

**Merchant Factors Corp. v OOC Apparel, Inc.**

2010 NY Slip Op 30907(U)

April 5, 2010

Supreme Court, New York County

Docket Number: 602398/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCH

PART 10

Index Number : 602398/2008

MERCHANT FACTORS

vs

OOPC APPAREL

Sequence Number : 003

VACATE DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

APR 13 2010

NEW YORK COUNTY CLERK'S OFFICE  
MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

THE ACCOMPANYING MEMORANDUM DECISION

THE ACCOMPANYING MEMORANDUM DECISION

APR 05 2010

Dated: April 5, 2010

  
HON. JUDITH J. GISCH, s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
MERCHANT FACTORS CORP.,

Plaintiff,

-against-

OOC APPAREL, INC., ELLIOT LAVIGNE,  
AND ELLYN LAVIGNE,

Defendants.  
-----X

**Decision/Order**

Index No.: 602398/08

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

**Numbered**

Ellyn Lavigne's n/m [CPLR 317] w/EL affid, exhs .....	1
Pltf opp w/TKR affirm, exhs .....	2

-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Merchant Factors, Corp. ("MFC") based upon allegations of fraud and unjust enrichment by the corporate defendant and individually named defendants. MFC is a commercial factor who loaned money to a clothing manufacturer ("AES"). According to MFC, the defendants sold AES licensing rights to the Sean John trademark, which rights defendants did not have. MFC paid \$360,000 for those rights and AES manufactured more than 59,000 Sean John branded t-shirts, which were then rejected by a large store when it discovered that AES did not have a valid license for the Sean John name, because defendants had entered into an agreement terminating those rights before entering into the agreement with AES.

This court granted MFC's motion for entry of a default judgment against the

individually named defendants and corporate defendant for the reasons set forth in its decision order of May 8, 2009 ("default order"). Presently before the court is the motion by Ellyn Lavigne ("Ms. Lavigne") to vacate that order and her default in appearing in this action because she was improperly served (CPLR 317) and the court does not have long arm jurisdiction over her (CPLR 3211 [a][8]).

This motion is opposed by plaintiff in all respects. Mr. Lavigne has not taken any position on this motion. Examining Ms. Lavigne's affidavit of service on this motion, Mr. Lavigne was not served with this motion. Although the Lavignes are apparently husband and wife, any decision to vacate the judgment against Ms. Lavigne would obviously impact Mr. Lavigne, since the judgment is against them jointly and severally. Consequently, this motion is defective for that reason alone. Nonetheless, the court considers the merits of the relief sought and doing so, denies it, even if it had been properly served, for the reasons that follow:

#### **Discussion**

The court directed entry of a default judgment against the Lavignes on plaintiff's 2<sup>nd</sup> and 3<sup>rd</sup> causes of action which are for aiding and abetting fraud (2<sup>nd</sup> cause of action) and unjust enrichment (3<sup>rd</sup> cause of action). The court ordered an Inquest on damages before a special referee. The Inquest was held on September 2, 2009 before Special Referee Nicholas Doyle. In his report, decision, order and judgment dated September 2, 2010, he granted plaintiff a money judgment against the Lavignes, jointly and severally, in the sum of \$760,000 with interest from March 26, 2006.

Ms. Lavigne denies that she was ever "personally" served with the summons and complaint in this action. She claims she has not "lived" at the address in Boca Raton,

Florida where she was served since "early 2008."

The affidavit of service filed by MFC shows that the process server made numerous attempts to personally serve Ms. Lavigne in August 2008 before resorting to substituted service. The summons and complaint were affixed to the door of the residence and mailed to Ms. Lavigne. The affidavit is prima facie proof of good service on Ms. Lavigne, as the court decided in the default order. However, Ms. Lavigne denies she was ever served with the summons and complaint or received any court papers from plaintiff through the mail until July 2009, when she received the court's default order.

None of the mail that plaintiff sent to Ms. Lavigne was returned to sender, except for court papers it sent to Ms. Lavigne in October 2009, after the referee made his decision and issued the judgment against Ms. Lavigne. Upon receipt, MFC remailed the court papers to Ms. Lavigne at her new address. Ms. Lavigne provides no possible explanation - let alone a reasonable one - for why the only mail she received from MFC was the court's default decision in July 2009.

On a motion under CPLR 317, the defendant does not have to come forward with a reasonable excuse for his or her default; s/he only has to demonstrate that s/he did not personally receive notice of the pending lawsuit (Pena by Pena v. Mittleman, 179 A.D.2d 607 [1<sup>st</sup> Dept 1992]). Ms. Lavigne's claim, that she did not know about this case because she was not served with the summons and complaint is wholly unpersuasive (Guggenheim v. Guggenheim, 178 A.D.2d 136 [1<sup>st</sup> Dept 1991]).

Although Ms. Lavigne claims she did not "live" at the Boca Raton address when the summons and complaint were served, she does not deny still owned the property in

August 2008 when legal process was made. On the underlying motion for entry of a default judgment, plaintiffs submitted competent evidence that a copy of the summons and complaint was properly mailed to the defendant at her residence, and thus, it must be presumed that she received it (Cavalry Portfolio Services, LLC v. Reisman, 55 A.D.3d 524 [2<sup>nd</sup> Dept 2008]). Her mere denial of receipt, without more, does not rebut the presumption of proper service (Cavalry Portfolio Services, LLC v. Reisman, supra).

Not only has Ms. Lavigne provided no explanation for why she would not have received mail sent by MFC, Ms. Lavigne did nothing to preserve her rights once she learned of the court's order. It is clear from the court's default order that there was going to be an Inquest on damages before a special referee. Ms. Lavigne failed to do anything to stay the Inquest or obtain relief from the court's default order. Any claim by defendant that she "immediately" took action is belied by the fact that the Inquest proceeded, as scheduled, in September 2009 and defendant did not appear for the Inquest. This motion was not made until two months after the referee made his decision and 4 months after defendant learned about this case. In fact, Ms. Lavigne does not even address the hearing before the special referee or explain why she did not make an appearance.

Ms. Lavigne's argument, that the court does not have long arm jurisdiction over her, also fails. She claims that she is not a New York resident, she does not transact business in New York, has no agents acting on her behalf in this state. However, Ms. Lavigne was admittedly the president of OOC, a domestic corporation at the time the allegedly fraudulent transactions occurred. This is not a fact she denies, nor does she deny signing the termination agreement dated May 18, 2005 that forms the bedrock of

MFC's dispute with her. Thus, Ms. Lavigne was admittedly engaged in business activities and/or transactions in New York which subject her to the court's long arm jurisdiction and there are tort claims against her (CPLR § 302[a][2], [a][3]); Deutsche Bank Securities, Inc. v. Montana Bd. of Investments, 7 N.Y.3d 65 [2006]).

Although this motion only seeks relief under CPLR §§ 317 and 3211[a][8], the court has also considered whether Ms. Lavigne is entitled to relief under CPLR § 5015. To vacate an order entered on default, the party seeking that relief must set forth excusable default and a meritorious defense (CPLR § 5015 [a]; Gray v. B.R. Trucking Co., 59 N.Y.2d 649 [1983]). Even were the court to accept Ms. Lavigne's excuse for why she did not answer or appear in this action, she does not have a meritorious defense.

Ms. Lavigne entered into a termination agreement in May 2005. Pursuant to the agreement, OOC's right to market the Sean John trademark was terminated. Plaintiff has proved that notwithstanding that termination agreement, the defendants continued to market those rights to AES which MFC paid for. Ms. Lavigne has not raised any meritorious defense to MFC's claims against her and consequently, there is no basis to vacate the court's default order.

Whether under CPLR §§ 317, 3211 [a] [8] or 5015, Ms. Lavigne has not established she is entitled to relief from the court's default order and the judgment entered against her. Therefore, Ms. Lavigne's motion is denied its entirety.

**Conclusion**

In accordance with the foregoing,


*It is hereby,*

**ORDERED** that defendant Ellyn Lavigne's motion to vacate the court's default order dated May 8, 2009 is denied in its entirety and the court's default order dated May 2009 is unmodified; and it is further

**ORDERED** that any relief requested that has not been expressly addressed is hereby denied; and It is further

**ORDERED** that his constitutes the decision and order of the court.

Dated: New York, New York  
April 5, 2010

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
APR 13 2010  
NEW YORK  
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