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| Suber v Churchill Owners Corp. |
| 2022 NY Slip Op 32990(U) |
| September 7, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 151845/2022 |
| Judge: Lisa S. Headley |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

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KAREN M. SUBER,

Plaintiff,

- v -

CHURCHILL OWNERS CORP., THE BOARD OF DIRECTORS OF CHURCHILL OWNERS CORP., FRANK BALOGH, EDWARD FRIEDMAN, RONALD KASLOW, CHRISTOPHER KINZEL, JEFFREY LEVY, ANTHONY MARTINEZ, ROBERT STELLA, JUDY RODE, EDWARD RODE

Defendant.

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INDEX NO. 151845/2022
MOTION DATE 05/16/2022
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 65, 66, 67, 68, 69, 70, 71, 72, 73, 77, 78, 79, 80, 81, 82, 83, 84 were read on this motion to/for ALTERNATE SERVICE.

Upon the foregoing documents, it is hereby ORDERED that the plaintiff’s motion for an Order, pursuant to *CPLR §308(5)*, to effect alternative methods of service on defendants 1) Frank Balogh; 2) Edward Friedman; 3) Ronald Kaslow; 4) Christopher Kinzel, Esq.; 5) Jeffrey Levy; 6) Anthony Martinez; and 7) Robert Stella (Hereinafter, “Churchill defendants”) is denied for the reasons stated herein. Defendants filed opposition, and plaintiff filed a reply.

Plaintiff, Karen Suber (“plaintiff”), who is also an attorney representing herself in this case, filed the instant action against defendants for alleged breach of fiduciary duty, fraud, and negligent misrepresentation. The defendants are the co-op board, managing shareholders and individual board members of the plaintiff’s co-op unit apartment building located at 300 East 40th Street, New York, N.Y.

In support of the motion for alternative service, plaintiff argues, *inter alia*, that the Churchill defendants have been aware that the plaintiff commenced this action since March 16, 2022 because plaintiff and the defendants’ legal counsel have had substantial communications, including discussions on answering the Complaint. Plaintiff contends that defendants’ counsel stipulated time for defendants to be served, but those terms of the agreement broke down. Plaintiff contends that without the assistance of the court, the plaintiff will continue to incur the time and expense of service of Churchill defendants. Plaintiff argues that alternative service such as email communication and social media have been accepted in New York courts. Plaintiffs annexed 12 e-mail correspondence regarding service attempts on the Churchill defendants in support of the motion.

The Churchill defendants filed a memorandum of law in opposition to plaintiff's motion, as well as an affirmation of defendants' counsel, arguing that the plaintiff did not attempt to demonstrate the required predicate for an Order permitting alternative service pursuant to *CPLR* §308. Defendants argue that plaintiff failed to demonstrate that personal service was impracticable under *CPLR* §308(5) and failed to show attempts of personal service. In addition, defendants argue that plaintiff's argument that the Churchill defendants should be deemed served because they voluntarily appeared in this action is meritless. Defendants' counsel submit that the Churchill defendants have not been served and that defendants' counsel only appeared on their behalf for the purpose of opposing the plaintiff's motion. Further, defendants argue that they never entered into a stipulation agreement for service of the action.

In reply, the plaintiff reiterates that the defendants are aware of this action, and they also have the personal and work addresses of the unserved individual defendants, and that the defendants are withholding information that would help her effectuate service.

DISCUSSION

CPLR §308 provides how personal service shall be effectuated. The provision states in its entirety:

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, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or
3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;
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; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such

affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

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.

See, *CPLR §308*

Specifically, the Court highlights that *CPLR §308(5)*, grants the Court discretion to direct an alternative method of service of process when it has been determined that the methods set forth in *CPLR §§308(1), (2) and (4)* are impracticable." *Home Fed. Sav. Bank v Versace*, 252 A.D.2d 480, 480 (2d Dep't 1998), quoting *CPLR §308 (5)*; see, *State St. Bank & Trust Co. v. Coakley*, 16 A.D.3d 403, 403 (2d Dep't 2005). "Although the impracticability standard 'is not capable of easy definition,' it does not require the applicant to satisfy the more stringent standard of 'due diligence' under *CPLR §308(4)*, or to make a showing that 'actual prior attempts to serve a party under each and every method provided in the statute have been undertaken.'" *Markoff v. South Nassau Community Hosp.*, 91 A.D.2d 1064, 1065 (2d Dep't 1983); *Astrologo v. Serra*, 240 A.D.2d 606, 606 (2d Dep't 1997), quoting, *Kelly v. Lewis*, 220 A.D.2d 485, 485 (2d Dep't 1995). "Due process requires only that the method approved by the court be reasonably calculated to apprise the defendant of a pending lawsuit." See, *Harkness v. Doe*, 261 A.D. 2d 846 (4th Dep't 1999); see, also *Henderson-Jones v. City of New York*, 87 A.D.3d 498, 506 (1st Dep't 2011); see also, *Nationwide Affinity Ins. Co. of Am. v. Martinez*, 2020 N.Y. Slip Op. 31187(U), 3 (N.Y. Sup Ct, New York County 2020).

Plaintiff has failed to demonstrate attempted service on all seven Churchill defendants. This Court finds that plaintiff did not demonstrate that abiding by the methods of service delineated in *CPLR §§308(1), (2) and (4)* are impracticable to warrant an Order directing alternate service. Plaintiff's request that this Court should allow service by e-mail or social media is denied as she failed to demonstrate any attempts of personal service, and that such service was deemed impracticable. Plaintiff fails to support her argument that the process server she hired attempted to serve two of the defendants at their residence, but the front desk staff could not accept service because they were not home. Here, the plaintiff's motion is devoid of any affidavit of service evidencing such attempts. This Court does not find the plaintiff's arguments and her supporting documents, the e-mail communications, to be compelling evidence to warrant alternate service. As such, the plaintiff's motion for an Order seeking alternate service is denied.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to allow for alternate service against defendants 1) Frank Balogh; 2) Edward Friedman; 3) Ronald Kaslow; 4) Christopher Kinzel, Esq.; 5) Jeffrey Levy; 6) Anthony Martinez; and 7) Robert Stella is **DENIED**; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon the Defendants with notice of entry.

This constitutes the Decision and Order of the Court.


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LISA S. HEADLEY, J.S.C.

9/7/2022
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE