

Gorell Enters., Inc. v Grover Aluminum Prods., Inc.

2010 NY Slip Op 32646(U)

September 20, 2010

Supreme Court, Suffolk County

Docket Number: 19200/2009

Judge: Joseph Farneti

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 GORELL ENTERPRISES, INC. a/k/a
 GORELL WINDOWS & DOORS,

Plaintiff,

-against-

GROVER ALUMINUM PRODUCTS, INC.
 d/b/a GROVER HOME HEADQUARTERS,
 ARTHUR SPENCER & IRVING FINE,

Defendants.

ORIG. RETURN DATE: MARCH 31, 2010
 FINAL SUBMISSION DATE: APRIL 15, 2010
 MTN. SEQ. #: 001
 MOTION: MG RRH

PLTF'S/PET'S ATTORNEY:

L. BLAKE MORRIS, ESQ.
 1214 CORTELYOU ROAD
 BROOKLYN, NEW YORK 11218-5404
 718-826-8401

DEFT'S/RESP ATTORNEYS:

PINKS ARBEIT & NEMETH
 140 FELL COURT
 HAUPPAUGE, NEW YORK 11788
 631-234-4400

Upon the following papers numbered 1 to 7 read on this motion _____
TO VACATE DEFAULT JUDGMENT

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affidavit and supporting papers 6, 7 it is,

ORDERED that this motion by defendants GROVER ALUMINUM PRODUCTS, INC. d/b/a GROVER HOME HEADQUARTERS, ARTHUR SPENCER and IRVING FINE (collectively "defendants") for an Order, pursuant to CPLR 5015 (a) (1) and CPLR 2221, relieving defendants from the default judgment entered herein on September 22, 2009, and vacating and setting aside the default judgment upon the grounds that defendants have a meritorious defense to this action and the default was excusable, is hereby **GRANTED** solely to the extent set forth hereinafter. The Court has received opposition to the instant application from plaintiff.

On or about April 14, 2009, plaintiff commenced this action by filing a summons and verified complaint with the Clerk of the Court. The complaint asserts three causes of action, to wit: breach of contract, an account stated, and

goods, sold and delivered, and seeks judgment against defendants in the amount of \$108,319.50, with interest thereupon from November 19, 2008.

On September 22, 2009, plaintiff obtained a default judgment against all defendants in the amount of \$116,969.74 ("Judgment"), and defendants inform the Court that on or about September 28, 2009, defendants' bank accounts were restrained by plaintiff by the service of a Restraining Notice and Information Subpoena. Plaintiff has since released the restraints on defendants' bank accounts. Defendants allege that upon learning of the Judgment, defendants' counsel contacted plaintiff's counsel in an effort to resolve the matter, but that no resolution could be reached.

On March 17, 2010, defendants filed the instant application, by Order to Show Cause, to vacate the Judgment. On even date, the Court (Pastoressa, J.) granted defendants a stay of enforcement of the Judgment pending the hearing of the instant application. Defendants argue that they have meritorious defenses to this action and that their default was excusable and not wilful. Initially, defendants allege that neither individual defendant was properly served with process herein. Specifically, with respect to service upon defendant SPENCER by "nail and mail" service pursuant to CPLR 308 (4), defendant SPENCER avers that he never received the summons and complaint at his residence or in the mail, and that the process server's attempts to personally serve him did not satisfy the due diligence requirement of CPLR 308. The Court notes that the affidavit of service executed in connection with service upon defendant SPENCER indicates that the process server attempted to serve this defendant four times at his residence before resorting to nail and mail service. With respect to service upon defendant FINE by serving a person of suitable age and discretion at his actual place of business pursuant to CPLR 308 (2), defendant FINE claims that there is no "Ann S." employed at Grover Home Headquarters and that he never received the summons and complaint at his residence. Defendants concede that the corporate defendant received the summons and complaint by mail at the corporation's headquarters; however, it allegedly did not respond to the complaint because defendants believed the time to answer had been extended by plaintiff's counsel.

Defendants have also asserted potential meritorious defenses to this action. In particular, defendants allege that plaintiff has no contractual claims against the individual defendants, as any goods delivered by plaintiff were delivered solely to the corporate defendant. Moreover, defendants contend that

plaintiff has no valid contractual claim against the corporate defendant, as plaintiff breached any agreement by selling and delivering “patently defective goods,” including defective windows, aluminum storm doors, and sliding patio doors. Thus, defendants allege that they have a meritorious counterclaim against plaintiff for the costs associated with the defective goods. In support of the foregoing, defendants have submitted, among other things, affidavits of defendants SPENCER and FINE.

In opposition, plaintiff has submitted an affidavit of service, sworn to on June 3, 2009, indicating service upon the corporate defendant by serving the Secretary of State on June 1, 2009, pursuant to BCL 306; an affidavit of service, sworn to on August 6, 2009, indicating nail and mail service upon defendant SPENCER on August 4, 2009, pursuant to CPLR 308 (4), at 5 Sands Lane, Port Jefferson, New York, with a follow-up mailing on August 6, 2009; and an affidavit of service, sworn to on June 17, 2009, indicating service upon defendant FINE on June 12, 2009, at his place of business pursuant to CPLR 308 (2), by serving “Ann S.,” a person of suitable age and discretion at Grover Home Headquarters, 577 Route 112, Patchogue, New York, with a follow-up mailing on June 17, 2009. Accordingly, plaintiff argues that all defendants were properly served herein. In addition, plaintiff alleges that the corporate defendant admits service of the summons and complaint. Plaintiff’s counsel contends that he only agreed to an extension of time to answer upon the conditions that defendant SPENCER forward to plaintiff’s counsel a stipulation to extend the time to answer and an explanatory letter as to why the debt is not due. Plaintiff’s counsel alleges that defendant SPENCER failed to comply with these conditions.

In addition, plaintiff claims that defendants have been on notice of the Judgment since September of 2009, and that defendants waited six months to file the instant application. Plaintiff further claims that it would suffer prejudice in this matter if the Judgment was vacated, as plaintiff extended credit to the corporate defendant based upon the individual defendants’ alleged fraudulent representation that the corporate defendant owned the real property where it is located. Plaintiff alleges that it does not, but rather that an entity known as “Spencer-Fine Associates” owns the real property and plaintiff would lose its real property lien if the Judgment was vacated.

With respect to the individual defendants’ potential defense that they never entered into any agreements with plaintiff, plaintiff informs the Court that both individual defendants executed guarantees in connection with a promissory

note in the principal amount of \$50,000 made by defendant corporation in favor of plaintiff. With respect to defendants' claim of defective goods, plaintiff alleges that this claim is "baseless" as defendants executed the aforementioned promissory note in order to cure their then-existing default to plaintiff and to secure additional credit with plaintiff for the corporate defendant to continue to sell plaintiff's goods to its customers. Further, plaintiff argues that defendants have failed to support their claim of defective goods with any documentation, and have failed to allege breach of warranty.

In reply, defendants argue that plaintiff has not asserted a breach of the promissory note in its complaint, and that assuming the personal guarantees therein are enforceable, they limit the individuals' liability to \$25,000 each yet plaintiff entered a Judgment against all defendants in the amount of \$116,969.47. Defendants allege that plaintiff was aware of the status of ownership of the real property when it extended credit, and maintain that plaintiff supplied defective goods. Finally, defendants claim that they had been "diligently pursuing settlement" in this matter for months, but that plaintiff ultimately refused to settle upon the negotiated terms.

A motion to vacate a default may be made upon a showing of a reasonable excuse and a meritorious defense (see *e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (see CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). A defendant served with a summons other than by personal delivery may obtain relief pursuant to CPLR 317 upon a showing that he did not receive notice of the summons in time to defend, and has a meritorious defense (see CPLR 317; *Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 968 [2d Dept 2006]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (see *I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

Although the affidavits of service submitted by plaintiff constitute *prima facie* evidence of service of process upon defendants pursuant to BCL 306 and CPLR 308 (2) and (4), a defendant can rebut a process server's affidavit by a

detailed and specific contradiction of the allegations in a process server's affidavit (see *Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343 [2003]). Here, defendant SPENCER avers that he never received the summons and complaint at his residence or in the mail, and defendant FINE avers that there is no "Ann S." employed at Grover Home Headquarters and he never received the summons and complaint at his residence. Moreover, defendants argue that they did not act wantonly or intentionally in failing to appear in this action, but rather that their default was the result of not receiving service of the summons and complaint and the settlement negotiations with plaintiff.

The Court finds the delay of approximately six months in defendants' appearance herein to be minimal given the ongoing settlement discussions with plaintiff. Furthermore, the Court finds that defendants have submitted detailed affidavits of the individual defendants, as well as affirmations of counsel demonstrating the potential meritorious defenses to this action as described hereinabove. As such, the Court finds that questions of fact exist as to the propriety of service upon the individuals defendants herein, sufficient to warrant a traverse hearing.

In view of the conflicting affidavits herein, and the strong public policy in favor of resolving cases on the merits, this motion to vacate is **GRANTED** solely to the extent that the parties are directed to appear for a traverse hearing on **October 21, 2010, at 10:00 a.m., in Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead**, to determine the propriety of service of the within summons and verified complaint upon defendants SPENCER and FINE (see e.g. *Mortgage Access Corp. v Webb*, 11 AD3d 592 [2004]).

The foregoing constitutes the decision and Order of the Court.

Dated: September 20, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court