

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

ROUTE 96 PROPERTIES, LLC,

Plaintiff,

Index No. 127226-2020

vs

ADVENTURES IN MOVEMENT AND
SENSATION, INC., AND MARK KLYCZEK,

AFFIRMATION

Defendants.

Michael Wegman, an attorney licensed to practice law in the State of New York, states under penalties of perjury:

1. I am associated with the law firm of Lacy Katzen LLP, attorneys for Plaintiff, and I am fully familiar with the papers, pleadings and proceedings of the instant action. I make this affirmation in support of Plaintiff's Motion for Summary Judgment.

2. This action was commenced by the filing of a Summons and Verified Complaint in the Clerk's Office on June 4, 2020. A copy of the Summons and Complaint is annexed as **Exhibit A**.

3. On July 1, 2020, Defendant Adventures in Movement and Sensation, Inc. was served by delivered a copy of the Summons and Complaint to the New York Secretary of State. A copy of the affidavit of service is annexed as **Exhibit B**.

4. Defendant Mark Klyczek was served with a copy of the Summons and Complaint on July 7, 2020 as set forth in the affidavit of service annexed as **Exhibit C**.

5. Defendants submitted an Answer with two affirmative defenses, both of which allege improper service of the Summons and Complaint. A copy of the Answer is annexed as **Exhibit D**.

6. Plaintiff moves for summary judgment because there are no genuine issues of material fact. The facts supporting Plaintiff's right to summary judgment on both liability and damages are set forth in the accompanying affidavit of Mark DiFelice.

7. For the reasons set forth below, Defendants' affirmative defenses are without merit and should be dismissed.

Defendant's First Affirmative Defense is Without Merit and should be Dismissed

8. Defendants' first affirmative defense alleges that Defendant Adventures in Movement and Sensation, Inc. ("Adventures in Movement") was not properly served with the Summons and Complaint. Answer ¶¶ 5-8.

9. Business Corporation Law § 304 provides that "[t]he secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served." Section 306(b)(1) provides that a domestic corporation may be served by personally delivering a copy of the Summons and Complaint to a designated agent of the Secretary of State.

10. Defendant Adventures in Movement is a domestic corporation registered with the State of New York. See the information on file with the New York Department of State annexed as **Exhibit E**.

11. The affidavit of service annexed as Exhibit B states that a copy of the Summons and Complaint was delivered to a person authorized by the Secretary of State to accept service.

12. Defendant Adventures in Movement was properly served under B.C.L. § 306(b)(1). The defense is without merit and should be dismissed.

Defendant's Second Affirmative Defense is Without Merit and should be Dismissed

13. Defendant's second affirmative defense alleges that Defendant Klyczek was not properly served with a copy of the Summons and Complaint. Answer ¶¶ 9-13.

14. Section 308 of the CPLR sets forth the manner in which a natural person within the State of New York may be served.

15. Section 313 of the CPLR provides that, where there is a basis of personal jurisdiction, a person residing outside the State of New York may be served "in the same manner as service is made within the state" by a person authorized to serve process within the state in which the defendant is served. In effect, CPLR 313 "removes state lines" and allows for service under the CPLR "wherever the defendant . . . may be found." Alexander, McKinney's Official Commentary, CPLR 313, quoting Siegel, New York Practice 4th ed. § 100.

16. Defendant Klyczek was properly served under CPLR 308(2), which provides that a natural person may be served by delivering a copy of the Summons and Complaint to a person of suitable age and discretion at the person's dwelling place or usual place of abode, and mailing a copy of the summons to the person to be served at his or her last known residence.

17. The affidavit of service states that the Summons and Complaint was delivered to Defendant's wife at Defendant's residence, located at 2810 Lilley Cove Drive, Chesapeake, Virginia on July 7, 2020. A copy of the summons and complaint was mailed to defendant at the same address on July 9, 2020.

18. Defendant's wife, who the process server estimated as between 46 and 55 years old, constitutes a person of suitable age and discretion who may be served. Service upon

Defendant's wife and the required mailing were performed within 20 days of one another. The affidavit of service is prima facie proof of proper service under CPLR 308(2). See Matter of Anna B., 105 AD3d 1399, 1401 (4th Dept 2013).

19. The process server testified that she is over the age of 18, is not a party to the action and resides in the State of Virginia. The process server is a person who may serve process pursuant to § 8.01-293 of the Virginia Rules of Civil Procedure.

20. Service was proper in all respects under CPLR 308(2) and 313.

Attorneys' Fees

21. Plaintiff referred this matter to my office on or about February 12, 2020. Lacy Katzen has since provided the following services:

- a. Receiving and reviewing the file, including the Lease, Guaranty and Addendum;
- b. Preparing the Notice of Default and Demand to Cure;
- c. Preparing the Notice terminated the Lease and accelerating rents;
- d. Preparing the Summons and Complaint;
- e. Forwarding the Summons and Complaint to Plaintiff for review and signature;
- f. Arranging for service of the Summons and Complaint;
- g. Preparing and sending Defendants additional notice of suit pursuant to CPLR Section 3215;
- h. Preparing Affidavit of Service of additional notice pursuant to CPLR Section 3215;
- i. Issuing checks to process server and Court Clerk;
- j. Receipt and review of Answer of Defendant;
- k. Drafting and dictating Affidavit in support of motion for Summary Judgment;

- l. Forwarding affidavit to Plaintiff for review, comment and signature;
- m. Preparing Affirmation in support of Plaintiff's motion for summary judgment.

22. The total time expended on these tasks consists of 11.7 hours of attorney time and 2.0 hours of paralegal time. The following is a more specific breakdown, providing the name of the attorney and the amount of time expended:

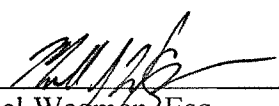
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|-------------------------------|------------|
| a. Craig R. Welch | 1.95 hours |
| b. Michael J. Wegman | 9.75 hours |
| c. Kimberly Heller, paralegal | 2.0 hours |

23. Mr. Welch's time is billed at \$310.00 per hour. My hourly rate is \$250.00 per hour. Ms. Heller's hourly rate is \$100.00 per hour. In total, the value of the time expended on this matter amounts to \$3,242.00.

24. I have been practicing as an attorney in the commercial area for nine years. I have spent substantial time handling commercial and residential evictions. I respectfully submit that the amount requested above is fair and reasonable under the circumstances.

WHEREFORE, I respectfully request the Court enter an Order granting Plaintiff's motion for summary judgment for the relief sought in the supporting affidavit of Mark DiFelice, for an award of attorneys' fees in an amount deemed reasonable by the Court, and for such other and further relief as the Court deems just and proper.

Dated: October 12, 2020



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