SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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ALINA MORINI,

Plaintiff,

- v -

TAYA THURMAN, JOHN DOE, and JANE DOE,

Defendants.

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INDEX NO. 159159/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - DEFAULT.

In this intentional tort action, plaintiff Alina Morini moves, pursuant to CPLR 3215, for a default judgment against defendant Taya Thurman. In the alternative, she moves, pursuant to CPLR 308(5), to serve Thurman in a manner deemed proper by this Court. Thurman opposes the motion and cross-moves, pursuant to CPLR 306-b, for an order dismissing the action as against her. Plaintiff opposes the cross motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion and cross motion are decided as follows.

Factual and Procedural Background

Plaintiff was an alleged family friend of Thurman's mother (Doc No. 17 at 4). She commenced this action in October 2021 after she was allegedly wrongfully removed from Thurman's mother's apartment in Manhattan (Doc No. 17 at 1-2). Plaintiff allegedly served a summons with notice upon the doorman of Thurman's apartment building and filed an affidavit of service shortly thereafter (Doc Nos. 1-2). In her summons with notice, plaintiff alleged causes of action for, among other things, false arrest, false imprisonment, intentional and negligent

infliction of emotional distress, wrongful eviction, and defamation (Doc No. 1 at 1-4). Plaintiff claims that in January 2022 she again served the doorman of Thurman's apartment building with a summons with notice and filed a corresponding affidavit of service on April 12, 2022 (Doc No. 34).

Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against Thurman on the ground that the latter has failed to appear despite being properly served (Doc No. 15; Doc No. 17 at 6-10). In the alternative, plaintiff moves, pursuant to CPLR 308(5), to serve Thurman in any other manner this Court deems proper (Doc No. 15; Doc No. 17 at 6-10). Thurman opposes the motion, arguing that she has not been properly served, and that plaintiff has failed to demonstrate that service by any of the methods prescribed by CPLR 308(1), (2) and (4) is impracticable (Doc No. 27 at 6-13). Thurman cross-moves, pursuant to CPLR 306-b, for an order dismissing the action as against her, arguing that plaintiff failed to properly serve her with process within 120 days after the commencement of this action (Doc No. 27 at 13-14). Plaintiff opposes the cross motion and, among other things, reasserts that Thurman has been properly served with process (Doc Nos. 35-36).

Legal Conclusions

Plaintiff's Request for a Default Judgment

To obtain a default judgment against a party for failing to appear, a plaintiff must provide "proof of service of the summons [with notice] and proof of the facts constituting the claim, the default and the amount due" (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2018]; *see* CPLR 3215 [f]; *PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]).

Contrary to plaintiff's contention, Thurman has never been properly served in this action. The purported service in October 2021 was defective for two reasons. First, the corresponding affidavit of service ("the October 2021 affidavit of service") does not identify the doorman allegedly served and does not indicate that an additional copy of the summons with notice was mailed thereafter, as required by CPLR 308(2) (Doc No. 2). Although service upon the doorman of an apartment building is proper (*see F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797-798 [1977]; *2110-2118 ACBP, LLC v Holland-Harden*, 118 AD3d 461, 461 [1st Dept 2014]), the defects in the October 2021 affidavit of service render the October 2021 service incomplete (*see Commissiong v Mark Greenberg Real Estate Co. LLC*, 203 AD3d 657, 657 [1st Dept 2022], *lv dismissed* 38 NY3d 1119 [2022]; *but see Navarro v Singh*, 110 AD3d 497, 498 [1st Dept 2013] [concluding that incorrectly indicating individual served and failing to indicate follow-up mailing occurred in affidavit of service were "mere irregularities" that did not prevent court from exercising personal jurisdiction over defendant]).

Second, the evidence submitted by defendant demonstrates that any mailing occurred subsequent to the 20-day period required by CPLR 308(2). In opposition to the motion, Thurman submits an envelope postmarked on November 26, 2021 (Doc No. 30). The October 2021 affidavit of service provides that the summons with notice was left with Thurman's doorman on October 25, 2021 (Doc No. 2). Thus, the only evidence of any purported follow-up mailing occurred more than 20 days after service of the summons with notice, thereby establishing that the October 2021 service was incomplete (*see* CPLR 308 [2]; *Deutsche Bank Natl. Trust Co. v Ferguson*, 156 AD3d 460, 461 [1st Dept 2017]; *Josephs v AACT Fast Collections Servs., Inc.*, 155 AD3d 1010, 1012 [2d Dept 2017]).

The purported service in January 2022 was also improper due to deficiencies in its corresponding affidavit of service ("the January 2022 affidavit of service"). Generally, a properly executed affidavit of service creates a presumption of proper service (*see Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591, 591 [1st Dept 2020], *lv dismissed* 36 NY3d 1046 [2021]; *American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013]). However, the January 2022 affidavit of service was not properly executed insofar as it was unsigned and unnotarized (Doc No. 34).[1] Thus, there can be no presumption of proper service (*see South Point, Inc. v John*, 140 AD3d 1150, 1150 [2d Dept 2016]).

The January 2022 affidavit of service was also filed late. Pursuant to CPLR 308(2), proof of substituted service must be filed with the court within 20 days of the date that the summons and notice were either delivered or mailed, whichever is later. The January 2022 affidavit of service indicates that Thurman's doorman was served on January 14, 2022 and the summons with notice was mailed that same day (Doc No. 34). Yet, it was not filed with the court until April 12, 2022, almost three months after the date of service and mailing, and well past the 20 days required by the CPLR (Doc No. 34). Since service was not timely completed (*see Miller Greenberg Mgt. Group, LLC v Couture*, 193 AD3d 1273, 1274-1275 [3d Dept 2021]; *County of Nassau v Gallagher*, 35 AD3d 786, 786-787 [2d Dept 2006]), plaintiff has failed to satisfy the requirements of CPLR 3215(f) (*see Matter of Petre v Lucia*, 205 AD3d 438, 438 [1st

[1] After submitting an affidavit in opposition to Thurman's cross motion, plaintiff submitted a surreply in support of its motion for a default judgment (Seq. 002). The surreply was accompanied by two exhibits: a signed, notarized version of the January 2022 affidavit of service; and May 2022 emails between plaintiff's counsel and the process server about obtaining a signed, notarized version of such affidavit after the fact (Doc Nos. 39-40). However, "[t]he practice of filing a surreply [has been] repudiated by [the First Department] . . . [and] has been applied to bar consideration of such submissions" (*Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]). Therefore, this Court will not consider the contents of plaintiff's submission (*see id.*; *Tran Han Ho v Brackley*, 69 AD3d 533, 534 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]).

Dept 2022]). Therefore, plaintiff's motion seeking a default judgment against Thurman must be denied (*see id.*).

Plaintiff's Request for Alternative Method of Service

To obtain leave to serve process by an alternative method, the moving party must demonstrate that service by the methods specified in CPLR 308(1), (2), and (4) are "impracticable" (CPLR 308 [5]; *see Kozel v Kozel*, 161 AD3d 700, 701 [1st Dept 2018], *lv dismissed* 32 NY3d 1089 [2018]; *Franklin v Winard*, 189 AD2d 717, 717 [1st Dept 1993]). Whether service by traditional methods is impracticable is a highly factual inquiry dependent on the circumstances of a particular case (*see Markoff v South Nassau Community Hosp.*, 91 AD2d 1064, 1065 [2d Dept 1983] [citations omitted], *affd* 61 NY2d 283 [1984]; *Safadjou v Mohammadi*, 105 AD3d 1423, 1424 [4th Dept 2013]).

Plaintiff fails to demonstrate that traditional methods of service are impracticable. On the contrary, plaintiff appears to have created the problems she has encountered in attempting to effectuate service. As described above, plaintiff's attempts at service were incomplete because of defects in the affidavits of service. These are easily avoidable procedural missteps that do not speak to impracticality. This is not a situation where service by a traditional method is impracticable because Thurman is "eva[ding]" service (*Chew Wah Bing v Sun Wei Assn.*, 205 AD2d 355, 355 [1st Dept 1994]). Therefore, plaintiff's request to serve Thurman by an alternative method is denied (*see 342 E. 50th St. LLC v Privitello*, 185 AD3d 448, 448 [1st Dept 2020], *lv denied* 35 NY3d 918 [2020]).

Defendant's Cross Motion for Dismissal

Pursuant to CPLR 306-b, if a plaintiff fails to serve a summons with notice upon an opposing party within 120 days of commencing the action, the action may be dismissed upon

motion (*see Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]). However, the statute allows a plaintiff "to show that its time for service should be extended for good cause or in the interest of justice" (*Goldstein Group Holding, Inc. v 310 E. 4th St. Hous. Dev. Fund Corp.*, 154 AD3d 458, 458 [1st Dept 2017]; *see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 n 3 [2006]). Yet, just as a motion is required to grant a dismissal pursuant to CPLR 306-b (*see Henneberry*, 91 AD3d at 495; *Rotering v Satz*, 71 AD3d 861, 862 [2d Dept 2010]), so too is a motion required to grant an extension of time to serve (*see HSBC Bank USA, N.A. v Russo*, 205 AD3d 647, 648 [1st Dept 2022]).

Plaintiff initially filed her summons with notice on October 6, 2021 (Doc No. 1). This gave her until February 3, 2022 to properly serve the summons with notice upon Thurman. However, as discussed above, plaintiff has yet to properly serve Thurman more than 120 days after the commencement of this action. Nor has plaintiff moved for an extension of time to serve Thurman. Although "a plaintiff who believes service was properly made has no incentive to move to extend the time to serve until after it has been found that service was, in fact, deficient" (*State of New York Mtge. Agency v Braun*, 182 AD3d 63, 67 [2d Dept 2020]), a court cannot sua sponte extend the time to serve (*see Russo*, 205 AD3d at 648). Since plaintiff has not served Thurman within the required 120-day period, and plaintiff has not moved for an extension of time to do so, the action must be dismissed (*see id.*; *Garcia v City of New York*, 115 AD3d 447, 448 [1st Dept 2014], *lv granted* 23 NY3d 906 [2014]; *Diaz v Perez*, 113 AD3d 421, 421 [1st Dept 2014]).

The parties' remaining contentions are either without merit or need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for a default judgment as against defendant Taya Thurman or, in the alternative, for leave to serve defendant Taya Thurman by alternative method is denied; and it is further,

ORDERED that defendant Taya Thurman's cross motion, pursuant to CPLR 306-b, to dismiss this action is granted, and the action is dismissed without prejudice;[2] and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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8/25/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[2] Although the plain language of CPLR 306-b requires that this action be dismissed without prejudice (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]; *Braun*, 182 AD3d at 70), this Court notes, without deciding, that the statute of limitations has expired for all of plaintiff's claims except her claim of negligent infliction of emotional distress.