

Nussbaum v McNally
2007 NY Slip Op 30588(U)
April 2, 2007
Supreme Court, New York County
Docket Number: 0114625/2003
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHULMAN
Justice

PART 1

NASSEBAUM, DAVID

INDEX NO. 114625/03

MOTION DATE _____

- v -

JAMES STEPHEN McNALLY

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
APR 06 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 2, 2007

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. MARTIN SHULMAN, Justice

PART 1

-----X
DAVID NUSSBAUM,

Index No.: 114625/05

Plaintiff,

Decision and Order

- against -

JAMES STEPHEN MCNALLY,

Defendant.

-----X

FILED
APR 06 2007
COUNTY CLERK'S OFFICE
NEW YORK

By summons and complaint filed October 19, 2005, plaintiff David Nussbaum ("plaintiff" or "Nussbaum") sought to recover damages against defendant James Stephen McNally ("defendant" or "McNally") based upon an alleged assault. Upon defendant's failure to answer, this court granted plaintiff's motion for a default judgment and set the matter down for inquest. This court conducted an inquest on June 29, 2006 and thereafter, by judgment dated October 20, 2006, granted Nussbaum a default judgment against McNally in the total amount of \$400,000.00 (the "judgment"). Defendant now moves by order to show cause (the "OSC") to vacate the judgment and enjoin plaintiff's enforcement of same. Plaintiff opposes the OSC.

McNally seeks to vacate the judgment pursuant to CPLR 5015(a)(4) based upon alleged improper service of the summons and complaint. Alternatively, defendant urges that dismissal should be granted pursuant to CPLR 5015(a)(1), alleging that he has a reasonable excuse for his default and a meritorious defense to the action.

McNally avers that he was never served with the summons and complaint or any other papers in this action and only became aware of this action in October 2006 when

his employer received an information subpoena with restraining notice. McNally Supp. Aff. at ¶¶ 2-3. The affidavit of service indicates that service was effectuated upon defendant in November 2005 at 22 River Terrace, Apt. 6L, New York, New York (the "prior address") by substituted service upon a doorman. OSC at Exh. B. McNally alleges that he moved to a new residence in August 2005 and thus no longer resided at the prior address on the date of the purported service. McNally Supp. Aff. at ¶¶ 9-10. Defendant alleges that he left no forwarding address since he receives and pays his bills electronically. McNally Supp. Aff. at ¶14. As a result, none of the papers in this action were forwarded to McNally's new address.

In opposition to the OSC, plaintiff primarily argues that defendant lacks a reasonable excuse for his default and a meritorious defense to the action. However, the existence or lack of a meritorious defense is irrelevant to the question of whether a judgment should be vacated for lack of personal jurisdiction. *Chase Manhattan Bank, N.A. v. Carlson*, 113 A.D.2d 734, 735, 493 N.Y.S.2d 339 (2nd Dept., 1985). Where proper service is lacking, a default judgment is a nullity and must be unconditionally vacated. *Id.*

Plaintiff argues that defendant's default was not excusable since he failed to comply with Vehicle and Traffic Law ("VTL") §505(5), which requires written notification of address changes to be provided to the Commissioner of Motor Vehicles within 10 days. Failure to comply with this provision estops an individual from contesting service of process at the former address. *Williams v. Yassky*, 199 A.D.2d 18, 604 N.Y.S.2d 568 (1st Dept., 1993). Plaintiff's counsel also alleges that she performed an unspecified computer database search before commencing the action, which revealed defendant

resided at the prior address. Schwartz Opp. Aff. at ¶15. Defendant responds that VTL §505(5) is inapplicable because he is not a motor vehicle licensee in New York State.¹

On this record, the court cannot conclusively determine that service of process was either valid or invalid. McNally offers no documentation corroborating his alleged move and the timing thereof. It is also unclear whether defendant engaged in conduct calculated to prevent plaintiff from learning his actual dwelling place or usual place of abode.² *Matt Santangelo, Inc. v. Brown*, 206 A.D.2d 463, 464, 614 N.Y.S.2d 933 (2nd Dept., 1994). For his part, Nussbaum offers no further affidavit from the process server attesting to whether or not the doorman served indicated that McNally no longer resided at the prior address, information which would be highly relevant to the issue of plaintiff's due diligence in effectuating service.

While the court declines to vacate the judgment pursuant to CPLR 5105(a)(4) (lack of personal jurisdiction), vacatur of the judgment is warranted under CPLR 5015(a)(1). McNally brings the OSC well within one year of the judgment's entry, and the issues raised with respect to the service of process upon defendant indicate a reasonable excuse for the default. Further, the parties proffer vastly different accounts of the alleged assault which is the subject of this action, thus indicating a potential meritorious defense. Under all of these circumstances, disposition of this action on the merits is warranted.

¹ McNally's Reply Memorandum of Law includes a copy of his New Jersey driver's license.

² Plaintiff avers that McNally "cursed at me for suing him" the day after being served. Nussbaum Opp. Aff. at ¶13. Defendant fails to submit an affidavit denying this allegation.

Accordingly, it is hereby

ORDERED that the default judgment against defendant dated October 20, 2006 is hereby vacated; and it is further

ORDERED that defendant shall serve and file its answer within twenty (20) days of the date of this decision and order; and it is further

ORDERED that the parties to this action are directed to appear for a preliminary conference on May 8, 2007 at 9:30 a.m. in IAS Part 1, Room 1127B, 111 Centre Street, New York County.

The foregoing constitutes the decision and order of this court. Courtesy copies of this decision have been sent to counsel for both parties.

Dated: April 2, 2007



Hon. Martin Shulman, J.S.C.

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NEW YORK