

Peer Foods Group, Inc. v Mesta Food Inc.

2010 NY Slip Op 31554(U)

June 7, 2010

Civ Ct, Queens County

Docket Number: CV127699/09

Judge: Cheree A. Buggs

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**Civil Court of the City of New York
County of Queens**

Part 32

Index Number CV127699/09

Motion Cal # 1 Motion Seq. #

Papers Submitted to Special Term on: 4/9/2010

PEER FOODS GROUP, INC.,

Plaintiff,

against

MESTA FOOD INC., A/K/A MESTA MEAT
INC. A/K/A STEINWAY MEAT MARKET
INC. AND GREGORY KALIKAS A/K/A GREG
KALIKAS A/K/A GREGORY MALIS

Defendants.

D E C I S I O N / O R D E R

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon the foregoing cited papers, the decision on the defendant’s Order to Show Cause to dismiss the Summons and Complaint pursuant to CPLR 3211 or to vacate a default judgment pursuant to CPLR 317 or 5015 which was entered on December 9, 2009 is as follows:

Defendant, Gregory Kalikas (“Kalikas”) filed an Order to Show Cause to vacate a default judgment rendered against Mesta Food, Inc.(“Mesta”) a/ka Mesta Meat Inc. a/k/a Steinway Meat Market (“Steinway”) and Kalikas on December 12, 2009. According to Kalikas’ sworn affidavit, he is the President of Mesta, however, at the time of service of the Summons and Complaint, he held a security interest in Mesta due to loans made to the company and he was not involved in the day to day operation of the business at the time the Summons and Complaint were served.

The plaintiff allegedly served the Summons and Complaint on Kalikas and the corporation at the Steinway location by serving Ahi Lea (“Lea”) on October 21, 2009. According to the affidavit of process server Anthony Gambino (“Gambino”), as well as the affidavit of service, Lea is stated to be the managing agent of the “corporation” and a person authorized to accept service on behalf of both defendant Kalikas.

Mesta has a different address than Steinway. Although the Summons and Complaint lists an address in Woodside, New York for Mesta, the Summons and Complaint for Mesta were served on Steinway. According to the plaintiff’s Summons and Complaint, defendant Kalikas does not reside in New York State.

In support of the motion, in addition to the attorney affidavit, the defendants have annexed a copy of the

Summons and Complaint; the affidavit of Kalikas, who is the President of Mesta; affidavits of service; copy of the default judgment entered on December 9, 2009; and a copy of defendants' answer dated December 18, 2009. Kalikas attested that the person in charge of operations at the time of the alleged service had been converting corporate funds and he was not sure if Lea ever gave a copy of the pleadings to him and moreover, Lea was not a managing agent of the corporation and did not work at the main business location. Kalikas became aware of the judgment when he took over operations. Kalikas contends that neither he or Mesta were served, and he also never received a copy of the notice of default. As to a meritorious defense, Kalikas contends that the amount sued upon is incorrect and moreover the plaintiff is not authorized to conduct business in the State of New York. He also states that the person who allegedly converted funds could possibly be named as a defendant as discovery proceeds.

It is well settled that the burden to prove proper service is on the party asserting it (*Castillo v Star Leasing Co.*, 69 AD3d 551 [2010]; *Chen v Shi*, 19 AD3d 407 [2005]). According to the plaintiff's affidavit of service, service of process was effectuated on defendants by serving a copy of the pleadings on Ahi Lea, ("Lea"), who the plaintiff indicated was the managing agent of the corporation and Lea was a person authorized to accept service on behalf of both defendant Kalikas. Plaintiff's process server also stated that a copy of the Summons and Complaint was later mailed to the defendants

Based upon the plaintiff's allegations, this Court can exercise personal jurisdiction over non-resident Kalikas. (See NYCCCA § 404 [a] [1], [2]; see also CPLR § 302 [1], [3]). NYCCCA § 404 (b) states that the service of a summons under this section "may be made in such manner and at such place, regardless of city or state lines, as would confer jurisdiction on supreme court in a like case." CPLR 313 titled "Service without the state giving personal jurisdiction" states that a person subject to the jurisdiction of the courts of this state pursuant to CPLR sections § 301 or § 302 may be served with the summons and complaint outside of the state "in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction."

Service of process on a natural person can be effectuated pursuant to CPLR § 308 (1) or (2) or § 312-a. The plaintiff had the option of attempting personal service upon Kalikas or by delivery "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode" (CPLR § 308 [2]). Kalikas was not personally served in his state nor was the Summons and Complaint given "to a person of suitable age and

discretion” at his actual place of business or alternatively by mail (CPLR § 312-a). Kalikas attested to now being the President of Mesta Food, Inc. d/b/a Mesta Meat. There is no indication that Kalikas had any business relationship with Steinway Meat, as Kalikas is moving to vacate the default only as to Mesta Food, Inc. d/b/a as Mesta Meat. Also, the plaintiff’s subsequent notice on Kalikas was defective. Plaintiff alleged service pursuant to CPLR § 3215 (g) (4) upon Kalikas, however, that section applies to notice upon a corporation. Service of additional notice based upon non-payment of a contractual obligation against a natural person is directed under CPLR § 3215 (g) (3) (i). Therefore, the plaintiff failed to properly served Kalikas . Therefore the default judgment is vacated against Kalikas and the action is dismissed against him, without prejudice, due to improper service.

As to the defendant corporation, service upon a corporation can be accomplished under NYCCA § 403 and § 404 (*see also* CPLR §§ 311, 312- (a) and BCL § 306). There is nothing in the record to substantiate that Mesta Food, Inc.d/b/a Mesta Meat authorized service at an entirely different corporation, Steinway. The plaintiff failed to show any business relationship between Mesta and Steinway to establish why service was made there. Even if Steinway is a subsidiary of Mesta, there is no evidence that Mesta Food or Mesta Meat designated Steinway or its employees as agents for service of process or that Steinway “is a wholly owned subsidiary of the defendant, or is so dominated by the defendant that it acts as a mere department of the defendant” (*Donley v Gateway 2000, Inc.* 266 AD2d 184 [1999] *see also* CPLR § 311 [a] [1]). The Department of State Division of Corporations lists where service of process should be made on Mesta. The record clearly shows that the plaintiff was aware of the defendants’ actual place of business (*Hon-Kuen Lo v Gong Park Realty Corp.*, 16 AD3d 553 [2005]). The credit agreement dated September 1, 2008 attached to the plaintiff’s opposition indicated that Kalikas signed as President of Mesta Meat. The plaintiff sent invoices to Mesta Food at an address in Woodside. Plaintiff’s exhibit g contained two checks allegedly to show payments made by defendants. The first check is dated May 1, 2009 and drafted from Mesta Food to Peer, however, it contained what appeared to be a stamped signature and was allegedly returned for insufficient funds. The second is from Steinway to Peer, and an unknown party signed this check. There is no evidence that the person who signed the Steinway check had any business relationship to Mesta. The Department of State Division of Corporations lists Kalikas as a person authorized to accept service on behalf of Mesta Meat, however, the address is not the same address as the location where the plaintiff served the papers. Therefore, the default judgment is vacated against Mesta Food Inc. a/k/a Mesta Meat Inc. and the matter is dismissed without prejudice, since plaintiff never served Mesta at the Woodside location or mailed a copy of the pleadings to the Woodside address.

The Court would also vacate Mesta Food, Inc. and Mesta Meat, Inc. and Kalikas' defaults pursuant to CPLR 5015 (a) (4) and 317. Pursuant to CPLR 5015 (a), a party may be relieved from a judgment by demonstrating excusable default as long as the motion was made within one year after entry of the judgment, upon a showing of a reasonable excuse and a meritorious defense including lack of jurisdiction. The defendants have demonstrated a basis for vacating a default under this statute.

Additionally, the Court's discretion to vacate the defendant's default lies not only with CPLR 5015 [a], but also with CPLR 317 (*see Eugene DiLorenzo, Inc. v AC Dutton Lbr. Co., Inc.* 67 NY2d 138, 143 [1986]; *Marinoff v Natty Realty Corp.*, 17 AD3d 412 [2004]; *Manhattan Med. Imaging. P.C. v Nationwide Ins. Co.*, 27 Misc3d 127[A], 2010 NY Slip Op 50584[U] [App Term, 2d, 11th & 13th Jud Dists 2010]). Under CPLR 317, a person served with a summons other than by personal delivery, or by service upon an agent as designated under CPLR 318, can obtain relief by showing that he did not receive notice in time to defend, and that he has a meritorious defense (*Girardo v 99-27 Realty, LLC*, 62 AD3d 659 [2009]); *Thakurdial v 341 Scholes Street, LLC.*, 50 AD3d 889 [2008]; *Hon-Kuen Lo v Gong Park Realty Corp.*, 16 AD3d 553 [2005]). Here, the defendants have demonstrated the person whom the Summons and Complaint were served, Ahi Lea was not authorized to accept service on behalf of the corporation or on behalf of Kalikas, and this is coupled with a meritorious defense. Moreover, the CPLR 3215 (g) (4) notice was mailed to Steinway not Mesta (*compare Levine v Forgotson's Central Auto & Elec.*, 41 AD3d 552 [2007]).

“It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void” (*Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 [2009], *citing McMullen v Arnone*, 79 AD 2d 496, 499 [1981]). The defect is not cured by defendants receipt of notice thereafter, “since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court” (*Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 [2009], *supra*, *citing Feinstein v Bergner* 48 NY2d 234, 241 [1979]).

Based upon the foregoing, the default judgment is vacated against Mesta Food, Inc a/k/a Mesta Meat Inc. and Gregory Kalikas individually, and the action is dismissed without prejudice on grounds of improper service.

The clerk is directed to serve a copy of this Order on the judgment clerk.

The foregoing constitutes the decision and order of the Court.

6/7/2010

Date

/s/

HON. CHEREÉ A. BUGGS

**Judge of the Civil Court of the City of New York
County of Queens**