

Statuto v Schuhmann's Inn, Inc.

2010 NY Slip Op 33659(U)

December 23, 2010

Supreme Court, Suffolk County

Docket Number: 3532/2006

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 3532/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 STEFEN STATUTO,

Plaintiff,

-against-

SCHUHMANN'S INN, INC., KENNETH
 FRANCIS SCHUHMANN d/b/a
 SCHUHMANN'S PUB, RONALD J.
 RASANEN and ROBERT TRIBUZIO,

Defendants.

ORIG. RETURN DATE: APRIL 29, 2010
 FINAL SUBMISSION DATE: JUNE 24, 2010
 MTN. SEQ. #: 004
 MOTION: MOT D RRH

ORIG. RETURN DATE: MAY 13, 2010
 FINAL SUBMISSION DATE: JUNE 24, 2010
 MTN. SEQ. #: 005
 MOTION: MOT D

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Upon the following papers numbered 1 to 8 read on these motions _____
TO VACATE DEFAULT JUDGMENT AND TO STAY PROCEEDINGS

Order to Show Cause and supporting papers 1-3; Order to Show Cause and supporting papers
4-6; Replying Affidavit 7; Replying Affirmation 8; it is,

ORDERED that this motion by defendant, KENNETH FRANCIS
 SCHUHMANN, JR. s/h/a KENNETH FRANCIS SCHUHMANN d/b/a
 SCHUHMANN'S PUB ("defendant") for an Order, pursuant to CPLR 5015,

vacating the default judgment of this Court dated April 27, 2009 and entered on June 9, 2009 ("Judgment"), and pursuant to CPLR 3211 (a) (8), dismissing this action, is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion by plaintiff, STEFEN STATUTO ("plaintiff"), for an Order: (1) staying a decision on defendant's instant motion to vacate the Judgment and to dismiss this action; (2) scheduling a testimonial hearing with respect to this proceeding in order to determine whether defendant and/or Kenneth Francis Schuhmann, Sr. was the owner of Schuhmann's Pub and the holder of the liquor license at Schuhmann's Pub on February 23, 2005; and (3) pursuant to CPLR 5015 (a) (3), vacating this Court's prior Order dated September 19, 2008 and entered September 29, 2008, which allegedly discontinued this action against Kenneth Francis Schuhmann, Sr., on the grounds of fraud, misrepresentation, or other misconduct of an adverse party, is hereby **GRANTED** solely to the extent set forth hereinafter.

This action was commenced by plaintiff with the filing of a summons and verified complaint on or about February 16, 2006, to recover damages for personal injuries allegedly sustained by plaintiff during an incident that occurred on or about February 23, 2005, at the premises known as Schuhmann's Pub located in Riverhead, New York.

Defendant now moves to vacate the default Judgment and to dismiss the action against him, alleging that this Court does not have jurisdiction over him. Defendant indicates that plaintiff served him by "nail and mail" service on June 10, 2006, at Schuhmann's Pub located at 70 West Main Street, Riverhead, New York. However, defendant claims that on June 10, 2006, Schuhmann's Pub was not his actual place of business. Defendant alleges that on the date of service he was neither a partner nor an employee of Schuhmann's Pub, but rather a licensed electrician working out of his home. Therefore, defendant argues that this service was in violation of CPLR 308 (4), which requires substitute service to be effectuated at a defendant's "actual place of business" (see CPLR 308 [4]). In support of the foregoing, defendant has submitted, among other things, a certified copy of an "Amended Business Certificate," executed on August 3, 2004 and filed with the Suffolk County Clerk on even date, indicating that "Kenneth F. Schuhmann Jr." was removed as a partner of the business entity known as "Schuhmann's Pub & Grill," leaving "Kimberly A.

Schuhmann" as the sole owner thereof. Defendant informs the Court that Kimberly A. Schuhmann is his sister, and that Kenneth Francis Schuhmann, Sr. is their father and the original owner of the business. Defendant further informs the Court that the liquor license for the business was held by his father, and that defendant has never held the liquor license therefor.

By *ex parte* Order dated December 17, 2007, this Court granted an application by plaintiff for a default judgment and an assessment of damages against defendant after defendant defaulted in answering the complaint. The Inquest was originally scheduled for January 17, 2008. Plaintiff served the Order upon defendant, and defendant appeared on January 17, 2008. On that date, defendant alleges that he informed plaintiff's counsel that they "had the wrong Kenneth Schuhmann," and subsequently faxed the Amended Business Certificate to plaintiff's counsel. Notwithstanding the foregoing, defendant alleges that plaintiff proceeded with the Inquest against defendant, which ultimately led to the Judgment being entered against him. Based upon the foregoing, defendant seeks to have the Judgment vacated and this action dismissed as asserted against him, or in the alternative, to have this matter set down for a traverse hearing to determine the propriety of service of process against him.

In response to defendant's motion, plaintiff has filed the instant motion seeking a stay of a decision on defendant's motion, scheduling a testimonial hearing to determine whether defendant and/or Kenneth Francis Schuhmann, Sr. was the owner of Schuhmann's Pub and the holder of the liquor license at Schuhmann's Pub on February 23, 2005, and vacating this Court's Order dated September 19, 2008, which allegedly discontinued this action against Kenneth Francis Schuhmann, Sr., on the grounds of fraud, misrepresentation, or other misconduct of an adverse party. Plaintiff indicates that he relied on a Business Certificate on file with the Suffolk County Clerk on August 20, 2007, which indicates that the owner of the business is Kenneth F. Schuhmann, Jr. Further, plaintiff alleges that as the liquor license for the business is in the name of "Kenneth Francis Schuhmann," it is unclear which Kenneth Francis Schuhmann is the holder thereof. Plaintiff argues that defendant should be compelled to produce the underlying application in order to determine which Kenneth Francis Schuhmann is the holder of the liquor license. Moreover, plaintiff contends that as Kenneth Francis Schuhmann, Sr. had previously submitted an affidavit to the Court indicating that he had no interest or control of the business as of October 22, 2003, the Court should order a testimonial hearing to determine whether defendant and/or Kenneth Francis Schuhmann, Sr. was the

owner of Schuhmann's Pub and the holder of the liquor license on February 23, 2005.

Initially, the Court notes that contrary to plaintiff's contention, the Order of September 19, 2008 did not discontinue this action against Kenneth Francis Schuhmann, Sr., but rather denied a motion by Kenneth Francis Schuhmann, Sr. to vacate the default Order issued against defendant by this Court on December 17, 2007. Within the Order of September 19, 2008, the Court found that:

[P]laintiff intended to sue Kenneth Francis Schuhmann, *Junior*, the [alleged] owner of SCHUHMANN'S PUB on February 23, 2005, the date of the subject assault. However, Kenneth Francis Schuhmann, *Senior* has filed the instant application seeking to vacate the default Order issued, arguing that this Court does not have jurisdiction over him. Plaintiff's counsel concurs with this argument, indicating that the correct defendant was named and served in this action, to wit: Kenneth Francis Schuhmann, *Junior* (emphasis in original).

As this action was not commenced against Kenneth Francis Schuhmann, Senior, no default Order or judgment was ever issued against him. Thus, the Court denied his application to vacate the Order of December 17, 2007, as it was issued upon defendant's default in appearing herein.

A motion to vacate a default may be made upon a showing of a reasonable excuse and a meritorious defense (see *e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (see CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (see *I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

Pursuant to CPLR 308 (4), service may be effectuated "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business" (CPLR 308 [4]). The "nail and mail" provision of CPLR 308 (4) clearly requires that the "nailing" be done at a defendant's "actual place of business, dwelling place or usual place of abode" (see *Feinstein v Bergner*, 48 NY2d 234 [1979]; *Commissioners of State Ins. Fund v Khondoker*, 55 AD3d 525 [2008]).

The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff (see *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343 [2003]; *Bank of Am. Nat. Trust & Sav. Assn. v Herrick*, 233 AD2d 351 [1996]; *Frankel v Schilling*, 149 AD2d 657 [1989]). A process server's affidavit of service establishes a *prima facie* case as to the method of service and, therefore, gives rise to a presumption of proper service (see *Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340 [2004]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, *supra*; *Frankel v Schilling*, 149 AD2d 657, *supra*). However, where there is a specific sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence (see *Mortgage Access Corp. v Webb*, 11 AD3d 592 [2004]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, *supra*; *Kingsland Group v Pose*, 296 AD2d 440 [2002]).

Here, the Court finds that defendant has proffered a reasonable excuse for failing to appear herein, as well as a potentially meritorious defense to this action as described hereinabove. Defendant disputes that 70 West Main Street, Riverhead, New York was his actual place of business on June 10, 2006 (see CPLR 308 [4]), as he claims that he was removed as a partner of the business on or about August 3, 2004. Therefore, the Court finds that questions of fact exist as to the propriety of service upon defendant on June 10, 2006, sufficient to warrant a traverse hearing.

In view of the conflicting affidavits herein, and the strong public policy in favor of resolving cases on the merits, these motions are **GRANTED** solely to the extent that the parties are directed to appear for a traverse hearing on

February 10, 2011, at 10:00 a.m., in Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead, to determine the propriety of service of the within summons and verified complaint upon defendant (see *Kim v Sydney R. Coleman*, 56 AD3d 259 [2008]; see also *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588 [2009]). As discussed, plaintiff has the burden of establishing jurisdiction over defendant by a preponderance of the evidence (see *Mortgage Access Corp. v Webb*, 11 AD3d 592, *supra*).

The foregoing constitutes the decision and Order of the Court.

Dated: December 23, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION