The Educational Resource Institute v McArdle
2007 NY Slip Op 34238(U)
December 17, 2007
Supreme Court, Nassau County
Docket Number: 2799-05/
Judge: William R. LaMarca
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SHORT FORM ORDER

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

Present: HON. WILLIAM R. LaMARCA
Justice

THE EDUCATIONAL RESOURCE INSTITUTE,

Plaintiff,

-against-

GIA MCARDLE,

Defendant.

Motion Sequence # 002
Submitted September 19, 2007
XXX

INDEX NO: 12799/05

The following papers were read on this motion:

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

Defendant, GIA MCARDLE, moves for an order, pursuant to CPLR §§5015, 317 and 2005, vacating and setting aside the default judgment, entered herein on June 23, 2006, in favor of the plaintiff, THE EDUCATIONAL RESOURCES INSTITUTE, INC., in the total sum of $19,766.95, and, pursuant to CPLR §3211(a)(8), dismissing the action for lack or jurisdiction or, in the alternative, pursuant to CPLR §3211(a)(5), dismissing the action because the statute of limitations has expired. Counsel for plaintiff opposes the motion, which is determined as follows:

In this action, which seeks to recover on a promissory note, defendant urges that the default judgment obtained against her on June 16, 2006, and entered on June 23,

must be vacated because the judgment was improperly obtained in that plaintiff failed to effect proper service upon her of the summons and complaint and because the action was filed after the applicable statute of limitations had expired.

A careful review of the record herein reveals that, in about June, 1990, defendant MCARDLE applied for and received a student loan while attending Pace University Law School, to cover the period from August 1990 through June 1991, in the total amount of $22,000.00. Thereafter, on October 4, 1994, said loan was assigned to plaintiff herein, and the instant action to recover on the promissory note was commenced on or about July 16, 2005. The affidavit of service reflects that MCARDLE was served at her dwelling house on August 22, 2005, pursuant to "nail and mail" service under CPLR §308(4), after three (3) attempts to personally serve her, on August 17, 2005 at 2:20 P.M., on August 18, 2005 at 7:51 P.M. and on August 22, 2005 at 9:30 A.M. , were unsuccessful. The process server states that followup mailing was made on August 24, 2005 and counsel confirms that a subsequent mailing of the summons and complaint, pursuant to CPLR §3215(g), was made on September 14, 2005.

In support of the motion to dismiss, MCARDLE states that she was never served with the summons and complaint in this matter, which was never attached to her home, and that utilizing "nail and mail" service was improper because the process server never exercised due diligence in effecting personal service upon her in that his claims that no one was at home are "lies". MCARDLE states that there is always an adult in her home because she has three (3) children, one of whom is disabled and requires an adult to provide constant care and supervision. She asserts that there is not a date or a time when either she or her husband or a relative is not in her home and that, on the morning of

August 22, 2007 when she was allegedly served, she particularly recalls being at home to receive a workman who was there to fix a leak and install a new window. MCARDLE states that she has inquired of all of her neighbors who she claims all assert that they were not approached by a process server with questions about her residence or military status. It is MCARDLE's position that the affidavit of service is inaccurate, much like inaccurate affidavit of service submitted to the Supreme Court, Queens County, entitled EDUCATIONAL RESOURCES v. MCARDLE, under Index No. 66095/01, that resulted in a default judgment against her which was later vacated based upon improper service, by Decision and Order, dated August 20, 2004 (Golia, J.). Indeed, she points to the Affidavit of Facts and Non-Military Affidavit, submitted to the Clerk herein to obtain the default judgment, which bears the 2005 Index Number of the instant action, but a notary acknowledgment sworn to January 11, 2002. MCARDLE contends that said document, relied upon by the Clerk, was altered after its execution and is another reason to vacate the default judgment

Moreover, MCARDLE asserts that, although her application is made slightly more than one (1) year after the entry of the default judgment, the Court, in an exercise of discretion, should excuse her delay which was the result of a prior timely application being denied on procedural grounds. She asserts that she has a meritorious defense in that the statute of limitations in this matter, six (6) years under CPLR §213, and points out that, under CPLR §317, because she was not personally served herein and only recently learned of the default judgment, she may be allowed to defend the action "within one year after [s]he obtains knowledge of entry of the judgment, but in no event more than five years after such entry". CPLR §317.

In opposition to the motion, counsel for plaintiff asserts that the motion should be denied because it is just an attempt to forestall the payment of monies that are due and owing to the plaintiff. Counsel asserts that the summons and complaint was properly served in strict accordance with CPLR §308(4) and claims that the Law of Ohio is controlling, in accordance with the parties contract, which provides for a fifteen (15) year statute of limitations on contracts. Counsel for plaintiff contends that MCARDLE has not proffered a reasonable excuse for her default and has no meritorious defense and that the motion should be denied. Counsel offers no explanation whatsoever with respect to the alleged "altered" document submitted to the County Clerk.

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*). A default judgment is granted upon proof of appropriate service and follow up mailing to the defendant.

After a careful reading of the submissions herein, and assuming proper service for the sake of argument, which has not been established herein, it is the judgment of the Court that MCARDLE is entitled to the requested relief. The Court finds that MCARDLE has made a *prima facie* showing that the default judgment was granted based upon improper and altered documents and that the statute of limitations on the action has

expired. The Court rejects plaintiff's argument that Ohio Law applies to the contract herein, an issue which has previously been addressed by the Second Department on similar facts in the case of *Educational Resources Institute, Inc. v Piazza*,17 AD3d 513, 794 NYS2d 65 (2nd Dept. 2005), wherein the Court held, after a choice of law analysis, that a promissory note executed by a New York residence is governed by the six year statute of limitations set forth in CPLR §213. Plaintiff has failed to come forward with a genuine issue of fact that requires a trial. Based on the foregoing, it is hereby

ORDERED, that defendant's motion to vacate the default judgment, dated June 16, 2006 and entered on June 23, 2006, is granted and the Nassau County Clerk is directed to correct its records accordingly; and it is further

ORDERED, that defendant is granted summary judgment dismissing the complaint on the ground that the statute of limitations has expired.

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.

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ENTERED
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COUNTY CLERK'S OFFICE

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