

Lumbermens Mut. Cas. Co. v Peralta

2010 NY Slip Op 30852(U)

April 9, 2010

Supreme Court, New York County

Docket Number: 116623/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

Index Number : 116623/2008
LUMBERMENS MUTUAL CASUALTY CO.
vs.
PERALTA, JOEL D.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

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

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 9, 2010

[Signature]
HON. JOAN A. MADDEN^{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 11

-----X
LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiff,

INDEX NO. 116623/08

-against-

JOEL. D. PERALTA, JOSE MEDINA and
ERNESTO JIMENEZ, JR.,

Defendants.

JOAN A. MADDEN, J.:

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this action involving issues of insurance coverage, plaintiff Lumbermens Mutual Casualty Company ("Lumbermans") seeks a judgment declaring that it has no duty to defend or indemnify defendants under a policy of insurance issued to defendant Peralta, in connection with any claims or judgments made or had in the underlying personal injury action entitled Jose Medina v. Joel D. Peralta and Ernesto Jimenez, Jr., Index No. 16250/05, Supreme Court, Bronx County. Plaintiff Lumbermans moves for an order pursuant to CPLR 3215 granting a default judgment against defendants Peralta and Medina, based on their failure to appear and answer.¹ Defendant Medina has appeared in opposition to the motion and defendant Peralta has defaulted on the motion.

In opposing the motion, defendant Medina contends that he was not properly served with the summons and complaint, and that Lumbermans has not shown that it is entitled to declaratory relief. Although Medina has not formally cross-moved for leave to serve a late answer, he

¹That portion of plaintiff's motion for default judgment against the third defendant, Ernesto Jimenez, Jr., is denied as moot in view of the September 15, 2009 stipulation discontinuing the action with prejudice as to Jimenez.

annexes a proposed answer to his opposition papers, and asserts that plaintiff's motion for a default judgment be denied.

The affidavit of service states that the process server attempted to serve Medina personally on three separate occasions within a four-day period at various times, at his "actual address" which is listed as "1565 Grand Concourse, Apt B33, Bronx, NY 10442." According to the affidavit, service was attempted on April 3, 2009 (Friday) at 6:40 p.m, April 4, 2009 (Saturday) at 3:19 p.m. and April 6, 2009 (Monday) at 11:30 a.m. On the third attempt on April 6, 2009 at 11:30 a.m., the process server affixed the summons and complaint to the door of the apartment, and on April 10, 2009, copies were mailed to Medina at the same address.

Contrary to Medina's assertion, the affidavit of service constitutes prima facie evidence of proper service in accordance with CPLR 308(4). See Ayala v. Bassett, 57 AD2d 387, 388 (1st Dept 2008). The three separate attempts to serve Medina at his apartment made on different days, including Saturday, and at various times during traditional working and non-working hours, are sufficient to establish "due diligence" so as to permit the use of substituted service under CPLR 308(4). See id; Johnson v. Waters, 291 AD2d 481 (2nd Dept 2002); Lara v. 1010 E Tremont Realty Corp, 205 AD2d 468 (1st Dept 1994); Brown v. Teicher, 188 AD2d 256 (1st Dept 1992); Matos v. Knibbs, 186 AD2d 725 (2nd Dept 1992); Hochhauser v. Bungeroth, 179 AD2d 431 (1st Dept 1992).

Medina, however, submits an affidavit rebutting the presumption of proper service. In his affidavit, Medina states that "[t]here were never any papers left on the door of my apartment." This sworn statement is sufficient to refute the process server's assertion that the summons and complaint were affixed to Medina's door on April 6, 2009. See Federal Home

4]

Loan Mortgage Corp v. MacPherson, 277 AD2d 418 (2nd Dept 2000); Norwest Bank Minnesota, N.A. v. Galasso, 275 AD2d 400 (2nd Dept 2000); Hopkins v. Tinghino, 248 AD2d 794 (3rd Dept 1998). A traverse hearing is necessary to resolve this issue of fact. See Federal Home Loan Mortgage Corp v. MacPherson, *supra*; Norwest Bank Minnesota, N.A. v. Galasso, *supra*; Hopkins v. Tinghino, *supra*.

Medina further objects that proof of service was not filed within the 120-day period required under CPLR 308(4). It is not disputed that the proof of service on Medina was filed on April 16, 2009, which was five days after the expiration of the 120-day period on April 11, 2009. Such late filing of proof of service, however, is a mere irregularity that is curable *nunc pro tunc*. See Bell v. Bell Kalnick, Klee & Green, 246 AD2d 442 (1st Dept 1998); McCormack v. Gomez, 137 AD2d 504 (2nd Dept 1988).

Finally, Medina cannot properly raise any issues as to service of process on his co-defendant Peralta, who defaulted on the instant motion, and in failing to appear and answer.

Accordingly, it is hereby

ORDERED that a traverse hearing on the issue of service of process on defendant Medina is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that upon receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee, plaintiff may also renew the instant motion to the extent relevant; and it is

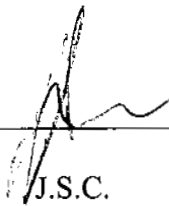
further

ORDERED that defendant Medina shall forthwith serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

The court is notifying the parties by mailing copies of this order.

DATED: April 9, 2010

ENTER:



J.S.C.

FILED
APR 14 2010
NEW YORK
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