

<b>McConnell v Santana</b>
2009 NY Slip Op 33199(U)
October 5, 2009
Supreme Court, Richmond County
Docket Number: 11945/02
Judge: Anthony Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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GERALDINE CARR MCCONNELL,  
Individually and as Administratrix of the Estate of  
GEREMY MCCONNELL, Deceased Infant,

Plaintiff,

TP-9  
Present:  
Hon. Anthony I. Giacobbe

-against-

HIRAM SANTANA, NEW YORK CITY TRANSIT  
AUTHORITY and METROPOLITAN TRANSIT  
AUTHORITY

Decision and Order  
Index No. 11945/02  
Motion No. 007

Defendants.  
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The following papers numbered 1 to 3 were submitted on the 11<sup>th</sup> day of September, 2009:

Order to Show Cause to Vacate Judgment by Defendants with supporting papers (dated July 10, 2009)	1
Affirmation in Opposition with supporting papers (dated August 7, 2009)	2
Affirmation in Reply (dated September 4, 2009)	3

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Upon the foregoing papers and oral argument, defendants' motion to vacate is granted, in part, and is otherwise denied.

This is a personal injury and wrongful death action wherein plaintiff is seeking monetary damages for, *i.e.*, pain and suffering allegedly sustained when decedent-bicyclist Geremy McConnell collided with a bus owned by defendant New York City Transit Authority (hereinafter "NYCTA") and operated by defendant Hiram Santana.

Upon a unified trial of all of the issues, the jury returned a verdict in plaintiff's favor and

assessed both of the remaining defendants' liability at 100%.<sup>1</sup> Although the jury also found the decedent negligent, it determined that his negligence was not a substantial factor in causing the accident which resulted in his death.

Following the trial, defendants moved pursuant to CPLR 4404(a), *inter alia*, to set aside the jury's verdict in the total amount of \$520,000 (1) upon the grounds that the verdict is unsupported by the testimony and against the weight of the evidence, and (2) with respect to the jury's finding that decedent's negligence was not a substantial factor in causing the accident, as against the weight of the evidence. In a Decision and Order dated June 9, 2008, the motion was denied in its entirety. On December 23, 2008, plaintiff's counsel filed the judgment and docketed a lien against defendants Santana, NYCTA and the MTA (Defendants' Exhibit "I").

Defendants now move by way of an order to show cause to, *inter alia*, vacate the judgment as against Santana pursuant to CPLR 5015(a)(3) and 5019(a) on the ground that its docketing by plaintiff's counsel incorrectly asserted a lien against the individual defendant, who defendants claim was not a party to this action.<sup>2</sup> In support of their motion, defendants maintain that since plaintiff never effected proper service upon Santana, he was never made a proper defendant. More specifically, it appears that on or about December 2, 2002, when plaintiff obtained a default judgment against Santana for failure to serve an answer (Defendants' Exhibit "F"), defendants moved to vacate the default judgment on the ground, *inter alia*, that Santana was never properly served with the summons and complaint (Plaintiff's Exhibit "G"). However, defendant NYCTA concedes that it is vicariously liable for the actions of its driver in the circumstances of this accident under the theory of respondeat superior, since he was operating the bus during the course of his employment. On or about March 10, 2003, the default was vacated (Defendants' Exhibit "G"), but

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<sup>1</sup>Former defendant Metropolitan Transportation Authority (hereinafter "MTA") was dismissed from this action as reflected in a court order dated June 13, 2003 (Defendants' Exhibit "H"). Accordingly, this branch of defendants' motion is unopposed.

<sup>2</sup>As defendants' motion fails to allege grounds sufficient to vacate the judgment pursuant to CPLR 5015(a)(3), *i.e.*, for "fraud, misrepresentation, or other misconduct of an adverse party", the Court will treat said papers as a motion to vacate pursuant to CPLR 5015(a)(1) and (a)(4).

defendant NYCTA asserts that the aforementioned order did not provide direction as to when an answer should be interposed on behalf of Santana. As a result, no answer has ever been submitted on his behalf, citing plaintiff's failure to effectuate proper service of the summons and complaint upon him. As a result, the judgment against Santana personally and against his real property is alleged to be erroneous (Defendants' Exhibit "I"). Moreover, it is claimed that while a copy of the judgment was served on the NYCTA, it was never served upon defendant Santana, who did not discover same until he applied to refinance his home mortgage in May of 2009 (Affidavit of Hiram Santana).

In opposition, plaintiff submits a copy of the affidavit of service, which indicates that defendant Santana was personally served with a Summons and Complaint on June 12, 2002 at his residence by personal delivery to a woman claiming to be Mary Santana, defendant's mother, and the mailing of a copy of said pleadings to this defendant at the same address (Plaintiff's Exhibit "B").

In addition, plaintiff asserts that this Court has jurisdiction over Santana by virtue of an adverse determination on the issue of jurisdiction over said defendant after a traverse hearing on May 27, 2003. Plaintiff further maintains that none of the previous court orders (1) made any finding of improper service or lack of jurisdiction; (2) directed that Santana had to be re-served, or (3) ruled that the case as against him had been dismissed (Defendants' Exhibits "G", "H"; Plaintiff's Exhibit "H"). Finally, plaintiff contends that during the entire seven years of litigating this case, defendant Santana's name was listed as a defendant in the caption; that he was an active participant in, *e.g.*, pre-trial discovery; and therefore must be deemed to have "appeared" in this action. It is undisputed that defendant Santana participated in pre-trial discovery by, *e.g.*, submitting various affidavits and appearing for an examination before trial.

A party appears in an action by serving and filing a notice of appearance or an answer or by making a motion that serves to extend the time to answer (CPLR 320; *see, NYCTL 1998-1 Trust v. Prol Properties Corp*, 18 AD3d 525 [2<sup>nd</sup> Dept. 2005]; *USF&G v. Maggiore*, 299 AD2d 341, 342 [2<sup>nd</sup> Dept. 2002]). In addition, a party who has not formally appeared in an action may nonetheless

be deemed to have done so, thereby conferring jurisdiction on the court, by actively litigating on the merits without raising the jurisdictional objection ( *see, NYCTL 1998-1 Trust v. Prol Properties Corp, supra* at 525; *USF&G v. Maggiore, supra* at 342-343; *Rose Ocko Foundation, Inc. v. Lebovits, 259 AD2d 685, 690 [2<sup>nd</sup> Dept.], lv denied, 93 NY2d 997 [1999]*). Thus, a defendant whose participation in an action has reached a certain level of activity without challenging the court's jurisdiction will be held to have appeared informally even though that defendant has not interposed any of the three responses set forth in CPLR 320(a) (*see e.g.* CPLR 320[b]). In fact, such an informal appearance has been held to prevent a finding that such a defendant is in default (*see, USF&G v. Maggiore, supra* at 343). Here, it is undisputed that defendant Santana was deposed, actively participated in the lawsuit by, e.g., submitting an affidavit of merit (Defendants' Exhibit "G") in support of defendants' motion to vacate his default in answering; and appeared before the court each day during trial, where he sat at the defendants' table.

Based on the foregoing, defendants have failed to meet their burden under CPLR 5015 or 5019 to warrant vacating the judgment docketed against defendant Santana. Under CPLR 5015(a)(4), a default must be vacated once a movant demonstrates a lack of personal jurisdiction (*see, Matter of Qadeera Tonzia D. Abbott House, Inc., 55 AD3d 606 [2<sup>nd</sup> Dept. 2008]*). However, "[a]lthough a party moving to vacate a default must normally demonstrate a reasonable excuse and a meritorious defense (*see* CPLR 5015)... the movant is relieved of that obligation when lack of personal jurisdiction is asserted as the ground for vacatur" (*id.* at 606; citations omitted). Here, defendant Santana appeared by participating in the merits of the proceeding, thereby waiving his jurisdictional objection (*id.* at 607).

Moreover, CPLR 5019(a) provides a court with the discretion to cure only mistakes, defects, and irregularities in a judgment of a ministerial nature which do not affect the substantial rights of the parties (*see, Haggerty v. Market Basket Enterprises, Inc., 8 AD3d 618 [2<sup>nd</sup> Dept. 2004]*). Here, defendants do not seek to correct a ministerial mistake, defect, or irregularity in the judgment, but rather to change the judgment with respect to a substantive matter, *i.e.*, to vacate the judgment as

against a defendant found to be liable at trial. Likewise, CPLR 5019(b) is inapplicable since the judgment at issue was not affected in the subsequent denial of defendants' motion to vacate same (CPLR 5019[b]; *see, Haggerty v. Market Basket Enterprises, Inc., supra* at 619).

Accordingly, it is

ORDERED that the defendants' motion is granted to extent that the judgment docketed and lien filed against defendant Metropolitan Transportation Authority is vacated; and it is further

ORDERED that in all other respects, the motion is denied; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

Dated: October 5, 2009

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J.S.C.