

Signature Bank v Global Mkt. Autotrade, Inc.

2009 NY Slip Op 31632(U)

July 8, 2009

Supreme Court, Nassau County

Docket Number: 018402/08

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**SIGNATURE BANK,
Plaintiff,**

**Motion Sequence #1
Submitted April 20, 2009**

-against-

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**GLOBAL MARKET AUTOTRADE, INC. and
DAVID O'LEARY, Individually,
Defendants.**

The following papers were read on this motion:

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

Requested Relief

Counsel for defendant, DAVID O'LEARY (hereinafter referred to as "O'LEARY"), moves for an order, pursuant to CPLR Rule 5015(a) and §317, vacating a default judgment entered herein, on December 10, 2008, in favor of the plaintiff, SIGNATURE BANK (hereinafter referred to as "SIGNATURE"), and against GLOBAL MARKET AUTOTRADE INC. (hereinafter referred to as "GLOBAL"), and O'LEARY, in the total sum of forty thousand five hundred sixty nine dollars and sixty one cents (\$40,569.61). GLOBAL does not oppose the judgment. It is O'LEARY's position that

he was not properly served with the action and that he has a meritorious defense. Counsel for SIGNATURE opposes the motion, which is determined as follows:

Background

This is an action to recover an outstanding balance of thirty six thousand two hundred ninety nine dollars and sixty six cents (\$36,299.66), plus interest, on a Signature Bank Business Revolving Credit Account Agreement (hereinafter referred to as the "original agreement"), dated June 1, 2006. It is alleged that defendants defaulted pursuant to the original agreement on June 20, 2007 and thereafter.

In an affidavit in support of the motion to vacate the default judgment, sworn to March 16, 2009, O'LEARY states that he was never personally served with the summons and complaint in the action. Counsel for defendant states that, upon information and belief, the summons and complaint was served at 139 Vanderbilt Avenue, Manhasset, New York. O'LEARY states that he and his family have not lived at 139 Vanderbilt Avenue, Manhasset, New York since "before the summer of 2008." Counsel for defendant agrees that O'LEARY never received the summons and complaint that he had no notice of SIGNATURE's action and, therefore he has a reasonable excuse for the default. O'LEARY contends that on or about June 2007, he had discussions with Robert Corrado (hereinafter referred to as "Corrado"), the Senior Vice President of SIGNATURE, with whom he signed the original agreement in June of 2006. O'LEARY states that Corrado agreed to amend the terms of the original agreement and that he complied with the amended terms for over one (1) year. No specific changes to the terms of the original agreement have been provided to the Court. O'LEARY contends that, after the one (1) year of compliance with the amended terms, he was contacted by counsel for plaintiff informing him that

Corrado was no longer employed by SIGNATURE and that he was in default. Counsel for defendant argues that Corrado was plaintiff's signatory for the original agreement and that because O'LEARY complied with the amended terms he has a meritorious defense. O'LEARY urges that the default be vacated and set aside.

In opposition to the motion, counsel for SIGNATURE claims that the motion should be denied because both defendants, GLOBAL and O'LEARY, were duly served with a copy of the summons and complaint. With respect to the movant, an Affidavit of Service reflects that, on or about October 16, 2008, O'LEARY was served by "nail and mail" service at 139 Vanderbilt Avenue, Manhasset, New York after three (3) attempts to personally serve him at what was believed to be his dwelling house. Counsel states that, an independent process server, Brian Kleinberg, served O'LEARY by affixing a copy of the summons and verified complaint to the door of the residence and subsequently mailing the same to said address. Counsel argues that an affidavit of service is *prima facie* proof of proper service, citing *Sando Realty v Aris*, 209 AD2d 682, 619 NYS2d 140 (2nd Dept. 1994), and that an "excusable default" is lacking.

Counsel for plaintiff states that SIGNATURE, in or about August 2008, was negotiating with O'LEARY to enter into a forbearance agreement to resolve the debt owed under the original agreement. Counsel states that, SIGNATURE does not dispute that O'LEARY complied with the terms of the original agreement for one year, beginning with the execution of the said agreement, however counsel argues that the instant action was brought after O'LEARY failed to make a payment in June, 2007, and that no payments were made subsequent to that date. It is SIGNATURE's position that O'LEARY "changed his mind and no longer wished to" enter into the

proposed forbearance agreement, at which point counsel for SIGNATURE advised O'LEARY's counsel that plaintiff would be commencing the instant action. SIGNATURE argues that O'LEARY has failed to establish the required excusable neglect to vacate the judgment and has further failed to demonstrate any meritorious defense and, therefore, the request to vacate the Judgment should be denied.

In defendant's reply affirmation, it is argued that SIGNATURE was made aware that O'LEARY did not reside at 139 Vanderbilt Avenue, Manhasset, New York, during a phone conversation with plaintiff's counsel in August of 2008. Counsel for O'LEARY argues that plaintiff was informed that defendant and his family were temporarily residing with his wife's relatives, an arrangement that is still in effect. Counsel contends that plaintiff's counsel was informed by O'LEARY personally of his "move" during negotiations relating to the forbearance agreement in July and August of 2008. Counsel notes that the plaintiff's proposed forbearance agreement was sent via electronic mail. Counsel argues that, in order to be served in accordance with CPLR § 308 (4), "service must be made to the defendant's actual dwelling place", citing *Feinstein v Bergner*, 48 NY2d 234, 422 NYS2d 356, 397 NE2d 1161 (C.A. 1979); *Gibson v Salvatore*, 102 AD2d 861, 476 NYS2d 930 (2nd Dept. 1984). It is counsel's position that O'LEARY was not properly served and that the default judgment must be vacated, citing *Bank One National Association v Osorio*, 26 AD3d 452, 811 NYS2d 416 (2nd Dept. 2006); *Shaw v Shaw*, 93 AD2d 403, 476 NYS2d 231 (2nd Dept. 1983). Counsel states that, O'LEARY has a meritorious defense to SIGNATURE's allegations because of the amended terms negotiated with Corrado. Counsel notes that, nine (9) payments were made by O'LEARY to SIGNATURE which were cashed subsequent to the alleged breach in June, 2007.

Counsel for defendant argues that it is in the interest of public policy to resolve issues on the merits, citing *Stuart v Kushner*, 39 AD2d 535, 833 NYS2d 197 (2nd Dept. 2007), and that the default judgment should be vacated and the instant action decided on the merits. Counsel urges the Court to vacate the default judgment in its entirety.

The Law

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 494, 717 NYS2d 923 [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, supra*. 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).

Discussion

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 Manhasset, New York address, a question remains whether said address was the actual place of business, dwelling place or usual place of abode of the defendant. It is the judgment of the Court that O'LEARY has raised significant challenges to the presumption of proper service.

Moreover, it appears to the Court that there is a factual dispute as to whether Corrado and O'LEARY actually negotiated amended terms to the original agreement and whether such amended terms were complied with by O'LEARY. It is the judgment of the Court that O'LEARY has raised a meritorious defense to plaintiff's allegations.

Conclusion

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 November 4,

2009 at 9:30 A.M., subject to the approval of the Justice there presiding; and it is further

ORDERED, that defendant, DAVID O'LEARY, 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 action shall go forward on the merits. It is the judgment of the Court that O'LEARY's application falls under CPLR § 317 and, moreover, that he has demonstrated a meritorious defense. Should, jurisdiction be found, DAVID O'LEARY shall serve and file a formal answer within twenty (20) days of the determination finding jurisdiction.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 8, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

JUL 16 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**