

Toner & Toner v Staebler

2007 NY Slip Op 32466(U)

August 2, 2007

Supreme Court, Suffolk County

Docket Number: 0006303/2001

Judge: Emily Pines

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Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES

Justice Supreme Court

Original Motion Date: 05-16-2007

Motion Submit Date: 06-14-2007

Motion Sequence No.: 001 MD

TONER & TONER, X

Mullen & Iannarone
300 East Main Street
Smithtown, New York 11787

Plaintiff,

-against-

LEE STAEBLER,

Goggins & Palumbo
PO Box 65
13105 Main Road
Mattituck, New York 11952

Defendant .

X

ORDERED, that the motion (motion sequence number 001) by Defendant brought on by Order to Show Cause (Weber, J.) dated April 27, 2007 seeking to vacate a Judgment and dismiss the action is denied; and it is further

ORDERED, that the stay on enforcement of the Judgment contained within the Order to Show Cause dated April 27, 2007 is hereby vacated and of no further force and effect.

This is a motion by Defendant seeking to vacate a Judgment on Default entered against him on July 17, 2001 in the amount of \$18,351.84 inclusive of interest to date and costs. The underlying action was commenced by Plaintiff to recover legal fees for its representation of Defendant in a matrimonial action. Plaintiff commenced the action by filing a Summons and Complaint on or about March 19, 2001. The affidavit of service reflects that on April 27, 2001, Defendant was served at 156 Shore Drive, Oakdale pursuant to **CPLR §308(4)**, after five (5) previous attempts to serve pursuant to either **CPLR §308(1)** or **(2)**. The record further reflects that an additional copy of the Summons and Complaint was mailed to defendant pursuant to **CPLR §3215(g)(3)(i)** and when defendant failed to respond, the Judgment on Default was entered.

Thereafter, on or about July 25, 2001, Plaintiff mailed a Notice to Judgment Debtor to Defendant at 156 Shore Road, Oakdale. This mailing was returned to Plaintiff with a label indicating a forwarding address of 23 Hollins Lane, East Islip and Plaintiff re-mailed the Notice to Judgment Debtor to this address. In August and September of 2003, an accounting firm sent an authorization and settlement proposal to Plaintiff on behalf of Defendant but the matter was not resolved. On or about March 29, 2007, Plaintiff served an Income Execution against Defendant and the within motion by Defendant to vacate the judgment ensued.

Defendant moves to vacate the Judgment of Default pursuant to **CPLR §5015(a)(1)** and **§5015(a)(4)** and to dismiss the action pursuant to **CPLR §3211(a)(8)** for lack of personal jurisdiction. Defendant's motion is supported by an affidavit, an affirmation of his counsel and a Memorandum of Law. Defendant alleges that he never received the Summons and Complaint and was not residing at 156 Shore Drive, Oakdale on April 27, 2001. He states that he was living at 3 Clearview Place, Bellport from March 1, 2001 until March 1, 2002 when he moved to 23 Hollins Lane, East Islip. He further states that he never received the mailed copy of the Summons and Complaint. Regarding the merits of the underlying action, Defendant states that he does not believe he owes Plaintiff any legal fees and that he believed that the retainer fee of \$5,000 he paid Plaintiff should have covered the representation. Defendant states that he did not have the money to pay plaintiff the amount claimed owed. Finally, Defendant alleges that Plaintiff did not plead in the Complaint that it was licensed to practice law, did not send the required Notice of Right to Arbitrate and did not send periodic billing statements every sixty (60) days.

In opposition to the motion, Plaintiff alleges that Defendant was properly served pursuant to **CPLR §308(4)** and that it also complied with the additional mailing requirements of **CPLR §3215(g)(3)(i)**. Additionally, Plaintiff claims that Defendant has misrepresented where he was living in July of 2001, since the Notice to Judgment Debtor was returned with a forwarding address of 23 Hollins Lane, East Islip (his current address). Plaintiff argues that it was only the Notice to Judgment Debtor that was returned to its office, and that the additional mailing was not returned. Plaintiff notes that Defendant has not submitted any documentary evidence to support his allegations regarding his residence at the time of service.

Regarding the motion to vacate pursuant to **CPLR §5015(a)(1)**, Plaintiff argues that it is not required to plead a license to practice law under **CPLR §3015** and that it did send a Notice of Right to Arbitrate, although it claims it was not required to do so because there was no fee dispute. A copy

of the certified mail receipt, signed for by “Zane Bailey” is annexed to the motion papers. Plaintiff also annexes copies of its billing statements to Defendant and states that Defendant never disputed any of the statements. Finally, Plaintiff argues that Defendant’s claim that he first received notice of the Judgment when he received the Income Execution is a misstatement of the facts. Specifically, Plaintiff points to the letters from Defendant’s accountant from 2003, seeking to resolve the fee dispute as evidence that defendant was aware of the Judgment. Plaintiff also states that in 2003 it also received a telephone call from an attorney on behalf of Defendant who offered a proposed settlement of this case. Therefore, Plaintiff argues that Defendant has failed to demonstrate excusable default and meritorious defense to the action and the motion to vacate and dismiss should be denied.

In reply, Defendant argues that because the Notice to Judgment Debtor was returned with a forwarding address, Plaintiff should have known that the Defendant did not reside at 156 Shore Drive, Oakdale and that the service of the Summons and Complaint was defective. On the issue of the Notice of Right to Arbitrate, Defendant argues that he did not receive the notice as reflected by the certified mail receipt which evidenced a signature other than Defendant’s (that Plaintiff claims is that of Defendant’s aunt).

The law is well settled that in seeking to vacate a default, a Defendant must demonstrate a reasonable excuse for the default and a meritorious defense. *Sime v. Ludhar*, 37 A.D.3d 817, 330 N.Y.S.2d 775 (2d Dept. 2007); *Yurteri v. Artukmac*, 28 A.D.3d 545, 813 N.Y.S.2d 741 (2d Dept. 2006); *Melish v. Melish*, 267 A.D.2d 218, 699 N.Y.S.2d 305 (2d Dept. 1999). Moreover, the mere denial of proper service is insufficient to rebut the presumption of proper service created by the affidavit of service of the process server. *Sime, supra*; *Levine v. Forgotson’s Central Auto & Electric*, __A.D.3d__; __N.Y.S.2d __; 2007 WL 1704426 (2d Dept. 2007).

In the case *sub judice*, Defendant has failed to demonstrate a reasonable excuse for the default. His mere denials of receipt of the Summons and Complaint, without more, are insufficient to rebut the presumption of proper service created by the affidavit of service of the process server. Defendant has not provided any documentary evidence regarding his residence on the date of the service in 2001. Moreover, the inconsistencies between the forwarding order on file with the United States Post Office and defendant’s affidavit weigh against defendant’s credibility on this issue since

the Notice to Judgment Debtor sent to the forwarding address provided by the post office was not returned to plaintiff, although defendant claims he resided at a different address at the time. Finally, defendant's claim that he only received notice of the Judgment of Default when he was served in 2007 with the Income Execution is belied by the record. Plaintiff has provided documentary evidence that in 2003 an accountant attempted to resolve the matter on Defendant's behalf and stated that it received a telephone call from an attorney seeking to do the same. Defendant's insistence that he was unaware of the Judgment belies credulity in light of this evidence and demonstrates that defendant waited six (6) years before attempting to vacate the Judgment on Default. Such protracted delay can not be considered reasonable. *See, Hazen v. Bottiglieri*, 286 A.D.2d 708, 730 N.Y.S.2d 445 (2d Dept. 2001); *Mantilla v. Lewkowitz*, 130 A.D.2d 557, 515 N.Y.S.2d 498 (2d Dept. 1987).

Defendant's claims of a meritorious defense to the action are also without merit. The documentary evidence demonstrates Plaintiff's compliance with the rules regarding Plaintiff to send billing statements at least every sixty (60) days and a Notice of Right to Arbitrate. Defendant's denials of receipt of these items are merely bald, conclusory allegations unsupported by any evidence in the record. Finally, as evidenced by the plain language of **CPLR §3015**, Plaintiff was not required to plead the existence of a law licence in the Complaint.¹

Based upon the foregoing, Defendant's application to vacate the Judgment on Default entered July 17, 2001 and to dismiss the action for lack of personal jurisdiction is denied in its entirety.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 2, 2007
Riverhead, New York



EMILY PINES
J. S. C.

¹CPLR §3015 requires that the existence of a license be pled when the action arises from plaintiff's conduct of a business which is required to be licensed by the department of consumer of affairs of New York City, Suffolk, Nassau or Putnam County Department of Consumer Affairs or Rockland County Department of Consumer Affairs/ Weight-Measures.