

186 Rest., Inc. v MGCM, Inc.

2012 NY Slip Op 31700(U)

June 20, 2012

Supreme Court, New York County

Docket Number: 102588/2009

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: _____ J.S.C. _____
Justice

PART 11

1586 RESTAURANT INC.

INDEX NO. 102588/09

- v -

MOTION DATE _____

MOTION SEQ. NO. 4

Magem, Inc., ET AL.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order.*

FILED

JUN 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 20, 2012

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
1586 RESTAURANT, INC.,

INDEX NO. 102588/2009

Plaintiff,

-against-

MGCM, INC. and MANUEL CAISAGUANO,

Defendants.
-----X

JOAN A. MADDEN, J.:

FILED

JUN 29 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

In this action to recover on a promissory note and personal guaranty, defendants move for an order pursuant to CPLR 317 and CPLR 5015 vacating the default judgment entered against them on November 18, 2010, in the total amount of \$133,735.08. Plaintiff opposes the motion.

The motion is granted only to the extent of directing a traverse hearing on the issues of service of process on individual defendant, Manuel Caisaguano and corporate defendant, MGCM, Inc. If service is sustained, however, the default judgment shall stand.

The affidavits of service state that on March 24, 2009, the summons and complaint were served on Manuel Caisaguano and MGCM, Inc. by delivering the papers to Louis Lesagu, at 1586 Second Avenue, New York, New York, 10028. The affidavit of service on Caisaguano describes Louis Lesagu as "a person of suitable age and discretion" who "identified" himself as "authorized of recipient," and states that the next day, March 25, 2009, the papers were mailed to Caisaguano at the 1586 Second Avenue address. The affidavit does not specify whether the 1586 Second Avenue address is Caisaguano's "actual place of business," "dwelling house" or "usual place of abode." The affidavit of service on MGCM, Inc. states that the corporation was served

by personally delivering the papers to Louis Lesagu who is described as “authorized.” Plaintiff asserts that 1586 Second Avenue is the address of the restaurant defendants purchased from plaintiff in March 2008.¹ Plaintiff’s judgment, however, lists “1594 Second Ave.” as the address for both Caisaguano and MGCM, Inc.²

In support of the instant motion, Caisaguano submits an affidavit that the summons and complaint were “not personally served on me and I was never made aware of this matter until I received the Marshall’s Notice on or about June 27, 2011.” Caisaguano submits a reply affidavit responding to plaintiff’s opposition that he was served “at the exact address where the restaurant is located,” as supported by the affidavit of service. Caisaguano’s reply affidavit challenges the content of the affidavit of service by stating, “I do not know who Louis Lesagu is, the person who allegedly accepted service on my behalf.”

Caisaguano’s sworn statement specifically denying any knowledge as to Louis Lesagu is sufficient to controvert the veracity and content of the affidavits of service which state that Lesagu was “authorized of recipient,” i.e. Caisaguano, and “authorized” by MGCM, Inc. See Finkelstein Newman Ferrara LLP v. Manning, 67 AD3d 538 (1st Dept 2009); NYCTL 1998-1 Trust v. Rabinowitz, 7 AD3d 459 (1st Dept 2004). Such sworn, non-conclusory denial raises

¹In connection with that purchase, MGCM, Inc. and Caisaguano as “debtor” executed a Security Agreement in favor of plaintiff as “secured party”; MGCM, Inc., as “borrower” executed a Promissory Note in the sum of \$170,000, in favor of plaintiff as “lender”; and Caisaguano executed an unconditional guaranty of the obligations contained in the Promissory Note. Caisaguano signed the documents in his individual capacity and as president of MGCM, Inc.

²The parties’ Security Agreement states that Caisaguano resides as “45-35 49th Street, Woodside, NY 11377,” that MGCM Corp. has “an office located at 1594 Second Avenue, New York, New York 10028,” and that the “Debtor’s place of business is currently 1594 Second Avenue, and in the future at 1586 Second Avenue, New York, New York 10028.”

issues of fact requiring a traverse hearing as to whether Lesagu is “a person of suitable age and discretion” at Caisaguan’s “actual place of business, dwelling place or usual place of abode,” within the meaning of CPLR 308(2), and whether Lesagu is authorized to accept service on behalf the corporation, MGCM, Inc. See Finkelstein Newman Ferrara LLP v. Manning, *supra*; NYCTL 1998-1 Trust v. Rabinowitz, *supra*; Ananda Capital Partners, Inc v. Stav Electrical Systems (1994) Ltd, 301 AD2d 430 (1st Dept 2003); Gibson, Dunn & Crutcher LLP v. Global Nuclear Services & Supply, Ltd, 280 AD2d 360 (1st Dept 2001); Columbus Realty Investment Corp v. Tsiang, 226 AD2d 259 (1st Dept 1996).

The Court notes, that if the traverse hearing is resolved in plaintiff’s favor and service is sustained, defendants’ motion must be denied, as they have not adequately demonstrated a meritorious defense. A meritorious defense is not necessary to vacate a default judgment based on lack of personal jurisdiction, since a default judgment is void for lack of personal jurisdiction over defendant and thus any judgment entered is a nullity. See Khanal v. Sheldon, 55 AD3d 684 (2nd Dept 2008), lv app den 12 NY3d 714 (2009); Haberman v. Simon, 303 AD2d 181 (1st Dept 2003); Ananda Capital Partners, Inc v. Stav Electrical Systems (1994) Ltd, *supra*; All Terrain Properties, Inc. v. Hoy, 265 AD2d 87 (1st Dept 2000); Cipriano by Cipriano v. Hanq, 197 AD2d 295 (1st Dept 1994). A meritorious defense, however, is required to vacate a default judgment under CPLR 5015 or CPLR 317. See Eugene Di Lorenzo, Inc v. A.C. Dutton Lumber Co, Inc, 67 NY2d 138 (1986); M.R. v. 2526 Valentine LLC 58 AD3d 530 (1st Dept 2009); CIT Group/Commercial Services, Inc v. 160-09 Jamaica Ave Ltd Partnership, 25 AD3d 301 (1st Dept 2006).

Here, defendants’ motion papers fall short of establishing a potentially meritorious

defense. In his affidavit, Caisaguano merely states that “[u]pon information and belief Defendants only owe Fifty Thousand Dollars (\$50,000).” Defendants submit no supporting documents as to any payments purportedly made. Absent personal knowledge and documentary proof as to the amount actually paid, Caisaguano’s affidavit does not provide a sufficient factual basis to substantiate a defense of partial payment. Defendants’ additional reliance on fraud as a ground for vacating the default is without merit. Thus, if after the traverse hearing, service is sustained, the default judgment shall stand.

Accordingly, it is

ORDERED that the motion is granted only to the extent of referring the issues of service of process on defendants MGCM, Inc. and Manuel Caisaguano to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referee Part (Part SRP), which, in accordance with the Rules of that Part (posted on the Court’s website www.nycourts.gov/supctmah at the “References” link under “Courthouse Procedures”), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another, and counsel for defendants shall, within 15 days from the date of this decision and Order submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (available at the

"References" link on the court's website) containing all the information called for therein, and as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear for the reference hearing with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(s)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specified above shall proceed from day-to-day until completion; and it is further

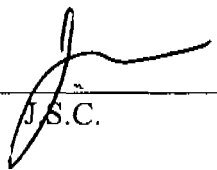
ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for Trial Courts.

The court is notifying the parties by mailing copies of this decision and order.

DATED: June 20, 2012

FILED
JUN 29 2012
NEW YORK
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ENTER:



J.S.C.