

Arnett v Smith

2011 NY Slip Op 33796(U)

August 8, 2011

Supreme Court, New York County

Docket Number: 650582/2009

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

JAN M. ARNETT,

Plaintiff,

-against-

**TONY R. SMITH and THE MARTLAND
GROUP, INC.,**

Defendants.

INDEX NO. 650582/2009

MOTION DATE June 24, 2011

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion for leave to renew and/or reargue

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for leave to renew and reargue the court's decision and order dated May 2, 2011, pursuant to CPLR § 2221, is decided in accordance with the accompanying decision and order.

Dated: 8/8/11

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
JAN M. ARNETT,

Plaintiff,

-against-

**DECISION AND ORDER
Index No. 650582/2009
Motion Seq. No. 003**

**TONY R. SMITH and THE MARTLAND
GROUP, INC.,**

Defendants.

-----X
The Law Office of Christopher B. Turcotte, P.C., New York, N.Y. (Christopher B. Turcotte, of counsel) for plaintiff.

O. PETER SHERWOOD, J.:

Before the court is plaintiff's motion for an order, pursuant to CPLR § 2221, for leave to renew and reargue this court's decision and order dated May 2, 2011, which denied plaintiff's motion for a default judgment against defendants for their failure to appear or answer and dismissed the verified amended complaint, and upon renewal and/or reargument, vacating the May 2, 2011 decision and order and entering a default judgment in plaintiff's favor against defendants or, alternatively, granting plaintiff additional time to re-serve the verified amended complaint pursuant to CPLR § 308.

Plaintiff argues that contrary to this court's May 2, 2011 decision and order, substituted service of the summons and verified complaint upon defendant Tony Smith, pursuant to CPLR § 308 (4), was properly effectuated as it complied with the "due diligence" standard enunciated in New York's decisional law. Plaintiff argues further that service of the verified amended complaint upon Smith by Federal Express overnight mail was proper as the amended complaint simply supplements the original complaint with additional facts and restructures a general separate claim for punitive damages so as to limit such damage claim to certain causes of action. It raises no new or additional claims for relief. Plaintiff also notes that service of the verified amended complaint was also made upon Smith by regular mail. Plaintiff raises no issues as to the court's dismissal of the action as against defendant The Martland Group, Inc.

Upon review of the record, the Court finds plaintiff's motion to be in the nature of a motion for leave to renew. Such a motion "is intended to direct the court's attention to new or additional facts which, although in existence at the time of the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention" (*Garner v Latimer*, 306 AD2d 209 [1st Dept 2003]). Although renewal motions generally should be based upon newly discovered facts that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice so as not to defeat substantive fairness (*id.*; *see e.g.*, *Rancho Santa Fe Assoc. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]; *Trinidad v Lantiqua*, 2 AD3d 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]).

Here, plaintiff submits his own sworn affidavit in support of the instant motion, detailing the efforts he made to obtain the home address for defendant Smith. In conducting a web search, plaintiff made use of personal details he knew about Smith and Smith's wife and was able to confirm that plaintiff resided at the address in New Rochelle, New York, where substituted service upon Smith was made. More recently, plaintiff conducted a follow-up search obtaining results that again confirmed that Smith resided at that address. Plaintiff further averred that while he was not presently aware of Smith's current employment, during the time that he conducted business with Smith, Smith was self-employed and doing business at his home as the Martland Group, Inc.

Plaintiff's affidavit, which provides details not proffered on the previous motion, warrants the exercise of the court's discretion in granting leave to renew in the interest of justice and, upon renewal, vacating that branch of the court's May 2, 2011 decision and order as dismissed the complaint as against defendant Smith, reinstating the verified amended complaint as against Smith, and granting a default judgment in plaintiff's favor as against defendant Smith. Under the circumstances as alleged, the process server's three separate attempts at personal delivery of the summons and verified complaint at defendant Smith's home pursuant to CPLR § 308 (1), at various times during traditional and non-traditional working hours, were sufficient to satisfy the "due diligence" requirement for the use of substituted service under CPLR § 308 (4) (*see Lara v 1010 E. Tremont Realty Corp.*, 205 AD2d 468 [1st Dept 1994]; *Brown v Teicher*, 188 AD2d 256 [1st Dept 1992]; *see also Koyenov v Twin-D Transportation*, 33 AD3d 967, 969 [2d Dept 2006]). Therefore, service of the summons and original complaint were properly effectuated and jurisdiction over Smith

has been established. Service of the verified amended complaint by regular mail and Federal Express upon Smith, thereafter, was also valid.

Defendant Smith has not answered or otherwise moved with respect to the verified amended complaint nor has he sought an extension of the time in which to do so.

Having failed to answer the allegations of the complaint, the defendant is deemed to have admitted “all traversable allegations in the complaint, including the basic allegation of liability” (*Curiale v Andra Ins. Co.*, 88 NY2d 268, 279 [1996]). Nevertheless, in order to be entitled to a default judgment, plaintiff must allege enough facts to enable a court to determine whether the plaintiff has established, prima facie, entitlement to judgment (*see, Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept. 2007]; *Dyno v Rose*, 260 AD2d 694 [3d Dept. 1999]). If upon review of the facts proffered to establish the merits of a claim the court concludes that plaintiff has failed to establish a prima facie case, plaintiff is not entitled to a default judgment (*see, Dyno v Rose, supra*).

The elements for a cause of action for breach of contract are: (1) the existence of a contract; (2) plaintiff’s performance under the contract; (3) defendants’ failure to perform; and (4) damages resulting from the failure to perform (*see, Furia v Furia*, 116 AD2d 694 [2d Dept. 1986]).

Here, plaintiff’s amended complaint, as verified by plaintiff who has personal knowledge of the relevant facts, may serve as an affidavit of merits (CPLR § 3215 [f]). The verified amended complaint, together with the documentary evidence annexed to the moving papers hereto, are sufficient to establish a prima facie case for breach of contract under the first cause of action against the defendant Smith for failure to pay, pursuant to his personal guaranties, amounts due and owing upon two promissory notes, as well as other monies loaned by plaintiff to defendant Smith.

Based upon the foregoing discussion, it is

ORDERED that the branch of plaintiff’s motion as seeks leave to renew is granted, and, upon renewal, so much of this court’s decision and order, dated May 2, 2011, as denied plaintiff’s motion for a default judgment as against defendant Tony R. Smith and dismissed the action as against Smith is vacated and a default judgment is granted against defendant Tony R. Smith on the first cause of action alleged in the verified amended complaint for his failure to answer or appear; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff JAN M. ARNETT and against defendant TONY R. SMITH in the sum of: (1) \$125,000, plus 10% compounded interest from October 31, 2002 through October 31, 2003, as computed by the Clerk, in the amount of \$ _____; (2) \$245,000.00, plus 10% compounded interest from September 29, 2003 through March 29, 2011, as computed by the Clerk in the amount of \$ _____; (3) \$30,000.00, plus statutory interest from March 29, 2004 through March 29, 2011, as computed by the Clerk in the sum of \$ _____; and (4) \$35,000.00, plus statutory interest from December 15, 2006 through April 15, 2011, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk upon submission of an appropriate bill of costs, making in all a sum total of \$ _____ and that plaintiff have execution therefor; and it is further

ORDERED, that within 30 days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendant.

This constitutes the decision and order of the Court.

DATED:

AUG 08 2011

ENTER,



O. PETER SHERWOOD

J.S.C.