

**Southern Wine & Spirits of N.Y., Inc. v 7940 Jericho
Turnpike Corp.**

2011 NY Slip Op 31730(U)

June 15, 2011

Supreme Court, Nassau County

Docket Number: 22900/09

Judge: Anthony L. Parga

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA
Justice

-----X PART 9
SOUTHERN WINE & SPIRITS OF NEW YORK INC.,

Plaintiff,

INDEX NO. 22900/09
XXX

-against-

MOTION DATE: 04/25/11
SEQUENCE NO: 03, 04

7940 JERICHO TURNPIKE CORP.
d/b/a SPERANZA FOOD STUDIO and
ANTHONY OTTIMO,

Defendants.

-----X	
Order to Show Cause, Exs & Aff.....	<u>1</u>
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Upon the foregoing papers, it is ordered that the motion by Plaintiff, brought by Order to Show Cause, for an order holding defendant Anthony Ottimo in contempt for his failure to respond to a subpoena duces tecum, dated April 30, 2010, is denied, and defendant Anthony Ottimo's motion, also brought by Order to Show Cause, to vacate the default judgment entered against him on March 22, 2010, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This action was brought by plaintiff to recover the amount of \$25,019.49 from the defendant, with interest at the rate of 12% per annum from June 22, 2009, for non-payment of the balances due under an agreement pursuant to which defendant 7940 Jericho Turnpike Corp. d/b/a Speranza Food Studio purchased alcoholic beverages from plaintiff. Plaintiff contends that the Summons and Complaint was served on both defendants on December 3, 2009. Defendants never answered the plaintiff's complaint, and, on March 22, 2010, a judgment in the amount of \$27,405.55 was entered at the Nassau County Clerk's Office. While the summons and complaint correctly names 7940 Jericho Turnpike Corp. d/b/a Speranza Food Studio as one of the

defendants to the lawsuit, the judgment filed by the plaintiff incorrectly names "7490" Jericho Turnpike Corp. d/b/a Speranza Food Studio and Anthony Ottimo as the defendants against whom the judgment was entered. Plaintiff contends that the error in no way affects plaintiff's claim against defendant Anthony Ottimo and that Anthony Ottimo moves to vacate the default judgment against himself only, not against the corporate defendant.

Plaintiff moves for an order holding defendant Anthony Ottimo in contempt for his failure to comply with a subpoena, dated April 30, 2010, which required that he appear as a witness for the taking of testimony relevant to the satisfaction of the judgment. Defendant Ottimo opposes plaintiff's application, attesting that he never received the summons and complaint in this matter and that he was not aware of the within action until he received plaintiff's Order to Show Cause requesting a contempt order.

Defendant Anthony Ottimo moves to vacate the March 22, 2010 default judgment entered against him, attesting that he was never served with the Summons and Complaint and believes that he has meritorious defenses to this action, including "failure to effectuate service or name the proper parties, plaintiff's violation of the Statute of Frauds, failure of consideration, the doctrine of laches, waiver and estoppels and unclean hands of plaintiff."

Defendant Ottimo attests that he maintained a business interest in an entity known as 7940 Jericho Turnpike Corp. Defendant Ottimo attests that he does not know a "Mr. Alex," upon whom the plaintiff contends the Summons and Complaint was served at 7940 Jericho Turnpike, Woodbury, New York. Defendant Ottimo attests that although he was the "president of the corporation which ran the restaurant," he did not reside at 7940 Jericho Turnpike, Woodbury, New York, or personally maintain a day-to-day business presence at said address. In addition, while defendant Ottimo concedes that he resides at the residence where the plaintiff contends the Summons and Complaint was mailed, he does not recall ever receiving same. As such, defendant Ottimo contends that he has a reasonable excuse for his default in answering the complaint.

Defendant Ottimo also contends that he has a meritorious defense to this action. Mr. Ottimo attests that while the personal guaranty bears his signature, he does not recall the details of this document and believes that it may have been completed "after the fact." Further, Mr. Ottimo contends that the guaranty lists the name of the corporation as Speranza d/b/a 7940 Jericho Turnpike Corp., rather than the correct 7940 Jericho Turnpike Corp. d/b/a Speranza Fine Italian Food Studio. Defendant Ottimo also contends that "the guaranty does not specify specific goods, products or purchase orders but rather serves as a blanket guaranty when it is common for a guaranty to apply to specific order(s)." Mr. Ottimo further attests that the "Application and

Credit Agreement” submitted by plaintiff, which lists his printed name under the signature line, does not contain his signature and states that he cannot recall receiving any invoices, other than a purported ledger, indicating the amount of money allegedly owed to plaintiff. Accordingly, defendant argues that he has a meritorious defense to this action.

Plaintiff has submitted the affidavits of service, which indicate that service of the Summons and Complaint upon defendant Anthony Ottimo was made by serving same upon a person of suitable age and discretion, “co-worker,” “Mr. Alex,” at 7940 Jericho Turnpike, Woodbury, New York. Plaintiff further submits an affidavit of service indicating that the Summons and Complaint was mailed to Anthony Ottimo at his home residence at 25 Sagamore Drive, Plainview, New York, pursuant to CPLR 3215(g)(3)(I), on December 10, 2009. In addition, plaintiff submits the Application and Credit Agreement between Southern Wine and Spirits of New York, Inc. and Speranza Food Studio. The agreement is dated November 17, 2008. The agreement states that the trade name of the business (DBA) is Speranza Food Studio and that the name of licensee is 7940 Jericho Tpk Corp, with an address of business listed as 7940 Jericho Turnpike, Woodbury, New York. The home address is listed as “25 Sagamore Drive, Plainview, NY,” and it purports to be signed by Anthony Ottimo. In addition, plaintiff submits the “Continuing Personal Guaranty” which lists Speranza Food Studio as the corporation and the “d/b/a” as 7940 Jericho Turnpike Corp. The guaranty states that the guarantor “unconditionally guarantees prompt repayment, when due, of all amounts advanced by Southern to purchaser for use in purchaser’s business described above. If purchaser defaults in the payment of any such indebtedness, guarantor(s) will pay to Southern on its order or demand the amount due.” Anthony Ottimo admits that his signature appears on the guaranty, and same was signed before a notary on December 3, 2008. Lastly, plaintiff submits a printed invoice ledger listing charges in the amount of \$25,019.49 to Speranza Food Studio.

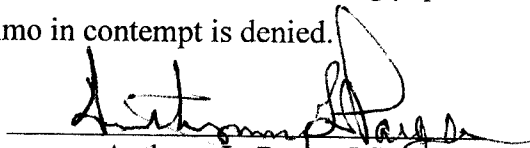
In order to vacate a default judgment, the movant must establish both a reasonable excuse for the default and a meritorious defense to the action. (*See*, CPLR §5015; *Putney v. Pearlman*, 203 D.D.2d 333, 612 N.Y.S.2d 919 (2d Dept. 1994); *Sciavetta v. McKeon*, 190 A.D.2d 724, 593 N.Y.S.2d 468 (2d Dept. 1993); *Shaw v. Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231 (2d Dept. 1983)). The determination of the sufficiency of the excuse and the statement of merits rests within the sound discretion of the court. (*Goldman v. Cotter*, 10 A.D.2d 289, 781 N.Y.S.2d 28 (1st Dept. 2004)).

In the instant action, defendant Anthony Ottimo has not presented evidence sufficient to demonstrate a reasonable excuse for his default or a meritorious defense to the action. Defendant's bare and unsubstantiated denial of receipt of process is insufficient to rebut

presumption of proper service created by affidavit of service by plaintiff's process server. (*Valiotis v. Psaroudis*, 78 A.D.3d 683, 911 N.Y.S.2d 111 (2d Dept. 2010); *See, Electric Ins. Co. v. Grajower*, 256 A.D.2d 833, 681 N.Y.S.2d 667 (3d Dept. 1998)). Even if the defendant Ottimo had presented a reasonable excuse for his default, he does not have a meritorious defense to this action. Defendant Ottimo concedes that he signed the guaranty at issue herein. It is well settled that a signer is responsible for reading a contract and having consented to its terms. (*See, BWI Guaranty Trust v. Banque Internationale a Luxembourg*, 567 N.Y.S.2d 731 (1st Dept. 1991)). Where a guarantee is clear and unambiguous on its face and, "by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (*Citibank v. Plapinger*, 55 N.Y.2d 90 (1985); *See, Gilman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824 (1988)(holding that absent a showing of fraud, duress, or other wrongful act by a party to a contract, a signer of an agreement is deemed to be conclusively bound by its terms whether or not he or she read it)).

With respect to plaintiff's Order to Show Cause for an order of contempt, the Court notes that it was not personally served upon defendant Anthony Ottimo, pursuant to CPLR 308(1), as directed by the Order dated November 1, 2010. The affidavit of service reflects that the Order to Show Cause was delivered to "Mr. Alex" at defendant's home address, which is insufficient to satisfy the requirement of personal service pursuant to CPLR §308(1). Accordingly, plaintiff's motion for an order holding defendant Anthony Ottimo in contempt is denied.

Dated: June 15, 2011


Anthony L. Parga, J.S.C.

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ENTERED
JUN 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE