

McGuigan v Gendell

2023 NY Slip Op 31697(U)

May 19, 2023

Supreme Court, New York County

Docket Number: Index No. 650294/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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PETER MCGUIGAN, FOUNDRY MEDIA, LLC, Plaintiffs, - v - YFAT REISS GENDELL, YRG PARTNERS IN LITERARY & MEDIA NY, LLC, WOODRUFF HICKORY, LLC, BRADLEY GENDELL Defendants.	INDEX NO. <u>650294/2021</u> MOTION DATE <u>02/28/2023</u> MOTION SEQ. NO. <u>009</u> DECISION + ORDER ON MOTION
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 215, 216, 217, 218, 219, 220, 221, 222, 224, 225, 226, 227, 228, 233, 238, 239, 240, 241, 242, 243, 244, 245, 247, 248, 249, 250

were read on this motion for DEFAULT JUDGMENT.

Plaintiffs Peter McGuigan and Foundry Media LLC’s (“Plaintiffs”) motion for a default judgment against Defendant Bradley Gendell (“Gendell”) pursuant to CPLR 3215 is **denied**.

A. Background

Plaintiffs contend that Gendell was served pursuant to the affix and mail statute, CPLR 308(4), at “42 West 17 Street #12B / #12C. . .”. on December 8, 2022 (NYSCEF 218 [Affidavit of Service]). While this motion was pending, on March 29, 2023, counsel for Gendell informed counsel for Plaintiffs that Gendell denied having been served (NYSCEF 240). Counsel for Gendell further advised that the Affidavit of Service incorrectly indicates that Gendell was served at two separate addresses.

Although Gendell contests that service was accomplished, counsel for Gendell agreed to accept service on the condition that Plaintiffs’ motion for a default be withdrawn and that Gendell be provided sixty days to respond to the Second Amended Complaint. Counsel for

Plaintiffs responded that they would not withdraw the default motion unless Gendell agreed to pay the costs of the motion, approximately \$10,500, and respond within twenty-one days.

Gendell opposes and argues that he was never served (NYSCEF 241 [Affidavit of Bradley Gendell]). Specifically, Gendell claims he moved to Los Angeles in December of 2021 and has filed a copy of a December 2021 lease and California driver's license in support of his contention (NYSCEF 242-243).

Next, Gendell argues that he could not have been served at Apartment 12B / 12C because they are separate units. Further, Gendell argues that substitute service could not have been made at either Apartment 12B or 12C because access to the twelfth floor is restricted to persons with key access.

Additionally, Gendell argues that Apartment 12B was being renovated and that Apartment 12C was being rented to non-parties when service was allegedly completed. Gendell provides a sublease to substantiate his assertions that Apartments 12B and 12C are separate units and that Apartment 12C was subleased as of July 18, 2021 (NYSCEF 244).

Finally, Gendell argues that the Affidavit of Service relied on by Plaintiffs is deficient on its face because it was sworn to on December 8, 2022 but claims that service by mail was completed on December 12, 2022 – four days later. Plaintiff did not file a corrected or amended affidavit of service with its reply.

B. Discussion

CPLR 3215(f) requires that a motion for a default judgment must be supported by “proof of the service of the summons and complaint” (*Gordon Law Firm, P.C. v Premier DNA Corp.*, 205 AD3d 416, 417 [1st Dept 2022]). The “plaintiff has the burden of proving, by a

preponderance of the credible evidence, that service was properly made” *Persaud v Teaneck Nursing Ctr., Inc.*, 290 AD2d 350, 351 [1st Dept 2002] [citations omitted]).

Generally, “to successfully oppose a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense” (*ICBC Broadcast Holdings-NY, Inc. v Prime Time Adv., Inc.*, 26 AD3d 239, 240 [1st Dept 2006] [citations omitted]). However, “the usual requirement of a pleading to establish a meritorious defense is obviated where the defense is a lack of personal jurisdiction” (*Id.* [citations omitted]).

A party may resort to “nail and mail” service under CPLR 308(4) only after engaging in “due diligence” to complete service under CPLR 308(1) and (2) (*Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007] [collecting cases]). Service is effective under Section 308(4) only if affixed to the defendant’s “actual dwelling place or usual place of abode” while the statutorily required mailing may be made to the defendant’s “last known residence” (*Feinstein v Bergner*, 48 NY2d 234, 241 [1979]). Accordingly, where a defendant moved “almost a year before service was attempted,” a motion for a default judgment was denied for failure to complete “due diligence” (*Roc-Lafayette Assoc., LLC v Reuter*, 183 AD3d 465, 466 [1st Dept 2020] *citing id.*).

Plaintiff’s Affidavit of Service is defective because it does not establish (1) that any due diligence was undertaken to determine Gendell’s actual residence; (2) that service was made at Gendell’s actual residence; or (3) that the required mailing was made. Accordingly, Plaintiffs have not sustained their burden to establish proper service under CPLR 3215(f) (*Petre v Lucia*, 205 AD3d 438, 438 [1st Dept 2022]). Therefore, Gendell need not demonstrate a meritorious defense to avoid a default (*ICBC Broadcast Holdings-NY, Inc., supra*). Even if the Affidavit of Service was not defective, the Court finds that Gendell’s Affidavit is sufficient to rebut

Plaintiffs' assertion that proper service was made (*Persaud, supra* at 350-351; *Italian Elegant Jewelry, LLC v Fteha*, 206 AD3d 493 [1st Dept 2022]).

The Court's denial of Plaintiffs' motion for a default judgment is without prejudice to Plaintiffs seeking leave to properly serve Gendell (*Stryker v Stelmak*, 69 AD3d 454, 455 [1st Dept 2010] *citing* CPLR 306-b). The foregoing notwithstanding, the Court strongly urges the parties to revisit counsel for Gendell's offer to accept service rather than engaging in further motion practice.

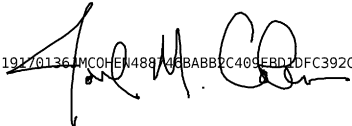
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Accordingly, it is

ORDERED that Plaintiffs' motion for a default judgment against Defendant Bradley Gendell is **DENIED**.

This constitutes the decision and order of the Court.

5/19/2023
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: