

Unifund CCR Partners v Reek
2011 NY Slip Op 31077(U)
April 15, 2011
Supreme Court, Nassau County
Docket Number: 18366/09
Judge: Denise L. Sher
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

for plaintiff allegedly sent “a true copy of the summons and verified complaint in this action in a first-class mail, post-paid, sealed envelope properly addressed to the defendant...” to comply with the additional notice provision of the CPLR. On or about December 21, 2009, judgment for the aforesaid debt was entered against defendant.

Defendant claims that he first learned of said judgment against him when, on or about August 3, 2010, he received an envelope directed to him at the East Cedar Street address which contained therein a Notice of Property Execution together with the Nassau County Sheriff’s cover letter demanding payment of a judgment in the amount of \$64,775.16.

In support of his argument that he had a reasonable excuse for the default, defendant submits that his residence, 81 East Cedar Street, Massapequa, New York 11758, includes three tenancies. Said residence includes two front doors located fifteen feet apart from each other. Said residence has a common mailbox wherein all mail for the three tenancies is received. Defendant states that he never observed a Summons and Verified Complaint, naming him as the defendant, affixed to a door at the East Cedar Street residence in or about October, 2009. Defendant also claims that he did not receive a Summons and Verified Complaint by mailings regarding the instant action. Defendant argues that, had he received said Summons and Verified Complaint, he would have instructed his then attorney, Robert B. Pollack, Esq., to file an Answer to the Verified Complaint.

Defendant adds that he was convicted of a federal crime in the Eastern District of New York and was incarcerated thereon for the period in or about October, 2003 to October 27, 2005. Upon his release from prison, defendant secured legal counsel, the aforementioned Robert B. Pollack, Esq., to assist him in settling certain credit card debts. Said debts included Key Bank, Chase, MBNA and Citibank. During the year 2007, Mr. Pollack settled the accounts with Key Bank, Chase and MBNA. Defendant asserts that he was advised by Mr. Pollack that he had attempted to settle the Citibank debt, which was allegedly approximately \$19,000.00 during the 2007 to 2008 period, but that the settlement was delayed by assignments of the alleged debt. Defendant adds that, on or about July 21, 2009, he received, at the East Cedar Street address, a letter from Eric Streich, P.C., by Eli Raider, Esq., that the Citibank debt has been sent to said law firm for collection purposes and that the debt was allegedly \$56,877.80. Defendant claims

that he gave said correspondence to his attorney, Mr. Pollack, immediately subsequent to his receipt thereof and continued his retainer as defendant's legal counsel regarding said matter. Defendant states that it was his understanding, obviously now incorrectly so, that his attorney was in contact with Mr. Streich's office. On or about January 8, 2010, defendant received correspondence from Mr. Pollack indicated that Mr. Pollack believed that defendant, himself, was handling the Citibank matter and that the debt was approximately \$30,000.00. Upon receipt of said correspondence, defendant states that he immediately contacted Mr. Pollack and questioned him concerning the status of the Citibank matter. Defendant alleges that Mr. Pollack told him that he would review the matter and "that all would be well." When defendant contacted Mr. Pollack in August 2010, after receiving the Sheriff's Notice, Mr. Pollack told defendant that he would be unable to handle the matter due to a serious illness within his family. Defendant argues that "the fact is that Mr. Pollack, most likely due to the serious illness within his family, was not handling the Citibank matter as I thought he had been."

With respect to a meritorious defense in the matter, defendant states that his meritorious defenses include, but are not limited to, "the statute of limitations, the alleged amount of the alleged debt and the alleged assignment thereof." Defendant included a copy of his proposed Verified Answer as an exhibit to his moving papers.

In opposition to defendant's motion, plaintiff argues that defendant's Order to Show Cause should be denied since service was properly effected in accordance with the provisions of the CPLR and defendant fails to demonstrate both a reasonable excuse for delay in appearing and answering the Verified Complaint and a meritorious defense. Plaintiff submits that merely stating conclusory allegations of a reasonable excuse is insufficient and that the bald denial that the defendant was not served is insufficient to rebut the presumption of proper service. Plaintiff states that the Affidavit of Service is proof that defendant was indeed properly served. Plaintiff adds that the East Cedar Street address to which were mailed the additional copy of the Summons and Verified Complaint and Notice of Judgment Debtor or Obligor is the same address which defendant admits to residing at in his affidavit in his Order to Show Cause. Plaintiff states that none of the aforementioned mailings were returned by the U.S. Postal Service as undeliverable or otherwise. Plaintiff argues that defendant's contentions that he was

not served with the Summons and Verified Complaint and did not receive any of the aforementioned mailing are unconvincing, especially given the fact that defendant admits to receiving the July 21, 2008 correspondence from plaintiff's counsel's office.

Plaintiff further argues that "defendant alleges that '...the Federal Government placed a lien upon his residence in the amount of \$108,000.00 representing restitution owed upon my conviction and for which I continue to make payments.' ...As a lien was placed on defendant's residence, apparently he is the owner of the real property at 81 E. Cedar Street, Massapequa, NY. As the apparent landlord of the two other tenancies, these tenants would logically give defendant his mail from the 'common mailbox.'"

With respect to defendant's meritorious defenses, in opposition to said alleged defenses, plaintiff submits copies of defendant's statements of account, all bearing the East Cedar Street Address. Plaintiff also states that "[a]s indicated on the statement for the period of July 23 through August 23, 2004, the last payment made on the account was on August 23, 2004 in the sum of \$800.00. As this action was commenced on September 9, 2009 by the filing of the summons and verified complaint, it is clearly within the six (6) year statute of limitations."

Relief under CPLR 5015 (a) is available where the defendant can demonstrate a reasonable excuse for the default and a showing of a meritorious defense. *See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986); *Szilaski v. Aphrodite Const. Co., Inc.*, 247 A.D.2d 532, 669 N.Y.S.2d 297 (2d Dept. 1998).

When viewing the moving papers in their best light, the Court finds that defendant has shown a meritorious defense in the submission of his proposed Verified Answer. The Court additionally notes that defendant has provided proof that he had attempted to settle the debt with plaintiff's assignor, Citibank South Dakota NA, upon his relief from Federal prison, but was unable to do so because of the assignment issues. The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. *See Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

With respect to a justifiable excuse for the default predicated on a lack of notice, the Court has received conflicting proof; to wit; the process server's Affidavit of Service and the

defendant's affidavit in support of his motion. There are questions concerning the service of the Summons and Verified Complaint, especially given that the facts that the East Cedar Street residence at has two doors and allegedly one mailbox for three tenancies. The Court finds that, in order to ascertain whether service was properly effected, a traverse hearing must be held.

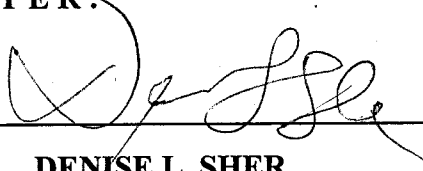
The matter is hereby set down for a traverse hearing to determine whether proper service was effected. Said hearing is to be held before the Calendar Control Part (CCP) at 9:30 a.m., on June 14, 2011.

All temporary stays that were granted by the Court in the original Order to Show Cause remain in effect pending a determination of the traverse hearing.

Defendant shall file a Note of Issue on or before May 30, 2011. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claim giving rise to the hearing. A copy of this Order shall be served upon plaintiff by May 30, 2011.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
April 15, 2011

ENTERED
APR 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE