

47 A.D.3d 919, 850 N.Y.S.2d 563, 2008 N.Y. Slip Op. 00680
(Cite as: 47 A.D.3d 919, 850 N.Y.S.2d 563)

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Supreme Court, Appellate Division, Second Department,
New York.
The CADLE COMPANY, appellant,
v.
Bertha AYALA, respondent.
Jan. 29, 2008.

Background: In an action to enforce a foreign judgment entered upon default, the Supreme Court, Queens County, Dorsa, J., denied plaintiff's motion for summary judgment in lieu of complaint.

Holding: The Supreme Court, Appellate Division, held that the plaintiff did not satisfy its burden to establish that the defendant was properly served with the motion.

Affirmed.

West Headnotes

[1] Courts 106

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k10 Jurisdiction of the Person

106k15 k. Allegations in Pleadings. [Most Cited Cases](#)

Judgment 228

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k183 k. In General. [Most Cited Cases](#)

There was no procedural requirement that plaintiff affirmatively plead and prove facts sufficient to establish long-arm jurisdiction over out-of-state defendant, but, rather, lack of long-arm jurisdiction had to be raised by defendant in opposition to plaintiff's summary judgment motion. [McKinney's CPLR 302, 3213](#).

[2] Judgment 228

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k184 k. Notice. [Most Cited Cases](#)

Proponent of an unopposed motion for summary judgment in lieu of complaint did not satisfy its burden to establish that the defendant was properly served with the motion; the affidavit of service, on its face, raised issues of fact as to the identity of the person served. [McKinney's CPLR 3213](#).

****563** Vlock & Associates, P.C., New York, N.Y. ([Steven Giordano](#) of counsel), for appellant.

[A. GAIL PRUDENTI](#), P.J., [ROBERT A. SPOLZINO](#), [STEVEN W. FISHER](#), and [MARK C. DILLON](#), JJ.

***919** In an action to enforce a **foreign judgment** entered upon default, brought by motion for summary **judgment** in lieu of complaint pursuant to [CPLR 3213](#), the plaintiff appeals from an order of the Supreme Court, Queens County (Dorsa, J.), dated January 8, 2007, which denied its unopposed motion for summary **judgment**.

ORDERED that the order is affirmed, without costs or disbursements.

[1] *920 Contrary to the Supreme Court's reasoning, there is no procedural requirement under [CPLR 3213](#) that the plaintiff affirmatively plead and prove facts sufficient to establish long-arm jurisdiction over the out-of-state defendant (*see* [CPLR 302](#)). Rather, lack of long-arm jurisdiction must be raised by the defendant in opposition to the motion (*see* [Buckeye Retirement Co., L.L.C., Ltd. v. Lee](#), 41 A.D.3d 183, 837 N.Y.S.2d 641; *cf.* [Fishman v. Pocono Ski Rental](#), 82 A.D.2d 906, 907, 440 N.Y.S.2d 700).

[2] Nevertheless, as the proponent of this unopposed motion for summary judgment in lieu of complaint, the plaintiff still bore the burden of establishing, inter alia, that the defendant was properly served with the motion (*see* [CPLR 3213](#)). Under the unusual circumstances presented, we find that the plaintiff failed

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to meet that burden, as, among other things, the affidavit of service, on its face, raises issues of fact as to the identity of the person served. Thus, the Supreme Court reached the correct result by denying the motion, and upon denial, the plaintiff's moving papers "shall be deemed the complaint" ([CPLR 3213](#)). Our decision is not intended to ****564** preclude the plaintiff from moving, if it be so advised, for leave to enter a default judgment against the defendant in this action, upon proper proof pursuant to [CPLR 3215](#) (*cf. Araujo v. Aviles*, [33 A.D.3d 830, 824 N.Y.S.2d 317](#)).

N.Y.A.D. 2 Dept.,2008.
Cadle Co. v. Ayala
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