidavit" (*Bankers Trust Co. Of Cal. N.A. v Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003]; *NYCTL 2009-A Trust v Tsafatinos*, 101 A.D3d 1092 [2d Dept 2012] ["Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an

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evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits"]). Defendants offer a bare denial of receipt which is insufficient even by affix-and-mail (see, for example, *Deutsche Bank Nat. Trust Co. v. White*, 110 AD3d 759, 760 [2d Dept 2013]).

Defendants further allege that service was improper as Plaintiff failed to use due diligence before resorting to affix and mail. "This Court has repeatedly emphasized that the due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received. 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" (*McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008][citations omitted]). "[D]ue 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 location at those times" (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007][citations and internal quotation marks omitted]). Depending on the facts of the case, precedents require attempts to ascertain Defendant's place of business (see, for example, *Gurevitch v Goodman*, 269 AD2d 355 [2d Dept 2002]) or uphold service without such efforts (see, for example, *County of Nassau v Gallagher*, 43 AD3d 972, 973-974 [2d Dept 2007]). In sum, the Court must assess whether the process server exercised sufficient diligence under the totality of the circumstances taking into account the when, where, and how of the attempts at service, the process server's attempts (or lack thereof) to determine alternative locations and times to serve the Defendant, what (if anything) the process server could have been expected to do to increase the chance of successful service pursuant to 308(1) or 308(2).

Herein, Plaintiff's process server demonstrated sufficient due diligence prior to resorting to affix and mail service as to each moving Defendant. Numerous attempts were made on a variety of days, including on weekends, at a variety of times. Alternate addresses were unsuccessfully sought and neighbors queried. Affix and mail was thus appropriate (*Wells Fargo Bank, N.A. v. Cherot*, 102 A.D.3d 768 [2d Dept 2013] ["Contrary to the appellant's contention, the process server's uncontradicted testimony that he made three attempts to effect personal service at the appellant's residence at different times on different days, including a Saturday, were sufficient to satisfy the 'due

diligence'requirement of CPLR 308(4)"]; *State v. Mappa*, 78 A.D.3d 926 [2d Dept 2010] [four attempts at dwelling at different times and on different days was sufficient to meet the "due diligence" requirement of CPLR 308(4)]; *County of Nassau v Gallagher*, 43 AD3d 972, 973-974 [2d Dept 2007] ["Where four attempts to serve the defendant at his residence included an attempt on a late weekday evening and an attempt on an early Saturday morning, it was not necessary that the plaintiff, County of Nassau, attempt to serve the defendant at his workplace"]; *Lemberger v Khan*, 18 AD3d 447 [2d Dept 2005] ["Contrary to the defendant's contention, the Supreme Court properly concluded that the three attempts made by the plaintiffs' process server to personally serve him at his residence satisfied the due diligence requirement"]; *Johnson v. Waters*, 291 A.D.2d 481 [2d Dept 2002] ["The three attempts to make service of the summons and complaint upon the defendant at his residence at different times and on different days, including a Saturday, were sufficient to constitute due diligence. Since there was no indication that he worked on Saturdays, there was no showing of any other reasonable means whereby the chances of successful personal service could have been significantly increased"] [citations omitted]).

CPLR 3215 provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one year period, as those claims are then deemed abandoned ... [unless Plaintiff demonstrates] both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious" (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-308 [2d Dept 2011][citations omitted]).

Herein, the matter was released from conference on 8/3/15 and Plaintiff filed its first motion seeking a default on 2/24/17, more than a year later. That Plaintiff filed an RJI is irrelevant. Further, unsubstantiated allegations of ongoing loss mitigation do not constitute a reasonable excuse.

Cross-motion granted. Case dismissed pursuant to CPLR 3215[c]. Motion denied.

ENTER:

Hon. Noach Dear, J.S.C.

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