

Unifund CCR Partners v Ahmed

2009 NY Slip Op 33170(U)

December 16, 2009

Supreme Court, Nassau County

Docket Number: 15767/08

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 6
NASSAU COUNTY**

UNIFUND CCR PARTNERS,

Plaintiff,

**MOTION DATE: 9/17/09
MOTION SEQ. NO. 001**

- against -

INDEX NO.: 15767/08

SYED M. AHMED, M.D.,

Defendant.

The following papers read on this motion (numbered 1-2):

Order to Show Cause.....	1
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In this action to collect the unpaid balance on a credit card account, defendant SYED M. AHMED, M.D., appearing *pro se*, moves to vacate the default judgment in the amount of \$77,687.59 purportedly entered in the Office of the Clerk of the County of Nassau on December 17, 2008 (the "Default Judgment"), and to recover any income garnished on execution thereof. Defendant claims that he was out of the country from August 1, 2008 through March 1, 2009 and did not receive the Summons and Complaint, which was filed and served during this time. Defendant submits copies of his passport to substantiate this claim. In opposition, Plaintiff asserts that Defendant has no defense to the underlying action, and submits copies of the Summons and Verified Complaint, the Affidavit of Service and the purported Default Judgment.

The *pro se* Defendant does not specifically invoke CPLR §5015(a)(4) as grounds for relief, his sworn statement to the effect that he never received the Summons and Complaint raises the question of whether or not there was jurisdiction to render a default judgment in the first instance. A default judgment rendered without personal jurisdiction over the defendant is a nullity and must be unconditionally vacated. **Hossain v. Fab Cab Corp.**, 57 A.D.3d 484; **Citibank, N.A. v. Keller**, 133 AD2d 63. In such circumstances, the defendant need not demonstrate a reasonable excuse for the default or a meritorious

defense. **Harkless v. Reid**, 23 A.D.3d 622; **Steele v. Hempstead Pub Taxi**, 305 AD2d 401. The issue of jurisdiction must be determined before the Court reaches the discretionary ground for vacatur pursuant to **CPLR §5015(a)(1)**, namely, excusable default. **Citibank**, 133 AD2d 63.

Plaintiff attaches an Affidavit of Service, sworn to on October 10, 2008, (the “Affidavit”), attesting to service upon Defendant pursuant to **CPLR §308(4)**. According to the Affidavit, the Summons and Verified Complaint were affixed to the door at 897 South Long Beach Avenue, Freeport, NY 11520 after three attempts at personal service, on three different dates, prior to the date of affixation. The Affidavit indicated that the premises were the Defendant’s “last known address as verified by the attorney’s records,” and that the “[p]lace of employment could not be ascertained.”

CPLR §308(4) provides that, where service cannot be made pursuant to **CPLR §308(1) or (2)** “with due diligence,” the summons and complaint may be affixed to the door of either “the actual place of business, dwelling place or usual place of abode” of the defendant, followed by a subsequent mailing. Although an affidavit of service is generally presumptive of proper service, and a conclusory denial of service will not suffice to raise an issue of fact, the Court finds that plaintiff is not entitled to the presumption in the first instance if the affidavit of service is deficient on its face or contains facts which call into question the validity of the service. *See CSC Holdings, Inc. v. Fung*, 349 F.Supp.2d 613 (presumption of proper service “in the absence of facts to the contrary”); *D’Alesandro v. Many*, 137 AD2d 484; *Kaszovitz v. Weiszman*, 110 AD2d 117.

In this case, the Affidavit, on its face, raises two issues regarding proper service: (1) did the prior attempts at personal service constitute “due diligence”; and (2) was the summons affixed at the proper address?

The due diligence requirement must be strictly observed, given the reduced likelihood that “nail and mail” service will actually be received. *Scott v. Knoblock*, 204 A.D.2d 299; *Gurevitch v. Goodman*, 269 AD2d 355. Nonetheless there is no rigid rule to determine whether or not the requirement has been satisfied. *See Sartor v. Utica Taxi Center, Inc.*, 260 F.Supp.2d 670, quoting *Barnes v. City of New York*, 51 NY2d 906. Instead, the Courts generally look at the “totality of the circumstances that bear on whether the service of process at issue was reasonably calculated to give the defendant notice, with the CPLR 308(4) due diligence inquiry guided by several pertinent considerations: whether the process server (1) attempted service during various days and times – before and after working hours, weekdays and weekends or holidays – when defendant may be reasonably expected to be found at home, ... (2) had an opportunity to

serve a person of suitable age and discretion pursuant to CPLR 308(2) and failed to do so, ... (3) made adequate inquiry, upon receiving no response to reasonable efforts to gain access to defendant's residence, as to defendant's whereabouts, habits or schedule of times at home, or place of business, ... (4) made an effort to serve at defendant's workplace where the location of employment was readily apparent." *Id.* at 676 (citations omitted). *See also Hanover New England v. MacDougall*, 202 AD2d 724. The fourth consideration has been afforded particular weight in the Second Department, some cases holding that three attempts to effect personal service at the defendant's residence were not sufficient where there was no showing that the process server attempted to ascertain the defendant's place of business or to serve the papers there. *See, e.g., County of Nassau v. Letosky*, 34 A.D.3d 414; *Gurevitch*, 269 AD2d 355; *Pizzolo v. Monaco*, 186 AD2d 727.

Here, the process server attempted personal service three times, on three different weekdays: Wednesday, 8/27/08 at 4:07 p.m.; Friday, 8/29/08 at 7:29 a.m.; and Thursday, 9/04/08 at 11:14 a.m. The papers were affixed to the door on Tuesday, 10/07/08 at 6:59 p.m.. The Court finds this insufficient to satisfy the diligence requirement of **CPLR §308(4)**. All of the attempts and final affixation were made on weekdays during hours when it reasonably could have been expected that a defendant would be working or in transit to or from work. *See Letosky*, 34 A.D.3d at 415; *Earle v. Valente*, 302 AD2d 353; *Annis v. Long*, 298 AD2d 340. The conclusory statement that a business address could not be ascertained is insufficient, absent some description of the attempts made to do so.

The Court acknowledges, as a practical matter, that if Defendant were out of the country, further diligence might have been futile. That is, however, of no consequence. The **CPLR** concerns itself with whether or not the service was reasonably calculated to give notice, not whether the notice was actually received or could be received. The Courts' concern is whether or not the efforts reflected in the affidavit of service or other documentation meet the criteria set forth in **CPLR §308(4)** and case law thereunder. Here they do not.

The Court does not, however, rest its determination solely upon the apparent lack of diligence. Equally troubling to the Court is the process server's notation that the papers were affixed at Defendant's "last known address." The Affidavit shows no attempt to ascertain whether this address was Defendant's actual dwelling place or usual place of abode. It is well settled that purported service by affixation to the door of a defendant's last known residence, as opposed to the defendant's dwelling place, usual place of abode or actual place of business, is ineffective, whether or not the defendant received notice of the suit. *Feinstein v. Bergner*, 48 NY2d 234.

The Court notes that, although Defendant denies receipt of process, he never denies that the address of affixation was, in fact, his residence at the time. Nonetheless, he is not obligated to rebut a presumption of valid service when the presumption does not arise in the first instance. Here, the Affidavit, on its face, reveals more than one significant defect in service that, in this Court's view, undermines the presumption to the point of extinction.

The Court concludes that jurisdiction over the Defendant was never acquired, and, accordingly, that Defendant is entitled to vacatur of the Default Judgment, if any, against him.

Although the Court is not required to reach the merits, the Court notes that it has serious concerns regarding the validity of the purported Default Judgment and the manner in which it was obtained by Plaintiff. First, the evidence of the Default Judgment attached to the opposition papers is not a signed judgment. Rather it is a "Statement For Judgment" stamped "Received" by the Nassau County Clerk's Office on December 17, 2008. The Court cannot tell whether this is an instance of defective proof or an indication that a default judgment was never actually signed and entered. Second, the Court questions whether the application for a default judgment was inappropriately submitted to the Clerk, as opposed to the Court, insofar as it is not clear that the credit card debt in question was a "sum certain." See **CPLR 3215(a); Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.**, 44 N.Y.2d 568. The Court is particularly troubled by the absence of documentation substantiating the amount of the debt, the terms of the agreement, if any, between the parties, and the assignment of the debt to Plaintiff.

The Court is concerned that the inadequacy of the proof submitted in opposition to this motion reflects a corresponding inadequacy in the proof used to obtain the default judgment against Defendant and the ultimate garnishment of his income. Applications for judgments on default must be meticulously scrutinized, particularly in the area of consumer debt, where the Courts are the last defense against the unscrupulousness or laxity of some creditors, the consequences of which may reverberate throughout the economy.

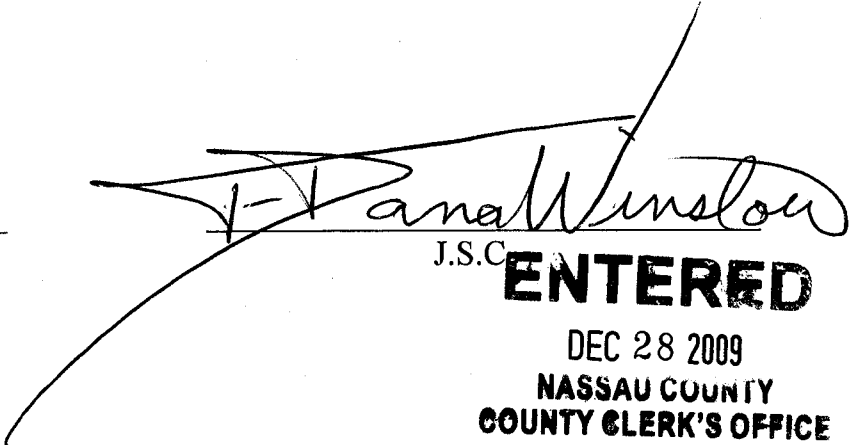
Based upon the foregoing, it is

ORDERED, that Defendant's motion to vacate the Default Judgment and any executions thereon is **granted**. It is further,

ORDERED, that any monies collected upon execution of the Default Judgment shall be returned to Defendant within 30 days of entry hereof.

This constitutes the Order of the Court.

Dated: 12/16/2009


J.S.C. **ENTERED**
DEC 28 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE