

Orix Credit Alliance, Inc. v Pasta Tree Café, Inc.

2008 NY Slip Op 30566(U)

February 29, 2008

Supreme Court, New York County

Docket Number: 0100899/2000

Judge: Shirley W. Kornreich

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SCANNED ON 3/3/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH
Justice

PART 54

ORIX CREDIT ALLIANCE

INDEX NO. 100899/00

MOTION DATE 11/8/07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
JOSEPH D. ROKE

The following papers, numbered 1 to 3 were read on this motion to/for Vacate Default

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 3

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

Cross-Motion: Yes No

FILED

MAR 03 2008

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/29/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ORIX CREDIT ALLIANCE, INC.,

Plaintiff,

-against-

PASTA TREE CAFÉ, INC.,
PATRICIA A. CURRAN and
JOSEPH D. KOKE

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 100899/00

DECISION
and ORDER

FILED
MAR 03 2008
NEW YORK
COUNTY CLERK'S OFFICE

This is an action to recover monies due under a lease for restaurant equipment, entered into between plaintiff Orix Credit Alliance, Inc. ("Orix") and defendants Pasta Tree Café, Inc. ("Pasta Tree) and Patricia A. Curran ("Curran"). The lease was guaranteed by pro se defendant Joseph D. Koke ("Koke"). Koke now moves, pursuant to CPLR § 5015, to vacate the default judgment entered against him on May 9, 2000. Plaintiff opposes.

I. Background

On or about June 15, 1998 Orix, Pasta Tree and Curran executed a lease for the purchase of several items of restaurant equipment. Prior to execution, Orix required Curran, Pasta Tree and Koke, as guarantor, to submit a lease application containing certain personal and financial information. The lease application submitted lists Curran and Koke as "principals" of Past Tree and contains, *inter alia*, bank and trade references as well as telephone and social security numbers¹. That same day, Koke entered into a written guarantee in which he unconditionally

¹Appropriately, the social security numbers were partially redacted by Orix in their submitted papers.

guaranteed Orix full and prompt payment of all debts and obligations owed by Pasta Tree under the lease. Koke also signed a Credit Life and Disability Insurance Addendum ("Addendum") as part of the lease.

Pursuant to the terms of the lease, Pasta Tree was to pay Orix \$9,115.40, including an initial payment of \$1,627.40 followed by 24 equal installments of \$312.00 per month. The lease further stated that in the event of default, Orix could declare the remaining principal to be immediately due and payable. Pasta Tree paid off approximately half of its balance before defaulting in 1999. Therefore, on or about July 30, 1999, Orix accelerated the remaining balance and declared it to be immediately due and payable.

Pasta Tree failed to tender the remaining balance and, thus, on January 18, 2000, Orix commenced the instant action. On February 11, 2000, Christine Garino served Koke with a copy of the Summons and Verified Complaint by personal service on Steven B. Geller, an officer of C-A Credit Corp. ("C.A. Credit"), the service of process agent designated by Koke under the terms of the guarantee. That same day, Orix sent a letter with a copy of the Summons and Verified Complaint, via certified mail, return receipt requested ("Certified Letter"), to Koke at his last known address, at 245 Old Mill Road Street, Box 1, St. James, N.Y. 11780 ("245 Old Mill Road"). The return receipt of the Certified Letter was signed for by Koke's sister Darcy. Additionally, that same day, a copy of the Summons and Verified Complaint was mailed on behalf of C-A Credit to Koke at 245 Old Mill Road. Service was also made on Koke at his last known address, pursuant to CPLR § 3215(g) on April 11, 2000. Koke never answered or moved with respect to this action, and Orix obtained a default judgement against him for \$4,650.35 on May 9, 2000 ("May Default").

II. *Conclusions of Law*

CPLR § 5015(a) states that the “court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct.” Pursuant to CPLR § 5013(a)(4), the court may relieve an affected party from a judgment or order based upon a lack of jurisdiction to render the judgment. A defendant seeking to vacate a default must also demonstrate a reasonable excuse for the default and a meritorious defense to the action. *Brown v. Suggs*, 38 A.D.3d 329, 330 (1st Dept 2007).

CPLR § 308(3) provides that service on an agent designated in accordance with CPLR § 318 is proper. CPLR § 318 states that an individual may be designated by a natural person as an agent for service in a writing with the consent of the agent endorsed thereon. CPLR 318; *In Re Estate of Gottesman*, 127 A.D.2d 563, 564 (2nd Dept 1987). The writing must be filed in the office of the county clerk where the principal to be served resides or has its principal office. *Id.* Service upon a designated agent pursuant to a guarantee clearly suffices under this section. *Orix Credit Alliance Inc. v. Fan Sy Prods., Inc.*, 215 A.D.2d 113, 114 (1st Dept 1995). *See also National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

Here, plaintiff properly served Koke pursuant to the terms of the guarantee which clearly states that Koke “hereby designate[s] and appoint[s]” C.A. Credit as its agent to accept service of process. Pursuant to the guarantee, once C.A. Credit received service on Koke’s behalf, it was required to forward a copy to him at his address within three days of receipt. This is exactly what occurred. C.A. Credit was served on February 11, 2000 and forwarded a copy to Koke at 245 Old Mill Road that same day. Orix has presented the affidavit of Christine Garino confirming service was made to C.A. Credit on February 11, 2000 and the affidavit of Glen York which

states that a copy of the Summons and Verified Complaint was sent by certified mail, return receipt requested, to Koke at 245 Old Mill Road. All of this was done in compliance with the guarantee and the provisions outlined in CPLR §§ 308(3) and 318.

Orix has submitted three separate affidavits of service in opposition to this motion. Koke, however, argues that he was not properly served in this action. He states that neither he nor his sister were living at 245 Old Mill Road at the time of service and that she was not authorized to accept service on his behalf. He does not say where he was living on February 11, 2000. A defendant's mere denial that he was served with the Summons and Verified Complaint is insufficient to rebut the presumption of proper service created by an affidavit of service. See *Koyenov v. Twin-D Transp. Inc.*, 33 A.D.3d 967 (2nd Dept 2006); *Carrenard v. Mass*, 11 A.D.3d 501 (2nd Dept 2004). Consequently, since service was proper, Koke has failed to demonstrate a reasonable excuse for his default. See *Household Fin. Realty Corp. of New York v. Brown*, 13 A.D.3d 340 (2nd Dept 2004).

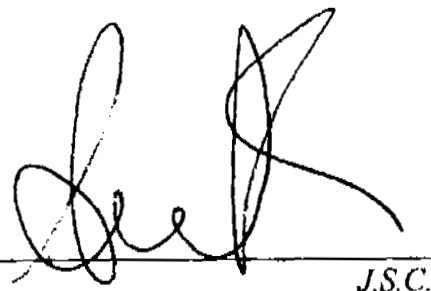
Moreover, Koke also argues that his signature on the guarantee "appears" to be a forgery. Pursuant to CPLR § 4536, the trier of fact may make her own comparison of a handwriting sample in the absence of any expert testimony. *Johnson v. Coombe*, 271 A.D.2d 780 (3rd Dept 2000); *Matter of Smith v. Coughlin*, 198 A.D.2d 726 (3rd Dept 1993). Handwriting samples alone may form the basis for a determination if the samples are sufficiently similar to compose substantial evidence that they were written by the same person. *Johnson*, 271 A.D.2d at 780; *Matter of Thomas v. Coughlin*, 145 A.D.2d 695, 696 (3rd Dept 1988).

Here, the evidence demonstrates that Koke signed the guarantee. Koke's signature on the guarantee is sufficiently similar to his signatures on the lease Addendum and his affidavit in

support of this motion. Interestingly, Koke challenges his signature on the guarantee, but not the Addendum, which he signed as part of the lease in June 1998. Since Koke does not offer any further evidence to dispute his signature on the guarantee, and he does not dispute his signature on the Addendum, the court finds that the signature on the guarantee belongs to Koke. See *Ouziel v. Baram*, 305 A.D.2d 564 (2nd Dept 2003) (Supreme Court authorized as fact finder to make determination as to genuineness of defendant's signature on guarantee as compared to other documents). Koke does not proffer any further defense besides his conclusory allegation that his signature on the guarantee was a forgery. As a result, he has not met his burden of demonstrating a meritorious defense to this action. *Roseboro v. Roseboro*, 131 A.D.2d 557 (2nd Dept 1987) (defendant failed to establish meritorious defense to warrant vacatur of default where affidavit of merit contained conclusory allegation of forged promissory notes). Accordingly, it is

ORDERED that Joseph D. Koke's motion to vacate the default judgement entered against him on May 9, 2000 is denied.

ENTER



J.S.C.

DATE: February 29, 2008
New York, NY

FILED
MAR 03 2008
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