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

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Audio Command Systems, Inc.,

Plaintiff,

Decision/Order

Index No.: 115728/2009
Seq. No.: 001

-against-

Alan Leavitt and Susan Leavitt,

Defendants.

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

Papers	Numbered
OSC, RAR affirm., AL affd., SL affd., exhibits	1
MAN affirm., exhibits	2
RAR reply affirm	3

Gische J.;

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

Defendants move to vacate a default judgment entered against them on July 1, 2010. They claim that the underlying summons and complaint were improperly served upon them, warranting dismissal of the underlying action. Alternatively, they argue that even if this court has personal jurisdiction over them, the default should be vacated under CPLR § 317 because they have several meritorious defenses. Plaintiff opposes the motion.

Service of Process

Service of Process was made pursuant to CPLR § 308(2) by delivering the

summons to a person of suitable age and discretion at defendants' the actual place of abode. This method of service requires a follow-up mailing and filing proof of service with the clerk of the court within 20 days after the latter of the service or mailing. The first affidavits of service, filed with the court on December 3, 2009, indicate that on November 27, 2009, copies of the summons and complaint were left for defendants at the building in which they live, by delivering same to "Andy 'Doe' doorman." In subsequent affidavits of service, filed on April 6, 2010, Andy Doe is now identified as "Andy Piechocki doorman."

Defendants claim that the first affidavit is insufficient because it does not properly identify the person of suitable age and discretion who was served. They further argue that the second affidavit is insufficient because it was not filed within the 20 day period.

The court finds that the service was proper. The timely filed affidavit sufficiently identified the person served, notwithstanding that the doorman is only identified by his first name. He is further identified by a physical description of his age, weight, height, sex, color of skin, and color of hair. Bossuk v. Steinberg, 88 AD2d 358 (1st dept. 1982). All of the identifying information, taken together, allows the reader to know who was actually served. The first affidavit of service constitutes *prima facie* evidence of a valid service of process. Defendants have not come forward with any issue of fact warranting a hearing on whether service was effectuated as set forth in the affidavit. Wells Fargo Bank NA v. Chaplin, 65 AD3d 588 (2nd dept. 2009).

Vacating Default

Defendants argue that since they have sought to vacate this default within a year of obtaining knowledge of the judgment and the mode of service of process of the

original summons and complaint was other than by personal delivery, they need only show a meritorious defense to obtain such relief. CPLR § 317. Under such circumstances they do not need to show an excusable default. CIT Group/commercial Services Inc. v. 160-09 Jamaica Ave. Ltd., 25 AD3d 301 (1st dept. 2006). Plaintiff does not dispute that CPLR § 317 applies to the case at hand; it only disputes the bona fides of defendants' claim that they have a meritorious defense.

Defendants' claims of meritorious defense are: [1] that this case involves payment of services for electronic or home appliances and installation of communications systems, which, under the Administrative Code of the City of New York ("ACCNY"), requires that plaintiff be licensed; [2] the contract between the parties requires that their disputes be arbitrated; and [3] the judgment fails to give defendant credit for payments made and received by plaintiff.

Plaintiff acknowledges that defendants are owed a credit for payment, which it states it will apply to the balance due. They do not otherwise specify what that credit is or how it is to be calculated. Plaintiffs otherwise argue that they are not subject to the licensing requirements of the ACCNY and that the arbitration provisions of the parties' contract do not apply, because the parties have no dispute that defendants did not pay for the services provided.

For the reasons set forth below, the court vacates the default judgment and stays the action in order for the parties to proceed to arbitration.

ACCNY title 20, ch.2 subch. 24 applies to "electronic or home appliance service dealers." ACCNY § 20-412 requires that a "service dealer" be licensed. Insofar as pertinent here a service dealer is ". . . a person . . . who solicits or bills a customer for

repair service on electronic or home appliances; . . . or provides, as part of a sales transaction, repair service, including repair service performed by the seller, subcontractor, or other service repairer. . ." ACCNY 20-411(4) defines repair service as "the installation, maintenance, repair, replacement, inspection or modification for compensation, other compensation or under a warranty, of electronic or home appliances." ACCNY further defines electronic or home appliances to expressly include televisions, stereo systems and home computer systems.

Defendants claim that the plaintiff was hired to install audio visual, stereo and computer equipment in their home. They argue that failure to be licenced is a defense to an action for payment. Plaintiff, citing Innovative Audio Video v. Friedman, 7 M3d 383 (Supr. Ct. NY Co. 2005) argues that it is not obligated to be licensed. Innovative, however, was expressly decided on the fact that the defendant therein failed to point to any particular provision of law pertaining to licensing those who service stereo/audio video systems and that the licensing provisions relied upon did not apply to new construction.

The cited provisions of the ACCNY clearly and expressly cover service dealers of stereo and home computer systems. Depending upon the work done in this case, the absence of a license for the installation of an audio visual, stereo and home computer system may constitute a defense. *See* Richards Conditioning Corp. v. Oleet, 21 NY2d 895 (1968).

Defendants also raise the fact that the parties' contract requires that disputes be arbitrated. Plaintiff's claim that there is no dispute between the parties misses the point. Plaintiff's claim for compensation is a dispute and the matter should be

arbitrated. In any event, the defendants raise at least a defense regarding licensing and proper credits; so there is an actual dispute between the parties.

In accordance herewith it is hereby:

ORDERED that defendants' motion to vacate the default judgment is granted and the judgment entered against defendants on July 1, 2010 is hereby vacated, and it is further

ORDERED that defendants' motion to dismiss the action for lack of service is denied, and it is further

ORDERED that the instant action is permanently stayed and the parties are directed to proceed with their dispute in arbitration, and it is further

ORDERED that any requested relief not expressly granted herein is denied and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
January 5, 2011

SO ORDERED:

J.S.C.