

Bond St. Servicing LLC v Artyllect, Inc.

2021 NY Slip Op 30509(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 651295/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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BOND STREET SERVICING LLC,

Plaintiff,

- v -

ARTYLLECT, INC., and AMIT GADHIA,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13

were read on this motion to/for

JUDGMENT - SUMMARY IN LIEU OF COMPLAINT .

Plaintiff commenced this proceeding by way of motion for summary judgment in lieu of complaint pursuant to CPLR 3213 to collect sums purportedly owed pursuant to a Commercial Credit Agreement (the “Agreement”) between Plaintiff and defendant Artyllect, Inc. (“Artyllect”), as guaranteed by defendant Amit Gadhia (“Gadhia”). CPLR 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint” (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank. B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 491-492 [2015]). “The purpose of CPLR 3213 is ‘to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless’” (*SpringPrince, LLC v Elie Tahari, Ltd.*, 173 AD3d 544, 545 [1st Dept 2019], *quoting Weissman v Sinorm Deli*, 88 NY2d 437, 443 [1996]).

Plaintiff commenced this action by filing the summons with notice of motion and supporting motion papers on February 26, 2020. The notice of motion filed at commencement designates the return date as April 24, 2020, and contains a notice pursuant to CPLR 3213 that “opposing papers, if any, to the motion are required to be served 10 days prior to the above-stated return date” (NYSCEF Doc. No. 2). Plaintiff filed affidavits of service for both defendants on June 4, 2020. The affidavit for Artyllect indicates that the defendant was served copies of the “Notice of Electronic Filing, Supplemental Summons for Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213 WITH RJJ” (emphasis original) by affixing a copy of the papers to the door of a “dwelling house (place of abode)” located at 43374 Debrum Common, Fremont, CA 94539 (NYSCEF Doc. No. 10). The affidavit further indicates that the papers were delivered on “5-12-2020 at 4:09 AM PM” [sic] where AM and PM are handwritten with no indication which time of day the papers were actually delivered. The affidavit also indicates that a copy of the documents was also mailed to the Fremont, California, address, which is designated as a “Last known residence” (*id.*). The affidavit of service for Gadhia (NYSCEF Doc. No. 11) is virtually identical to the Artyllect affidavit, indicating the same manner of service, address, time, and indication that the address is the defendant’s last known residence (and bearing the time “4:09¹] AM PM,” with “AM PM” handwritten).

On September 2, 2020, Plaintiff filed an amended notice of motion that designates the return date for the motion as October 30, 2020. The amended notice of motion also indicates that “opposing papers, if any, are required to be served 10 days prior to the above-stated return date” (NYSCEF Doc. No. 12). An affidavit of service was filed on September 3, 2020, which

¹ Semicolon in original.

indicates that the defendants were served a copy of the amended notice of motion by mailing to the same Fremont, California, address listed on the affidavits of service for the initial motion.

The proponent of a motion for summary judgment in lieu of complaint bears the burden of establishing that the defendant was properly and timely served with the motion as set forth in section 3213 (*see*, CPLR § 3213; *499 Fashion Tower LLC v Ahmed*, 2017 WL 3873266 [Sup Ct, NY County 2017]). The minimum time that such motion “shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service” (CPLR § 3213). Plaintiff’s purported service of the motion on May 12, 2020 (*see*, NYSCEF Doc. Nos. 10, 11) over a month *after* the motion’s return date of April 24, 2020 (*see*, NYSCEF Doc. No. 2) is obviously not sufficient to give the defendants timely notice of the proceeding. Moreover, Plaintiff’s subsequent mailing on September 2, 2020, of an amended notice of motion (NYSCEF Doc. No. 12) with a later return date of October 30, 2020 does not remedy the foregoing deficiency because the affidavit of service of that amended notice of motion (NYSCEF Doc. No. 13) indicates mailing as the method of service, which is insufficient for service of process and the attainment of personal jurisdiction over these defendants.

As for the service method resorted to in the initial affidavits of service (“nail-and-mail”) which, in any event, do not suffice due to the timing problem noted above: the “nail-and-mail” method provided for by CPLR 308 (4) applies only to defendants who are natural persons and cannot be used to serve a corporation (*Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 [2d Dept 1984], *affd*, 65 NY2d 865 [1985]). Plaintiff, therefore, failed to serve process over Artyllect. Furthermore, CPLR 308 (4) provides for service “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,” which is distinguished from the individual’s

“last known residence” (CPLR 308 [4]). The Court of Appeals has strictly interpreted CPLR 308 (4), holding that “nailing” of the summons and complaint at the last known address is insufficient for the purposes of the statute (*Feinstein v Bergner*, 48 NY2d 234, 239 [1979] [“While there may be some question as to whether there is a distinction between ‘dwelling place’ and ‘usual place of abode,’ there has never been any serious doubt that neither term may be equated with the ‘last known residence’ of the defendant”]). Whereas the affidavits of service indicate that process was served at a “dwelling place (place of abode)” indicated as “Last known residence,” this is insufficient service under CPLR 308 (4) and does not constitute proper service upon Gadhia either. Additionally, the ambiguous notation that process was made at “4:09 AM PM” [sic] or at “4:00 AM PM” [sic], is not sufficient to demonstrate that service was made at an appropriate hour of day, and the affidavit indicates only copies of the “Notice of Electronic Filing, Supplemental Summons for Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213 WITH RJ,” and not all of the supporting papers to the motion as required by CPLR 3213. Plaintiff, therefore, did not serve either defendant with process and this court does not have jurisdiction over either defendant.

In a proceeding brought pursuant to CPLR 3213, jurisdictional defects of the type outlined here require not only denial of the motion, but also dismissal of the action (*National Bank of Canada v Skydell*, 181 AD2d 645 [1st Dept 1992]; *PT Trust v Gerasimowicz*, 2018 WL 3241701 [Sup Ct, NY County, 2018]; *Clinton Capital Corp. v 635 Realty Corp.*, 2015 WL 1779013 [Sup Ct, NY County, 2015]; *Mashantucket Pequot Gaming Enterprise v Lin*, 27 Misc 3d 216 [Sup Ct, Kings County, 2010]).

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied and the proceeding is dismissed.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>2/22/2021</u>				<u>LOUIS L. NOCK, J.S.C.</u>
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	DENIED	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		GRANTED IN PART
				<input type="checkbox"/>
				OTHER
				<input type="checkbox"/>
				REFERENCE
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