

Segway of N. Y., Inc. v Udit Group Inc.
2012 NY Slip Op 31603(U)
June 8, 2012
Supreme Court, Nassau County
Docket Number: 12639/11
Judge: Antonio I. Brandveen
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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN
J. S. C.

SEGWAY OF NEW YORK, INC. d/b/a Formula
One extreme,

TRIAL / IAS PART 29
NASSAU COUNTY

Plaintiff,

Index No. 12639/11

- against -

Motion Sequence No. 002

THE UDIT GROUP INC. d/b/a REVOLUTION
POWERSPORTS, MARK UDIT and ANDREW
UDIT,

Defendants.

The following papers having been read on this motion:

Order to Show Cause, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant corporate borrower and its two natural guarantors Mark Udit and Andrew Udit move pursuant to CPLR 5015 (a)(1),(4) and 317 to vacate a January 13, 2012 default \$204,292.96 judgment, and pursuant to CPLR 3211 (a)(8) to dismiss the summons and notice of motion for summary judgment in lieu of complaint, to recall a December 19, 2011 court order and render a new order. The defense contends the defendants were not properly served with a copy of the plaintiff's summons and notice of motion for summary judgment in lieu of complaint. The defense asserts the defendants

were denied due process of law under the federal and state constitutions because the plaintiff's notice of motion in lieu of complaint incorrectly identified the court address rendering the motion jurisdictionally defective. The defense maintains the defendants have a reasonable excuse for the default and a meritorious defense to the plaintiff's claim. The defense claims the defendants do not owe the money since they were fraudulently induced to sign an agreement of sale without benefit nor assistance of an attorney. The defense states the plaintiff expressly omitted an itemized statement of assets purchased by the defendant corporation.

The plaintiff corporation opposes this motion. The plaintiff points out the defendants sole defense is lack of personal jurisdiction because of the improper service allegation. The plaintiff. The plaintiff asserts the contract, note and guarantees are shown in the documents signed by the defendants. The plaintiff avers the three September 7, 2011 affidavits of service by Robert M. Serkes, a nonparty over the age of 18 years, show the defendant Mark Udit was personally served on September 6, 2011, and the defendant corporation and Andrew Udit by serving Mark Udit, as managing agent, partner and his brother of Andrew Udit at the same time. The plaintiff notes the defendants assert fraud, but lack any particularized allegations regarding their \$28,000.00 cash payment and signing a \$172,000.00 note thinking they were buying assets, to wit motorcycles not mentioned in the documents. The plaintiff avers there is no evidence submitted by the defendants showing any permanent change of address. The plaintiff

adds the defendants had actual notice of the action before the return date of the prior motion., and they attempted to settle the matter with the plaintiff on several occasions with no indication they did not receive notice of the action. The plaintiff maintains Andrew Udit acknowledges service of process to a person of suitable age and discretion at his residence and the subsequent mailing.

The underlying action arises from a February 1, 2009 promissory note. A defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see U.S. Bank Nat. Ass'n v. Slavinski*, 78 A.D.3d 1167; *Taddeo-Amendola v. 970 Assets, LLC*, 72 A.D.3d 677; *Perfect Care, Inc. v. Ultracare Supplies, Inc.*, 71 A.D.3d 752, 753. The Second Department recognized certain factors which should be considered in exercising that power, including: (1) what is the excuse for the default and whether there was any wilfulness attached to the default; (2) whether there exists a meritorious defense; and (3) whether prejudice to the adverse party has been shown (*Williams v. City of New York*, 85 AD2d 633). Courts have inherent power to relieve a party from default, but should exercise that power with sound judgment (*see, Paulucci v. Casa De Cuzzi, Inc.*, 272 AD2d 594).

A process server's affidavit of service constitutes *prima facie* evidence of proper service (*Associates First Capital Corp. v Wiggins*, 75 A.D.3d 614 [2010]; *Scarano v Scarano*, 63 AD3d 716, [2009]).

While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing (*see Omansky v. Gurland*, 4 A.D.3d 104, 108, 771 N.Y.S.2d 501; *Haberman v. Simon*, 303 A.D.2d 181, 755 N.Y.S.2d 596; *Ananda Capital Partners, Inc. v. Stav Elec. Sys.*, 301 A.D.2d 430, 753 N.Y.S.2d 488; *Stylianou v. Tsourides*, 73 A.D.2d 642, 422 N.Y.S.2d 748) *NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460, 777 N.Y.S.2d 483 [1st Dept, 2004].

The Court determines there are sharp factual disputes as to the validity of service upon each defendant here. The Court determines a traverse is necessary to resolve the threshold issue of service upon each defendant (*see Finkelstein Newman Ferrara LLP v. Manning*, 67 A.D.3d 538, 889 N.Y.S.2d 147 [1st Dept, 2009]).

CPLR 2001 provides:

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

CPLR 3026 provides: “Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.” This Court determines defects pointed out by these defendants here do not prejudice any substantial right of any defendant, and do not constitute any jurisdictional flaw (*see Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 940 N.E.2d 909 [2010]).

A cause of action alleging fraud must be pleaded with the requisite

particularity pursuant to CPLR 3016(b). “[T]he purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents” (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d at 559, 883 N.Y.S.2d 147, 910 N.E.2d 976). While there is no requirement that there be “unassailable proof at the pleading stage,” the basic facts constituting the fraud must be set forth (*id.* [internal quotation marks omitted]). “CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct” (*id.* [internal quotation marks omitted]) *Pace v. Raisman & Associates, Esqs., LLP*, --- N.Y.S.2d ----, 2012 WL 1859923 [2d Dept, 2012].

The defense claims of fraud here are conclusory allegations without meeting the required particularity of CPLR 3016(b). As such, the defense fails to show a meritorious defense regarding its fraud accusations (*see Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 890 N.E.2d 184 [2008]).

The defense allegations of itemized asset statement omission is irrelevant. The defendants’ claim they did not receive motorcycles they expected with the transaction is belie by the defendants acknowledgment the contract is silent regarding the motorcycles. The note and the guarantees are the basis of the underlying action. The underlying action seeks summary judgment in lieu of complaint. The defense fails to show there exists any triable issue of fact with respect to the note and guarantees shown in the documents signed by the defendants.

Accordingly, the motion is granted solely to the extent the Court orders a traverse on the issue of service of process on each defendant. This matter is referred to the Calendar Control Part for a hearing on this issue. The plaintiff shall file and serve a Note of Issue, together with a copy of this order, upon the calendar clerk of this court within

twenty days of this order. The directive with respect to a hearing is subject to the right of the Justice presiding in Calendar Control Part to refer the matter to a Justice, Judicial hearing Officer, or a Court Attorney/Referee, as deemed appropriate.

So ordered.

Dated: **June 8, 2012**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED
JUN 11 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE