

**Bank of N.Y. v Bestbuydigital, Inc.**

2010 NY Slip Op 31418(U)

June 2, 2010

Supreme Court, Nassau County

Docket Number: 008668/05

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**THE BANK OF NEW YORK,**

**Plaintiff,**

**-against-**

**BESTBUYDIGITAL, INC. T/A BEST BUY  
DIGITAL, MICHAEL BTESH,**

**Defendants.**  
-----X

**TRIAL TERM PART: 45**

**INDEX NO.: 008668/05**

**MOTION DATE: 5-25-10  
SUBMIT DATE: 5-25-10  
SEQ. NUMBER - 001**

**The following papers have been read on this motion:**

- Order to Show Cause, dated 5-7-10.....1**
- Affirmation in Opposition, dated 5-20-10.....2**

Defendant Michael Btresh, moves pursuant to (i) CPLR §5015(a)1 vacate default due to excusable default/meritorious defense, (ii) CPLR 5015(a) 4 5015(a) 4, lack of jurisdiction and (iii) CPLR §317 meritorious defense and failure to receive notice in time to defend, to vacate his default. The motion is denied and all stays are vacated and lifted.

Defendant also alleges that the proof of service was not filed as provided in CPLR § 308(2) but offers no proof in support of this contention which is belied by the stamp of the Nassau County Clerk's office on the affidavit of service attached to plaintiff's affirmation in opposition.

This is an action to collect on a promissory note made by the co-defendant and allegedly guaranteed by the defendant. Service on defendant was made pursuant to CPLR §308(2) mailing and service upon someone of suitable age and discretion.

After defendant failed to appear and respond, judgment was entered against him on August 17, 2005.

The plaintiff has submitted a copy of an affidavit of service stamped "Received" by the Nassau County Clerk evidencing the filing of an affidavit of service showing that service was made pursuant to CPLR §308(2) by serving "Mr. Btesh a relative" and mailing to an address in Brooklyn, which is the same address used by defendant in his Request for Judicial Intervention.

As to service of process, defendant has submitted an affidavit stating that he was never served with the Summons and Complaint and did not receive a copy. There is no submission by any other person and no reference to the information contained in the affidavit of service. For purposes of satisfying CPLR §5015(a)1 defendant relies on the failure to receive process as his excusable default and has offered no other explanation.

An affidavit of service by a process server which specifies the papers served, the person who was served, and the date, time, address and sets forth facts showing that service was made by an authorized person, and in an authorized manner, constitutes prima facie evidence of proper service. *Maldonado v. County of Suffolk*, 229 AD2d 376 (2d Dept. 1996), *Sandor Realty Corp v. Arvis*, 209 AD2d 682 (2d Dept. 1994). A conclusory denial of receipt such as is present here is insufficient to raise an issue of fact which would entitle defendant

to a traverse hearing. *Id.* A sworn denial of service by a defendant will rebut the presumption of proper service where it refutes factual allegations in the process server's affidavit or presents a question of fact rather than baldly denying receipt of process. *Silverman v. Deutsch*, 283 AD2d 478 (2d Dept. 2001); *European Am. Bank v. Abramoff*, 201 AD2d 611 (2d Dept. 1994). Here, defendant has failed to controvert the affidavit of service or to set forth sufficient facts to warrant a traverse hearing. Thus, the claim of improper service has no merit.

CPLR §317 applies when a person who is served by other than personal service defaults, has a meritorious defense and moves within one year of discovery of the judgment. Since defendant was served by substituted service, CPLR §317 is applicable as to him.

The Court, in its discretion, may relieve any party from the effect of a default upon proof of both a meritorious claim or defense and as to CPLR §5015 (a)1, a reasonable excuse for the default. *Chemical Bank v. Vasquez*, 234 A.D.2d 253 (2d Dept. 1996).

A motion to vacate may be predicated upon CPLR §317 if made within one year of receipt of knowledge of the judgment, and the focus is on the manner of service. When a defendant is served by other than personal service, the provisions of this section become applicable. *Fleetwood Park Corp., v. Jerrick Waterproofing Co.*, 203 AD2d 238 (2d Dept. 1994). As noted above, CPLR §317 is applicable here because service is alleged to have been made pursuant to CPLR §308.2. Under CPLR §317 a defendant must also show that it did not receive actual notice of the process in time to defend, *Brockington v. Brookfield Development Corp.*, 308 AD2d 498 (2d Dept. 2001), *Maines Paper and Food Service, Inc., v. Farmington Food Inc.*, 233 AD2d 595 (3d Dept. 1996), and there must be a showing of

a meritorious defense from a person with knowledge of the facts containing factual material, and not merely conclusory allegations or vague assertions.

A motion to vacate pursuant to CPLR §5015 (a)1 places emphasis on the presence of an excusable default rather than the manner or means of service. A court may consider the application of either CPLR §317 or CPLR §5015 (a) 1, even where not raised by the moving party. The common feature of both statutes is the showing of a meritorious defense. *Id.*

On a motion pursuant to CPLR §5015 (a) 1 a person must demonstrate a reasonable excuse for its delay in appearing and a meritorious defense. *DiLorenzo v. Dutton, Lumber Co.*, 67 NY2d 138 (1986). See, *Incorporated Vil. Of Hempstead v. Jablonsky*, 283 AD2d 55 (2d Dept. 2001); *Matter of Gambardella v. Ortov Lighting*, 278 AD2d 494 (2d Dept. 2000); *Parker v. City of New York*, 272 AD2d 310 (2d Dept.). This section also requires that the application be made within one year after service of the judgment with notice of entry. Since there is no proof of service of notice of entry of the judgment, the Court will consider this motion as timely under CPLR §5015(a)1, however other than a vague reference to a review of his credit report, defendant has not stated when he learned of the judgment and thus he has not satisfied the CPLR §317 requisite of showing that this motion was made within one year after obtaining knowledge of the judgment.

The common feature of meritorious defense necessary under both CPLR §317 and 5015(a)1 has not been established by the defendant.

In order to establish a meritorious defense under CPLR §§317 and 5015(a)1, a person with personal knowledge of the facts must submit some competent evidence of the defense and not conclusory allegations or vague assertions. *Peacock v. Kalikow*, 239 AD2d 188 (1<sup>st</sup>

Dept. 1997). Here defendant has not met his burden of showing a meritorious defense. It is necessary for a defendant to demonstrate a defense that is potentially meritorious. *Marinoff v. Natty Realty Corp.*, 17 AD3d 412 (2d Dept. 2005); *Cupoli v. Nationwide Insurance Company*, 283 AD2d 2d 961 (4<sup>th</sup> Dept. 2001). The quantum of proof necessary is not as great as is required to oppose summary judgment. *Bilodeau-Redeye v. Preferred Mutual Ins. Co.*, 38 AD3d 1277 (4<sup>th</sup> Dept. 2006). However, there must be some minimal showing of merit. Here defendant has not demonstrated a defense that is potentially meritorious and has not submitted documentary evidence to support the contention. *See M.R. v. 2526 Valentine LLC*, 58 AD3d 530 (2d Dept. 2009).

The second prong of CPLR §5015(a) 1, excusable default, has not been satisfied. The sole excuse offered for not responding to the complaint is lack of service of process. However, defendant has failed to make a *prima facie* showing of lack of service hence as an excuse for not answering the claim fails.


Except for the affidavit of service, the Court has not, based on CPLR §4547, considered the letter from defendant which predates the date of the summons and complaint and the promissory note and guarantee attached to plaintiff's opposition because they have not been authenticated. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1<sup>st</sup> Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, plaintiff's attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence.

The motion is denied, all stays are vacated.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 2, 2010

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**  
**JUN 04 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**