SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

SAGE COMBS, an infant by her mother and natural guardian CATHERINE COMBS and CATHERINE COMBS, individually,

Plaintiff(s),

-against-

ALFRED KAMALI, JOSHUA AARON REALITY CORP., MARYSE N. CHARDONET, and BOSS PROPERTY MANAGEMENT LLC,

Defendant(s).

ORIGINAL RETURN DATE: 12/07/07
SUBMISSION DATE: 02/14/07
INDEX No.: 12187/06

MOTION SEQUENCE #1,2,3,4

The following papers read on this motion:

Notice of Motion.....	1,2
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Motion [sequence #1] by plaintiff, Sage Combs, an infant, by her mother and natural guardian, Catherine Combs, and Catherine Combs, individually (collectively referred to herein as "Combs"), for an Order of this Court pursuant to CPLR 3215 granting a default judgment against defendants, Alfred Kamali ("Kamali"), Joshua Aaron Realty Corp. ("JARC"), and Boss Property Management, LLC. ("Boss") is denied.

Motion [sequence #2] by defendant Boss for an Order of this Court: (1) pursuant to CPLR 2004, extending its time to serve and file an answer in this proceeding; and (2) pursuant to CPLR 510(3), changing the place of trial of the within action to Supreme Court, Rensselaer County, is granted to the extent that Boss' proposed answer is deemed served and is otherwise denied.

Cross-motion [sequence #3] by defendant Kamali, for an Order of this Court: (1) pursuant to CPLR 3211(a)(8), dismissing the action against him on the grounds of lack of personal jurisdiction; and (2) transferring the action to Rensselaer County is granted as to dismissal and is otherwise denied.

Finally, cross-motion [sequence #4] by defendant JARC for an Order of this Court: (1) pursuant to CPLR 2001 and/or CPLR 2004 deeming its answer served; and (2) transferring the action to the Rensselaer County is granted to the extent that JARC's answer is deemed served and is otherwise denied.

Plaintiffs seek to recover damages for injuries sustained by infant plaintiff, Sage Combs, as a result of her exposure to lead paint in her second floor apartment in a building located at 693 2nd Avenue, Troy, New York. Infant plaintiff was born on February 25, 2005. On June 1, 2006, the infant's blood level was tested and she was found to have lead poisoning with a blood lead level of 37 mcg/dl (*see Plaintiff's Affidavit*).

Prior to June 15, 2005, the building was owned by defendant Maryse N. Chardonet; thereafter, it was owned by defendant Alfred Kamali. It is undisputed in this case that defendant Kamali is defendant JARC's sole officer, director and shareholder (*Kamali Affidavit*, ¶3). In May 2006, defendant Kamali retained defendant Boss to provide certain management services with respect to the subject apartment and other properties owned by defendant, Kamali (*Iachetta Affidavit*, ¶ 3).

Plaintiffs allege essentially that:

> "[p]rior to June 1, 2006, there was peeling and chipping paint in our apartment. After my daughter was found to have lead poisoning, the Rensselaer County Department of Health conducted a lead inspection on June 8, 2006, and found thirty-four (34) areas in the interior of the apartment that had peeling and chipping paint with a lead content in excess of the amount permitted by the New York State Public Health Law § 1373" (*Plaintiff's Affidavit*).

Plaintiffs commenced this action on July 31, 2006 to recover for personal injuries sustained by infant plaintiff. As a result of defendants Kamali, JARC and Boss's failure to serve an answer or otherwise appear in this case, plaintiffs move to impose a default judgment as against them.

In opposing plaintiffs' motion, and in support of his cross-motion to dismiss plaintiffs' action pursuant to CPLR 3211(a)(8), defendant Kamali argues that plaintiffs' Summons and Verified Complaint were not served in accordance with CPLR 308(4). Kamali contends that plaintiffs' process server did not exercise due diligence within the meaning of the statute. As a result, Kamali argues that plaintiffs' motion for a default judgment must be denied and Kamali's cross-motion to dismiss for lack of personal jurisdiction should be granted.

"'Nail and mail' service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence" (*Lemberger v. Khan*, 18 AD3d 447 [2nd Dept. 2005]). "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" (*Gurevitch v. Goodman*, 269 AD2d 355 [2nd Dept. 2000]). The issue presented here is whether plaintiffs'

process server, Brian Kleinberg, exercised due diligence in attempting to serve defendant personally prior to resorting to substituted service under CPLR 308(4).

The pertinent facts are not in dispute and are as follows. Kleinberg attempted to serve Kamali personally at 201 West Shore Road, Great Neck, NY (West Shore Address) on

> "August 7, 2006 [Monday] at 12:00 p.m. and was unable to serve the [defendant]. At the given address the [defendant's] name did not appear on any bell, mailbox or directory. I spoke to the neighbors there who told me that the [defendant] was not known. I called Verizon for a listing for said [defendant] at the aforementioned address and found none...[I believe] that [I] will be unable to effect personal service upon the [defendant] herein, although [I have] made due and diligent efforts to effect same" (*Aff in Opp*, Ex. C "Affidavit of Due Diligence").

Apparently, upon doing an internet search thereafter for defendant Kamali, Kleinberg learned that defendant's last known address was 19 Lawson Lane, Great Neck, NY ("Lawson Address"). At that point, Kleinberg, attempted to personally serve defendant at the Lawson Address. In his affidavit of service, Kleinberg states that he

> "affix[ed] a true copy...[of the Summons and Verified Complaint]...to the door [at 19 Lawson Lane, Great Neck, New York 11023], which is the defendant's...dwelling house/usual place of abode within the state... [Kleinberg] was unable, with due diligence to find the defendant...or a person of suitable age and discretion, thereat, having called there on: [Monday] August 21, 2006 at 7:39 AM, [Wednesday] August 23, 2006 at 6:56 PM, and [Friday] August 25, 2006 at 4:20 PM" (*Plaintiff's Motion*, Ex. D).

Furthermore, Kleinberg attests in his affidavit that he mailed a copy of the Summons and Verified Complaint to defendant Kamali at the Lawson Address and that he also "[s]poke with Mr. Finkels, Neighbor at # 17 [Lawson Lane], who stated that the defendant...lives at the aforementioned address but [Kleinberg] was unable to divulge the defendant's... place of employment" (*Motion*, Ex. D). Upon being unable to serve Kamali personally on this last occasion, Kleinberg utilized substituted service under CPLR 308(4) and affixed the summons and complaint at the Lawson Address.

In support of his cross-motion, defendant Kamali provides evidence including a letter by plaintiffs' counsel, dated July 10, 2006, addressed to defendant Kamali at the West Shore Address which requested Kamali's insurance information (*Cross Motion*, Ex. 4). Defendant Kamali complied with the request for the information. Defendant argues that because plaintiffs knew and communicated with Kamali at the West Shore Address, plaintiffs' failure to pursue service at the West Shore Address does not meet the due diligence requirement of CPLR 308(1) and (2). Defendant Kamali additionally submits evidence that on April 13, 2005, prior to all attempts at service, he moved from the Lawson Address to the West Shore Address. To that effect, defendant submits, *inter alia*, copies of his Cablevision's bills for service at the West Shore Address for the

period beginning May 7, 2005 to October 15, 2006 and copies of his AT&T's invoices for phone number (516) 487-4150 at the West Shore Address.

Regardless of which address is utilized as defendant Kamali's dwelling place or usual place of abode, all attempts of service were "on weekdays during normal business hours or when it could reasonably have been expected that defendant Kamali was in transit to or from work" (Earle v. Valente, 302 AD2d 353, citing inter alia, Guretivich v. Goodman, 269 AD2d 355 and Gantman v. Cohen, 209 AD2d 377; see also, Fattarusso v. Levco Am. Improvement Corp., 144 AD2d 626), and there is only minimal evidence of an attempt to ascertain defendant's business address for service at that location.

As a result, and as a matter of law, plaintiffs have failed to demonstrate "due diligence" so as to establish proof of service upon defendant Kamali in accordance with CPLR 308(4) (O'Connell v. Post, 27 AD3d 630; Earle v. Valente, supra; Guretivich v. Goodman, supra; Moss v. Corwin, 154 AD2d 443; Fattarusso v. Levco Am. Improvement Corp., supra; Carfora v. Pesiri, 89 AD2d 237).

Accordingly, defendant Kamali's cross-motion for an order dismissing plaintiffs' action against him on the grounds of lack of personal jurisdiction is granted. Nevertheless, where as here plaintiffs have adequately demonstrated service upon all other defendants, the court sua sponte extends plaintiffs' time to serve defendant Kamali "in the interests of justice" (CPLR 306-b). Plaintiffs' time to do so is extended for a period of 30 days from the date of this order.

In opposing plaintiffs' motion for a default judgment, and in support of its own motion, defendant JARC argues that pursuant to CPLR 2001 and/or CPLR 2004, its answer to plaintiffs' summons and complaint should be deemed served. Defendant concedes that while JARC was allegedly served under BCL 306[b][1], JARC "never received the summons and complaint for *if it was served upon the NYS Secretary of State, it would have been mailed to an old address* " (*Aff in Support of Cross Motion*, ¶5 [Emphasis Added]). Defendant JARC nevertheless submits that after checking the summons and complaint on file with the Nassau County Clerk, it mailed a copy of its Answer to plaintiffs' counsel on November 18, 2006 and filed the original on November 22, 2006 with the Nassau County Clerk and thus, pursuant to CPLR 2001, this Court should direct that its Answer be deemed served.

That defendant JARC did not receive the summons and complaint due to its failure to update its address on file with the Secretary of State does not preclude relief from plaintiffs' motion for a default judgment (see, *Lawrence v. Esplanade Gardens*, 213 AD2d 216 [1st Dept., 1995]).

Pursuant to CPLR 2001, where a substantial right of any party is not prejudiced, a mistake, omission, irregularity, or defect must be disregarded by this Court (CPLR 2001; *see also Great Eastern Mall, Inc. v. Condon* , 36 NY2d 544 [1975]; *Standard Fruit & S. S. Co. v. Russo*, 67 AD2d 970 [2nd Dept. 1979]).

Pursuant to CPLR 2004, it is within the court's discretion to grant an extension of time in which to interpose an answer where it is established that delay was not willful, lengthy, or prejudicial and the moving party supplies the Court with an affidavit of merit (*A & J Concrete Corp. v. Arker*, 54 NY2d 870 [1981]). While an affidavit of merit is not an absolute requirement to be granted an extension of time, where there has been a default in pleading, an affidavit of merit is a prerequisite (*Tewari v. Tsoutsouras*, 75 NY2d 1 [1989]). In this case, since defendant JARC's motion for an extension of time to serve an answer was made after its time in which to serve an answer already expired, its verified answer appended to the motion papers herein is sufficient to satisfy the requirement that defendant provide an affidavit of merit (*Richard Kranis, P.C. v. European American Bank*, 208 AD2d 904 [2nd Dept. 1994]; *see also Buderwitz v. Cunningham*, 101 AD2d 821 [2nd Dept. 1984]). In light of the fact that there is no evidence that defendant, JARC, acted willfully or in bad faith or has been grossly or inexcusably negligent, this Court finds that JARC should have its day in court. Defendant JARC's motion for an extension of time to serve an Answer pursuant to CPLR 2004 is accordingly granted (*see Salzman & Salzman v. Gardiner*, 100 AD2d 846 [2nd Dept. 1984]. Plaintiffs' motion for a default judgment against JARC is denied.

For the foregoing reasons, defendant Boss Property Management LLC's motion, pursuant to CPLR 2004 extending its time to serve and file an Answer in this proceeding is likewise granted (see, also CPLR 317).

Defendant Boss offers the affidavit of Paul Iachetta, who states that "the address to which the Secretary of State was to send those papers is my home address [and] [n]either I nor any other member of my household received the Summons and Complaint, and we do not recall receiving any notices from the post office that it was holding mail to be delivered to Boss Property Management LLC" (*Iachetta Aff.* ¶6). In light of the fact that the failure of Boss to serve a timely answer in this matter was not intentional or the product of willful neglect, this Court grants Boss's motion to serve an Answer at this time. Plaintiffs' motion for a default judgment against Boss is denied.

Defendants Kamali, JARC and Boss also move, pursuant to CPLR 510(3), for an Order of this Court, transferring this action to Supreme Court, Rensselaer County. Defendant, Maryse N. Chardonet supports Boss's motion to do same. The motions are denied without prejudice.

Pursuant to CPLR 510(3), "[t]he court, upon motion, may change the place of trial of an action where...the convenience of material witnesses and the ends of justice will be promoted by the change" (CPLR 510[3]). Where venue has been properly designated by plaintiff based on the residence of either party, a discretionary change of venue should be granted based on the convenience of witnesses *only after there has been detailed evidentiary showing* that convenience of nonparty witnesses would in fact be served by granting such relief (*O'Brien v. Vassar Bros. Hosp.*, 207 AD2d 169 [2nd Dept. 1995] [Emphasis Added]). This showing is not made in this case.

Since defendant Kamali resides in Nassau County, and since corporate defendant JARC's principal place of business is in Nassau County, plaintiffs properly designated Nassau County as the place for trial in accordance with CPLR 503(a). The decision of whether to grant a change of venue based on the convenience of material witnesses is discretionary (*O'Brien v. Vassar Brothers Hospital*, supra). On a motion to change venue pursuant to CPLR 510(3), the moving party must first satisfy four requirements: (1) provide the names, addresses, and occupations of all prospective witnesses; (2) disclose the facts about which said witnesses will testify so the court can ascertain whether said witnesses are material and necessary; (3) demonstrate that the witnesses are willing to testify; and (4) identify how the witnesses would be inconvenienced absent the change in venue (*O'Brien*, supra). Failure to meet the requirements outlined warrants a denial of the motion to change venue (*Id*). However, once the movant makes this evidentiary showing, then "all other factors being equal" the transitory cause of action should be tried in the county where the claim arose.

In this case, not a single defendant seeking to change the place of trial of this action has made the requisite showing. While certainly affidavits from the witnesses themselves are not required, the movants must, at the very least, provide the necessary information through sworn averments about the witnesses (*see e.g. Soufan v. Argo Pneumatic Co.*, 170 AD2d 289 [1st Dept. 1991]). As a result of their failure to do so, defendants' motion to change the place of trial of the within action to Supreme Court, Rensselaer County is denied without prejudice to renewal at a time after party disclosure has meaningfully begun.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

Counsel are directed to appear on April 12, 2007 at 2:30 P.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

No adjournment of this Preliminary Conference shall be permitted and all parties are forewarned that failure to attend may result in the striking of pleadings (22 NYCRR 202.27) or the imposition of monetary sanctions (22 NYCRR 130-2.1).

This decision constitutes the order of the court.

Dated: 3-6-07

HON THOMAS P. PHELAN

J.S.C.

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