

Willow Capital Invs. LLC v Goff

2007 NY Slip Op 31621(U)

June 11, 2007

Supreme Court, New York County

Docket Number: 0106617/2006

Judge: Martin Shulman

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

PRESENT. **MARTIN SHULMAN**
J.S.C.

PART 1

Index Number : 106617/2006

WILLOW CAPITAL INVESTMENTS

vs

GOFF, NORVELL, JR.

Sequence Number : 002

VACATE DEFAULT JUDGMENT

INDEX NO.

106617/06

MOTION DATE

MOTION SEQ. NO.

002

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 _____

Sur-reply

Cross-Motion: Yes No

PAPERS NUMBERED

1, 2

3, 4, 5

6, 7, 8, 9, 10

11

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
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 11, 2007

MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

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

PRESENT: Hon. MARTIN SHULMAN, Justice

PART 1

-----X
WILLOW CAPITAL INVESTMENTS LLC
d/b/a WC INVESTMENTS,

Index No.: 106617/06

Decision and Order

Plaintiff,

- against -

NORVEL GOFF, JR.,

Defendant.

FILED
JUN 14 2007
NEW YORK COUNTY CLERK'S OFFICE

-----X
By summons and notice of motion for summary judgment in lieu of complaint filed May 15, 2006, plaintiff Willow Capital Investments LLC d/b/a WC Investments ("plaintiff" or "Willow") sought to enter judgment against defendant Norvel Goff, Jr. ("defendant" or "Goff") based upon Goff's alleged default under a promissory note dated February 29, 2005. This court granted plaintiff's motion for summary judgment on default by memorandum decision dated September 19, 2006. The New York County Clerk subsequently entered judgment in the amount of \$51,424.32 against Goff on November 15, 2006 (the "judgment"). Defendant now moves to vacate the judgment and quash service. Willow opposes the motion.

Goff seeks to vacate the judgment based upon alleged improper service of the summons and notice of motion for summary judgment in lieu of complaint. The affidavit of service indicates that service was effectuated by conspicuous place service pursuant to CPLR §308(4) at the address defendant provided in the promissory note (the "service address"). Goff, a law school graduate, states that he only became aware of this action in January 2007 when the Appellate Division, First Department's Committee on

Character and Fitness questioned him as to why he failed to disclose this action and the judgment in his application for membership in the New York Bar.¹

Defendant challenges service on two grounds. First, Goff alleges that the service address was no longer his actual dwelling place or usual place of abode at the time of service. Second, the process server failed to exercise due diligence in serving Goff on a holiday weekend.²

Regarding the address where process was served, defendant claims he: 1) has not resided in New York City since July 2005; 2) was homeless during an unspecified time period after he vacated the service address; and 3) began residing with his parents in South Carolina at an unspecified time. Goff further claims that Willow knew of his "permanent address" in South Carolina.

For its part, Willow claims that although its principals communicated with defendant by telephone and e-mail from the time of his default in March 2005 through the commencement of this action in May 2006, it had no knowledge of defendant's alleged relocation to South Carolina. Plaintiff further alleges that none of its mailings³ to

¹ By letter dated December 29, 2006, plaintiff's counsel advised the Committee on Character and Fitness of the judgment against defendant in this action.

² The first attempt at service was made on Friday May 26, 2006 at 6:23 p.m. Thereafter, a second attempt was made on Saturday May 27, 2006 at 7:05 a.m. The summons and notice of motion were affixed to the door of defendant's purported residence on Memorial Day, May 29, 2006 at 4:00 p.m., with a copy mailed to defendant's "last known residence, usual place of abode" on May 30, 2006.

³ This includes the process server's mailing of the summons and notice of motion; plaintiff's counsel's mailing of notice of entry of this court's September 19, 2006 decision and order; and an additional mailing of the summons and notice of motion in October 2006.

defendant at the service address was ever returned as undeliverable. Finally, Willow notes that the Committee on Character and Fitness continues to direct correspondence to Goff at the service address.⁴

Plaintiff 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.*

While an affidavit of service is generally presumptive of proper service, a plaintiff is not entitled to the presumption if the affidavit of service is deficient on its face or contains facts which call into question the validity of service. *JP Morgan Chase Bank, N.A. v. H & B Design, Inc.*, 10 Misc.3d 1055(A), 809 N.Y.S.2d 481 (Sup. Ct., Nassau Cty., 2005). CPLR §308(4) provides that, where service cannot be made pursuant to CPLR §308(1) or (2) "with due diligence", process may be served by affixing the summons and complaint to the door of either the defendant's "actual place of business, dwelling place or usual place of abode", followed by a subsequent mailing. In determining whether due diligence has been established:

. . . Courts generally look at the "totality of the circumstances that bear on whether the service of process at issue was reasonably calculated to give the defendant notice, with the CPLR 308(4) due diligence inquiry guided by several pertinent considerations: whether the process server (1)

⁴ Defendant concedes that the Committee on Character and Fitness used the service address in or about January 2007 at his request and that the person(s) residing at that address accepted mail addressed to him.

attempted service during various days and times before and after working hours, weekdays and weekends or holidays when defendant may be reasonably expected to be found at home, ... (2) had an opportunity to serve a person of suitable age and discretion pursuant to CPLR 308(2) and failed to do so, ... (3) made adequate inquiry, upon receiving no response to reasonable efforts to gain access to defendant's residence, as to defendant's whereabouts, habits or schedule of times at home, or place of business, ... (4) made an effort to serve at defendant's workplace where the location of employment was readily apparent." *Id.* at 676 (citations omitted). See also *Hanover New England v. MacDougall*, 202 AD2d 724. *Id.*

Here, the documentation defendant submits does not conclusively establish that the service address was not his actual dwelling or usual place of abode at the time of service. However, the affidavit of service contains no indication that the process server made any inquiry as to defendant's whereabouts. Further, even assuming the service address was Goff's actual residence or usual place of abode, the service attempts, all made on weekends and a holiday do not satisfy CPLR §308(4)'s due diligence requirement. Plaintiff having failed to obtain personal jurisdiction over defendant, the complaint must be dismissed without prejudice.

Accordingly, it is hereby

ORDERED that defendant's motion is granted in its entirety; and it is further

ORDERED that the judgment entered against defendant on November 15, 2006 is vacated; and it is further

ORDERED that the action is dismissed without prejudice.


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

Dated: June 11, 2007

FILED

JUN 14 2007

NEW YORK
COUNTY CLERK'S OFFICE


Hon. Martin Shulman, J.S.C.