

Masone v Fey

2007 NY Slip Op 33630(U)

October 30, 2007

Supreme Court, Nassau County

Docket Number: 2278-94/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

DOMINIC MASONE, ^x

Plaintiff,

Index No. 032278/94

-against-

**MICHAEL FEY a/k/a MICHAEL NICHOLAS FEY
a/k/a NICHOLAS FEY a/k/a MICHAEL CERULLO
a/k/a MICHAEL NICHOLAS CERULLO a/k/a
NICHOLAS CERULLO, PARI PUB, INC. and
CITY LIMITS,**

**Motion Submitted: 8/22/07
Motion Sequence: 008**

Defendants.

^x

The following papers read on this motion:

- Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's Respondent's.....

Defendant moves this court for an order vacating a ten year old default judgment on the grounds that the defendant was never served with the summons and complaint in the action and the defendant now claims to have a meritorious defense.

Plaintiff personally served a summons and complaint upon defendant Michael Fey on November 21, 1994. On December 3, 1994 defendant filed an answer that he called a "verified complaint" pro se. In his answer, he made various denials of the allegations

including, *inter alia*, the plaintiff lacked personal jurisdiction over the defendant because there was no person named "Michael Faye"[sic], that "Michael Faye"[sic] had never been arrested by the police regarding the alleged incident, and that the matter should be time barred by the statute of limitations. On April 24, 1996 the plaintiff personally served a motion for summary judgment on Michael Fey a/k/a Nicholas Fey. The motion was submitted to the court without opposition on May 2, 1996. On June 7, 1996, the Hon. Howard E. Levitt rendered a decision granting the plaintiff summary judgement against Michael Fey a/k/a Nicholas Fey pursuant to CPLR § 3212 and placed the matter on the inquest calendar of the Trial Assignment Part. On January 27, 1997 said inquest was held before the Honorable Edward T. O'Brien and the plaintiff was awarded \$75,000.00 plus disbursements. The judgement was recorded on February 2, 1997 in the amount of \$75,987.00 against Michael Fey, residing at 123 Beach Avenue, Bellmore, New York 11710 and in favor of Dominic Masone, the plaintiff.

The plaintiff tried to collect on the judgement for a number years unsuccessfully. By sheer coincidence plaintiff appears to have learned of at least one of the defendant's aliases when he observed a photo of the defendant which accompanied a Daily News article about the defendant's arrest on fraud charges in Nassau County. As a result of that information the plaintiff made three applications to this court to amend the extant judgment so as to include the various names allegedly assumed by defendant/judgement debtor, Michael Fey. Finally, after properly serving the defendant the Hon. Bruce D. Alpert granted plaintiff's application

on July 31, 2006 and amended the caption to include the defendant's assumed names MICHAEL NICHOLAS FEY, NICHOLAS FEY, MICHAEL CERULLO, MICHAEL NICHOLAS CERULLO, and NICHOLAS CERULLO.

From the onset, it is clear to the court that the defendant has been properly served through every stage of this thirteen year long proceeding. In fact, the plaintiff's attorney, who has represented the plaintiff since the death of his original attorney in 2004, has put an extraordinary amount of time and effort into requisitioning the County Clerk's file and providing the court with copies of the entire file. This effort has illustrated for the court the extensive history surrounding this case and the many different times the defendant was personally served with pleadings or motion papers under this docket number.

The defendant's allegation that he was never served with a summons and complaint is clearly not accurate given the fact that he served and filed an answer in 1994. Shortly thereafter, defendant was served with a motion for summary judgement which he failed to answer. Subsequently, he was served with the June 7, 1996 decision of this court (Levitt, J.) granting the summary judgment motion and placing the matter on the inquest calendar. He failed to appear at the inquest and as a result a judgment was entered against him on February 7, 1997, in the amount of \$75, 987.00 (O'Brien, J.).

On May 31, 2006 defendant/judgment debtor Michael Fey submitted a letter to the court asking that moving counsel be disqualified because he represented the defendant previously. Simultaneously, counsel for the plaintiff had moved this court seeking permission to withdraw as counsel or a decision of the court stating the representation would

not pose a conflict. On July 31, 2006 this court (Alpert, J.) rendered a decision finding that counsel's continued representation of the plaintiff, despite the fact that he represented the defendant more than ten years ago in traffic court, did not pose a conflict.

In all, there have been seven motions filed with this court since the time the original summary judgement motion was granted under motion sequence #1. With the exception of the informal letter to the court regarding the representation of plaintiff's counsel defendant has failed to answer any motion that has come before this court.

The court may vacate a default pursuant to CPLR § 5015(a) "where the moving plaintiff demonstrates both a reasonable excuse for the default and the existence of a meritorious defense" (*Rockland Tr. Mix, Inc. V. Rockland Enters., Inc.*, 28 A.D.3d 630, 814 N.Y.S.2d 196). Defendant has been aware of this action since 1994 as is evidenced by the answer interposed pro se. Moreover, in 2006, he sought the assistance of the court in asking that counsel for the plaintiff be removed and prevented from assisting the plaintiff in collecting this ten year old judgement. Despite the fact that defendant was on notice of the judgment and objected to plaintiff's counsel pursuing his client's economic interests, defendant failed to address this issue of service during that application. Defendant's last minute attempt to re-litigate this case is a transparent attempt to prevent the plaintiff from collecting the debt owed for the acts defendant was found liable for in a June 7, 1996 decision and the damages which were assessed at the January 27, 1997 inquest. Defendant has failed to raise the issues, presented here for the first time, in the seven prior motions heard before this court or during the inquest held before this court on January 27, 1997.

Defendant's bare bones application claiming he was never served is untimely and fails to present any sort of meritorious defense.

ORDERED, defendant's motion to vacate the default judgement is denied in its entirety.

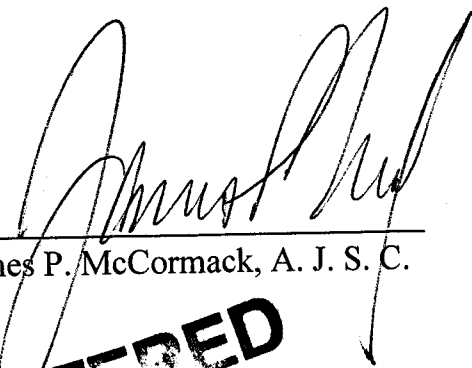
ORDERED, any stay entered by this court regarding the enforcement of the judgement entered February 7, 1997 is hereby lifted and vacated;

ORDERED, plaintiff's motion for costs to defend this application is granted in the amount of Two Thousand Dollars (\$2,500.00);

ORDERED, plaintiff is ordered to submit judgement on notice to defendant.

The foregoing constitutes the Decision and Order of this court.

Dated: October 30, 2007
Mineola, N. Y.



James P. McCormack, A. J. S. C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**