

Peerless Importers, Inc. v Palace Liq., Inc.

2008 NY Slip Op 30309(U)

January 31, 2008

Supreme Court, New York County

Docket Number: 0101614/2007

Judge: Martin Shulman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: J.S.C.

PART 1

Index Number : 101614/2007
PEERLESS IMPORTERS INC
vs
PALACE LIQUOR INC.
Sequence Number : 001
DEFAULT JUDGMENT

INDEX NO. 101614/07
MOTION DATE _____
MOTION SEQ. NO. 001
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 _____

PAPERS NUMBERED

1
2, 3

Cross-Motion: Yes No

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
FEB 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

JAN 31 2008

Dated: _____

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
PEERLESS IMPORTERS, INC.,

Plaintiff,

Index No.: 101614/07

-against-

DECISION/ORDER

PALACE LIQUOR, INC. and IAN WALTERS,

Defendants.
-----X

Plaintiff Peerless Importers, Inc. ("Peerless" or "plaintiff") moves to enter judgment on default against defendants Palace Liquor, Inc. ("Palace") and Ian Walters ("Walters"). Palace and Walters (collectively "defendants") oppose the motion.

In order to successfully oppose a motion for a default judgment, defendants must demonstrate a justifiable excuse for their default and a meritorious defense. *Johnson v. Deas*, 32 A.D.3d 253, 819 N.Y.S.2d 751 (1st Dept., 2006). Here, defendants allege that the court lacks personal jurisdiction in that the summons and complaint were not properly served upon either Palace or Walters.

An affidavit of service constitutes prima facie evidence of proper service. 96 *Pierrepont, LLC v. Mauro*, 304 A.D.2d 631, 757 N.Y.S.2d 468 (2nd Dept., 2003). A sworn denial of service will rebut this presumption only where it refutes factual allegations in the process server's affidavit or presents a question of fact rather than baldly denying receipt of process. *Silverman v. Deutsch*, 283 A.D.2d 478, 724 N.Y.S.2d 647 (2nd Dept., 2001).

Here, defendants' unsubstantiated denial of service is insufficient to refute the process server's affidavit of service or warrant a traverse hearing. 96 *Pierrepont, LLC*

[* 3]

v. Mauro, supra. The process server's affidavit indicates that he effectuated personal service upon Walters at his residence. Exh. E to motion. Walters admits that he resides at 2300 Goodwin Road, Elmont, New York, where the affidavit of service states that service was effectuated. *Id.*; Walters Opp. Aff. at ¶1. Walters only summarily states that: 1) he "was never personally served with the Summons and Complaint"; on the date of service he "never saw nor received the Summons and Complaint"; and he "never received the Summons and Complaint by mail." Walters Opp. Aff. at ¶¶ 5-7. However, he neither fails to dispute the process server's description of his appearance nor does he deny that a person fitting that description resides at the service location. Walters also does not deny being at home on the date and time set forth in the affidavit of service.

Similarly, with respect to Palace, Walters states that: 1) he is responsible for receiving papers on Palace's behalf and did not receive the summons and complaint; and 2) on the date of service, Palace did not have a managing or registered agent named "Haran Cox" who was authorized to accept service. *Id.* at ¶¶ 8-10. Significantly, Walters does not deny that Haran Cox was employed by Palace, nor does he offer an affidavit from her denying that she represented to the process server that she was authorized to accept service. For the above reasons, defendants' conclusory denials of service are insufficient to rebut Peerless' proper affidavits of service and no traverse hearing is warranted.

Defendants having failed to proffer a justifiable excuse for their default, the court need not consider whether defendants established a meritorious defense. As Peerless established its prima facie case, the motion for a default judgment must be granted.

[* 4]

However, the motion is granted solely with respect to liability, as plaintiff's supporting documentation does not conclusively establish the amount of damages, which defendants contest. The matter shall proceed to inquest, at which time defendants may challenge the amount of damages sought.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment against defendants Palace Liquors, Inc. and Ian Walters is granted with respect to liability and an inquest for the assessment of damages against defendants is hereby directed; and it is further

ORDERED that, on or before March 5, 2008, plaintiff shall file with the Clerk of the Trial Support Office a copy of this order with notice of entry and a note of issue and shall pay the appropriate fee, and said Clerk is directed thereupon to place this matter on the appropriate trial calendar for the assessment herein above directed.

The foregoing constitutes this court's decision and order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
January 31, 2008

Hon. Martin Shulman, J.

FILED
FEB 05 2008
COUNTY CLERK'S OFFICE
NEW YORK