

Palisades Collection, L.L.C. v Sbreu

2008 NY Slip Op 33507(U)

December 18, 2008

Supreme Court, Suffolk County

Docket Number: 13309-2006

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 003 MotD

Present:
Hon. SANDRA L. SGROI

MAIL COPIES OF
DECISION TO ALL
PARTIES

Adj'd Date: 10-9-08
Return Date: 7-17-08

PALISADES COLLECTION, L.L.C.
ASSIGNEE OF HSBC,
Plaintiff,

WOLPOFF & ABRAMSON, LLP
Attorney for the Plaintiff
300 Canal View Blvd., Third Floor
Rochester, New York 14623

-against-

HECTOR ABREU,
Defendant.

HECTOR ABREU
Pro Se Defendant
74 Farrington Avenue
Bay Shore, New York 11706

Upon the following papers numbered 1 to 15 read on this Motion: Order to Show Cause and supporting papers 1-14; Affirmation in opposition 7-15; it is,

ORDERED that the relief requested by Hector Abreu, the Defendant, to vacate the default judgment entered against him by the Plaintiff, Palisades Collection, L.L.C. assignee of HSBC, is granted to the extent that the Defendant is directed to serve an answer to the Plaintiff's Complaint within 30 days of personal service on him of a copy of this order by the Plaintiff and there shall be a stay on the enforcement of this judgment until further order of this Court; and it is further

ORDERED that the judgment shall stand as security until further order of this Court; and it is further

ORDERED that the stay on the enforcement of the judgment shall continue for sixty (60) days after the service of this order on the Defendant Hector Abreu by the Plaintiff whether or not the Defendant serves an answer as directed herein; and it is further

ORDERED that the Plaintiff is directed to serve a copy of this order on the Defendant Hector Abreu by personal in hand delivery to Hector Abreu; and it is further

ORDERED that a copy of this decision must be attached on any further application for a stay in this matter by the Defendant.

Patricia A. Blair, the attorney for the Plaintiff Palisades Collection LLC, states that letters were sent by her office to the Defendant at his address of 74 Farrington Avenue, Bay Shore, New York on January 30, 2006, March 6, 2006 and April 27, 2006. When no response was received from the Defendant and the letters were not returned by the United States Postal Service, the attorneys commenced this action by filing the summons and complaint on May 17, 2006. On June 14, 2006, the Plaintiff's process server attempted to serve Hector Abreu by affixing the summons and complaint to the door of 74 Farrington Avenue, Bay Shore, New York and then mailing a copy of the summons and complaint on June 16, 2006, to that same address. On June 20, 2006, the office of the Plaintiff's attorneys mailed a duplicate copy of the summons and complaint to the Defendant at 74 Farrington Avenue, Bay Shore, New York. On November 28, 2006, the Plaintiff entered a default judgment against the Defendant Abreu.

It appears that the Plaintiff served the summons and complaint by service pursuant to *CPLR* § 308(4). According to the affidavit of service, the summons and complaint was affixed to the door of the Defendant's residence at 74 Farrington Ave, Bay Shore, New York and thereafter process was mailed to the same address. The Plaintiff filed the default judgment and it was entered by the Suffolk County Clerk in November of 2006. In December of 2006, the Plaintiff issued an income execution and restraining notice to the Defendant's Bank in an attempt to collect the amount owed under the judgment. According to the affirmation submitted by an attorney for the Plaintiff, the Defendant was in contact with the office of Wolpoff & Abramson, L.L.P. on February 27, 2007, by telephone. In March of 2007, the attorneys for the Plaintiff issued an income execution to the Suffolk County Sheriff. In May of 2007, after the income execution was issued, the Defendant, who is pro se, moved by order to show cause in an attempt to halt the enforcement of the judgment by the Plaintiff. That motion, by order to show cause, was submitted for decision on July 26, 2007, without opposition from the Plaintiff.

On July 31, 2007, this Court decided the Defendant's unopposed motion to stay the income execution because the Defendant alleged in the Order to Show Cause that he never had any transactions with Palisades L.L.C., he never had a credit card with the assignor HSBC and he had never been served with process. Since the Defendant did not request that the default judgment be vacated in that application, the Court only stayed the income execution temporarily. The order issued by the Court stayed the income execution for a period of 120 days in order to permit the Defendant to bring an order to show cause to vacate the default judgment. The Plaintiff, although aware that personal jurisdiction was contested, has chosen not to attempt

to re-serve the Defendant with the Summons and Complaint.

The Defendant never moved to vacate the judgment within the time frame provided by the Court in the 2007 order. The Court recognizes that the Defendant is pro se and inadvertent procedural irregularities should be excused if there are merit to his contentions. The Plaintiff alleges that he did not move within 120 days to vacate the judgment because he was unaware of the order. He apparently received that order sometime in January of 2008. Upon the Defendant's receipt of the order of this Court, Abreu immediately brought another order to show cause (motion sequence # 002) requesting additional time but once again he did not move to vacate the Plaintiff's default judgment.

The Defendant has now moved to vacate the default judgment.

The Defendant has alleged a meritorious defense and an excusable default to this action taking into consideration his sworn statement in the affidavit submitted in the first order to show cause that he was never served. The affidavit of service attached to the Plaintiff's papers states that Bruce Kustka, the process server, affixed the summons and complaint to the door of the residence of Hector Abreu located at 74 Farrington Ave, Bayshore, New York and thereafter mailed the summons and complaint to that address. The summons and complaint were not returned as undeliverable. It appears that the address where the process server mailed the summons and complaint is the present residence of the Defendant. Although service may have been sufficient to provide this Court with jurisdiction, this factor alone is not determinative of the request to vacate the judgment. The Defendant may be entitled to vacatur of the judgment pursuant to *CPLR* 5015 or 317 even if service is valid where the Defendant has alleged both an excusable default *and* a meritorious defense.

Actual notice of the lawsuit alone will not sustain the service or subject a person to the Court's jurisdiction when there has not been compliance with the prescribed conditions of service (see, *Bankers Trust Co. of Cal., v. Tsoukas*, 303 A.D.2d 343, 343-344, 756 N.Y.S.2d 92; *Mortgage Access Corp. v. Webb*, 11 A.D.3d 592, 784 N.Y.S.2d 116). The Court must have obtained jurisdiction in a statutorily proper manner for the to have the power to act.

Initially, the affidavit of the process server is treated as prima facie proof of valid service (see, *Household Finance Realty Corp. of New York v. Brown*, 13 A.D.3d 340, 785 N.Y.S.2d 742; *Simmons First Natl. Bank v. Mandracchia*, 248 A.D.2d 375, 669 N.Y.S.2d 646). The Defendant's sworn denial of receipt of process may be sufficient to rebut the proffered affidavit of service depending upon the facts. It is not sufficient if the Defendant's allegation are unsupported or inadequately supported by factual assertions. If an issue of fact is raised as to service, the Plaintiff is required to establish personal jurisdiction by a preponderance of the evidence at a hearing (see, *Schwerner v. Sagonas*, 28 A.D.3d 468, 811 N.Y.S.2d 595; *Bankers Trust Co. of Cal. v. Tsoukas, supra*). An issue of fact is not established by a bare denial of service.

However, here, Abreu's bare denial of service contained in a prior affidavit that was submitted to the Court is insufficient to rebut the prima facie proof of proper service pursuant to *CPLR* § 308 (4) that was

established by the process server's affidavit (see, *General Motors Acceptance Corp. v. Grade A Auto Body*, 21 A.D.3d 447, 799 N.Y.S.2d 748; *Mauro v. Mauro*, 13 A.D.3d 345, 345-346, 786 N.Y.S.2d 213; *Household Fin. Realty Corp. of N.Y. v. Brown*, 13 A.D.3d 340, 341, 785 N.Y.S.2d 742). Therefore, no hearing is required (see, *Simonds v. Grobman*, 277 A.D.2d 369, 716 N.Y.S.2d 692).

Since the affidavit by Abreu challenging the jurisdiction of the Court is insufficient to raise any issue of fact so as to warrant a hearing on jurisdiction, the Court cannot set aside this judgment on the basis of improper service(see, *425 East 26th Street Owners Corp. v. Beaton*, 50 A.D.3d 845, 858 N.Y.S.2d 188; *Chemical Bank v. Darnley*, 300 A.D.2d 613, 752 N.Y.S.2d 397, lv to app'l den'd 1 N.Y.3d 593, 776 N.Y.S.2d 224, 808 N.E.2d 360). Although the Court will not vacate the judgment on the ground of lack of jurisdiction, the Court can vacate this judgment or stay the enforcement of the judgment and permit the Defendant to proceed on the merits

To vacate a judgment on the ground of excusable default pursuant to *CPLR* 5015(a)(1), as noted before, Abreu is required to demonstrate both a reasonable excuse for his default *and* the existence of a meritorious defense to the action (see *CPLR* 5015[a][1]; *Taylor v. Saal*, 4 A.D.3d 467, 771 N.Y.S.2d 671). There is a strong public policy that favors the disposition of civil matters on their merits (see, *Bunch v. Dollar Budget*, 12 A.D.3d 391, 783 N.Y.S.2d 829) and the determination of whether or not to vacate a default in answering is generally left to the sound discretion of the Court (see *Hegarty v. Ballee*, 18 A.D.3d 706, 795 N.Y.S.2d 747). The pro se Defendant has alleged that he did not receive the Summons and Complaint and he has repeatedly attempted to address the merits of the claim of the Plaintiff. The Defendant alleges that he “never have (sic) any transaction with Palisades, LLC or any credit card with HSBC.” While the Defendant alleges simply that he had “never been served with process” in his affidavit, he states that the process server in his affidavit stated that he talked to a neighbor living at 76 Farrington Ave, Bayshore, New York named “Joyce Allen” and no “Joyce Allen” lived at that address. Instead, he alleges that Diana E. Taitt lived at that address for thirty years.

The Plaintiff chose a method of service that has often resulted in a Defendant not receiving actual notice of the cause of action interposed against him and the Plaintiff has not shown that the Defendant's alleged defense is without merit. In fact, the defense the Defendant has interposed has not even been addressed by the Plaintiff. Further, the Plaintiff has not shown that it would be prejudiced if the default judgment was vacated and the Defendant was able to address the action on its merits.

In light of the strong defense interposed by the Defendant and the inability of the Plaintiff to show that the Defendant had actual notice of the action prior to the default, the motion of the Defendant to vacate the default will be granted to the extent provided herein. The Defendant must serve an answer on the Plaintiff, file that answer with the Suffolk County Clerk, respond to all further motions of the Plaintiff and appear for all conferences scheduled by this Court.

Palisades Collection LLC v. Abreu

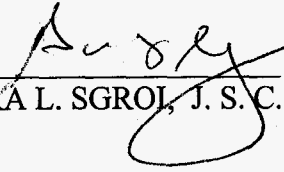
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Suffolk County Supreme Court does not, as a regular course, mail copies of its orders to the parties in civil actions, but in this matter and on this decision only, the Court will direct that this short form order be mailed to the attorney for the Plaintiff and the Defendant as a courtesy to the pro se litigant. Decisions are published on line on the Court web site and decisions and procedural dates are available at that computer web address. The Defendant, who is acting as an attorney for himself in this matter, must respond to the telephone calls and letters of his adversary or he runs the risk of sanction or other penalty if the Plaintiff is prejudiced by improper actions or the inaction of the Defendant in responding to communications.

Dated:

12/18/08


SANDRA L. SGROI, J. S. C.