S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

DELLON SALES & MARKETING LTD., d/b/a DELLON SALES COMPANY

Plaintiff,

-against-

ARNOLD KAUFMAN,

Defendant.

Motion Sequence # 01
Submitted September 19, 2007

INDEX NO: 3836/07

The following papers were read on this motion:

Notice of Motion/Order to Show Cause 1
Affirmation in Opposition.....2
Reply Affidavit.....3

Defendant, ARNOLD KAUFMAN (hereinafter referred to as "KAUFMAN"), moves for an order, pursuant to CPLR Rule 5015 and §317, vacating a default judgment entered herein, on May 4, 2007, in favor of the plaintiff, DELLON SALES & MARKETING LTD. d/b/a DELLON SALES COMPANY (hereinafter referred to as "DELLON") and against KAUFMAN, in the total sum of $62,970.66. An interim order of the Court staying collection of the judgment was issued in the initiating Order to Show Cause, dated August 29, 2007. Counsel for DELLON opposes the motion, which is determined as follows:

This is an action to recover for plumbing supplies allegedly ordered and delivered to Marc Levine of Plumbing Depot and Supply by DELLON, during the period from August 4, 2004 to January 15, 2007. During that period of time, it appears that KAUFMAN was a manufacturers representative for the purchase and sale of plumbing supplies, who had dealings with DELLON. In his affirmative defense, KAUFMAN asserts that the subject supplies were never delivered or received by KAUFMAN, but were ordered by Marc Levine of Plumbing Depot and Plumbing Supply, and delivered to said company which has since gone out of business. He claims that is why he is being sued.

In an affidavit in support of the motion to vacate the default judgment, sworn to August 17, 2007, KAUFMAN states that he was never personally served with the summons and complaint in the action, so he never appeared or answered within the prescribed time. He states that he was first advised of the default when he received a copy of the default judgment, with notice of entry, sent to him by DELLON's attorney in June, 2007. KAUFMAN asserts that, contrary to the Affidavit of Service filed herein with respect to service of the summons and complaint, which reflects "nail and mail" service on March 21, 2007 after three (3) attempts to personally serve defendant he was home on March 14 and 15, 2007, at the times the process server allegedly attempted service upon him, and that when he arrived home on March 21, 2007, there was nothing affixed to his door. He claims that on or about March 23, 2007, he never received a copy of the papers by mail, nor any other additional mailings. KAUFMAN relates that he and his wife have a residence in Florida and go there every winter. He states that he travels to Florida every Friday morning and returns to New York on Monday afternoons, with his wife remaining in Florida for the entire winter. It is his position that he was never personally served and that he has a good

an meritorious defense to the action. He urges that the default be vacated and that his proposed answer be accepted.

In opposition to the motion, counsel for DELLON claims that the motion should be denied because KAUFMAN was properly served with the summons and complaint by a licensed process server pursuant to CPLR §308(4) and that his denial of receiving mailings at his home should be questioned. It is DELLON's position that KAUFMAN was served and had ample opportunity to defend and the motion should be denied.

There are two sections within the CPLR that provide for the vacatur of a default judgment. CPLR § 317 provides as follows:

> A person served with a summons other than by personal delivery to him... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment ... upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense ...

Additionally, pursuant to CPLR § 5015 (a) (1), the Court which rendered a judgment or order may relieve a party from it if the party demonstrates both a reasonable excuse for the default and a meritorious defense (see, CPLR §5015 [a][1]; see *Titan Realty v Schlem*, 283 AD2d 568, 724 NYS2d 908 [2nd Dept. 2001]; *Matter of Gambardella v Ortov Light*, 278 AD2d 491 [2nd Dept 2000]; *Parker v City of New York*, 272 AD2d 310, 707 NYS2d 199 [2nd Dept.2000]). What constitutes a reasonable excuse is within the sound discretion of the Court. (*Parker v City of New York*, *supra*).

"It is well settled that where service of process has been improperly effected, any resulting default judgment is a nullity. This is so even where the defendant had actual notice of the lawsuit, and no meritorious defense, for in such case, the court never had

personal jurisdiction over the defendant". *DeMartino v Rivera*, 148 AD2d 568, 539 NYS2d 38 (2nd Dept. 1989); *see also, Laurenzano v Laurenzano*, 222 AD2d 560, 635 NYS2d 668 (2nd Dept. 1995). Once it is shown that service was not properly effected, the judgment must be unconditionally vacated. CPLR §5015(a)(4); *Chase Manhattan Bank, N.A. v Carlson,* 113 AD2d 734, 493 NYS2d 339 (2nd Dept. 1985). Whether or not the defendant has a meritorious defense is irrelevant to the question of whether the judgment should be vacated for lack of personal jurisdiction. *Steele v Hempstead Pub Taxi*, 305 AD2d 403, 760 NYS2d 188 (2nd Dept.2003); *Shaw v Shaw*, 97 AD2d 403, 467 NYS2d 231 (2nd Dept. 1983). The existence of a meritorious defense only becomes significant in determining whether to open a default once it is clear that service was properly made. *Shaw v Shaw*, *supra*; *Mayers v Cadman Towers, Inc.* 89 AD2d 844, 453 NYS2d 25 (2nd Dept. 1982).

Moreover, a judgment entered in the course of a proceedings without obtaining personal jurisdiction over the defendant is a nullity and the "person purportedly served may ignore the judgment, resist it or assert its invalidity at any and all times". *McMullen v Arnone,* 79 AD2d 496, 437 NYS2d 373 (2nd Dept. 1981).

CPLR §308 (4) provides for personal service upon a natural person as follows:

> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential: and not indicating on the outside thereof, by return address or otherwise, that the communication is from and attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other.

It is well settled that nail and mail service pursuant to CPLR § 308(4) may only be used where service under CPLR § 308(1) and (2) cannot be made with "due diligence". The due diligence requirement of CPLR § 308(4) should be strictly construed given the reduced likelihood that a summons served pursuant to that section will be received. *Moran v Harting*, 212 AD2d 517, 622 NYS2d 121 (2nd Dept. 1995); *Gurevitch v Goodman*, 269 AD2d 355, 702 NYS2d 634 (2nd Dept. 2000); *Walker v Manning*, 209 AD2d 691, 619 NYS2d 137 (2nd Dept. 1994).

After a careful reading of the submissions herein, it appears to the Court that an evidentiary hearing is required to determine whether effective service of the Summons and Complaint has been obtained. Although the process server avers that he made three (3) attempts to personally serve the defendant prior to affixing the Summons and Complaint to the Forest Hills, residence, KAUFMAN has raised significant challenges to the presumption of proper service. Accordingly, it is hereby

ORDERED, that this matter is specifically referred to the Calendar Control Part for a traverse hearing and shall appear on the calendar of CCP on April 2, 2008 at 9:30 A.M., subject to the approval of the Justice there presiding; and it is further

ORDERED, that defendant, ARNOLD KAUFMAN, shall file a Note of Issue within ninety (90) days from the date of this order and shall serve plaintiff's counsel a copy of same by certified mail, return receipt requested; and it is further

ORDERED, that the failure to file a Note of Issue as directed may be deemed an abandonment of the claims giving rise to the traverse hearing; and it is further

ORDERED, that in the event that jurisdiction over the defendant is found, the motion to vacate the default judgment is granted and the proposed answer shall be accepted. It is the judgment of the Court that KAUFMAN's application falls under CPLR §317 and, moreover, that he has demonstrated a reasonable excuse and a meritorious defense under CPLR Rule 5015(a).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 17, 2007

WILLIAM R. LaMARCA, J.S.C.

TO: Stephen M. Abrami, PLLC
Attorney for Plaintiff
500 North Broadway, Suite 223
Jericho, NY 11753

Rudy Hirschheimer, Esq.
Attorney for Defendant
300 Old Country Road, Suite 241B
Mineola, NY 11501

ENTERED

DEC 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

dellonsales-kaufman,#01/defaultjudg