

Fauci v Suclarato

201GNY Slip Op 33HH(U)

January 6, 201G

Sup Ct, NY County

Docket Number: 118284/2009E

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FAUL G. FEINMAN
Justice

PART 12

Index Number : 118284/2009 E
FAUCI, CLARIE
vs.
SUCARATO, ROBERT
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

ENTERED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Courtesy copy mailed to incarcerated self-represented defendant. No other copies mailed as decision is uploaded to NYSCEF.

Dated: 1/6/2012

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

CLAIRE FAUCI,
Plaintiff,

Index No. 118284/2009E
Mot. Seq. No. 002

- against -

DECISION and ORDER

ROBERT SUCARATO, LEIGH SUCARATO,
NYFC CAPITAL LLC., NEW YORK FINANCIAL
GROUP, INC., DENISE ARMSTRONG, and
JAMES G. EBERZ,

Defendants.

-----X

Appearances:

For Plaintiff

Kase & Druker, Esqs.
By: James O. Druker, Esq.
1325 Franklin Ave., ste. 225
Garden City, NY 11530
(516) 746-4300

For Defendant Robert Sucarato (*pro se*)

Robert J. Sucarato
Reg. No. 61303-050
Federal Detention Center
P.O. Box 562
Philadelphia, PA 19105

For Defendants James G. Eberz (*pro se*) and Leigh Sucarato

James G. Eberz, Esq.
c/o John C. Sullivan, P.C.
2649 Strang Blvd., ste. 103
Yorktown Heights, NY 10598
(914) 592-7300

Papers considered in review of this motion:

E-Filing Document Number

Notice of Motion, Frome affirmation and annexed exhibits A-G	17 - 22
Eberz affidavit and Leigh Sucarato affidavit in opposition	25
Robert Sucarato affidavit in opposition	26

PAUL G. FEINMAN, J.:

Plaintiff, Claire Fauci, moves to renew and reargue the court's decision and order of August 18, 2011, which denied plaintiff's motion for a default judgment against defendant, Robert Sucarato, and upon reargument, granting the underlying motion, or in the alternative, for leave to extend plaintiff's time to serve Robert Sucarato, pursuant to CPLR 306-b. Defendant, Robert Sucarato, opposes to the extent plaintiff seeks to renew or reargue her prior motion for a

default judgment. For the reasons that follow, plaintiff's motion is granted solely to the extent that plaintiff is permitted to re-serve the summons and complaint upon Robert Sucarato as provided in this decision and order and otherwise denied in its entirety.

Background

This action arises out of the alleged breach of a contract for the sale of real property located at 9 Hastings Road, Holmdel, New Jersey. In the underlying decision and order, the court denied plaintiff's motion for a default judgment as against Sucarato due to the inadequacy of plaintiff's proof of service of the summons and complaint and plaintiff's failure to submit sufficient proof that Sucarato was not engaged in active military service at the time of his default (*see Fauci v Sucarato, et. al.*, Sup Ct, NY County, Aug. 11, 2011, Feinman, J., index no. 118284/2009). However, the motion was denied without prejudice to renew upon submission of the appropriate proof.

Analysis

Plaintiff moves to "renew and reargue" the underlying motion, and upon "reargument," for a default judgment against Robert Sucarato. In support, plaintiff submits an affirmation of her attorney, Paula Schwartz Frome, Esq., which she offers an explanation for why service upon Robert Sucarato was proper. Frome states that service was made at 19 Habitat Lane, Cortlandt Manor which is the residence of defendant Eberz, and also the residence of defendant Leigh Sucarato, Robert Sucarato's wife. In support, Frome submits a copy of an affidavit of service showing that personal service was made upon Leigh Sucarato on January 23, 2010, at 19 Habitat Lane (Doc. 19, ex. D, Leigh Sucarato affid. service). Frome also says that Eberz is Leigh Sucarato's father. Further, she suggests that a comparison of the description of Leigh Sucarato in

the affidavit of service upon, and that of “Jane Smith” in the affidavit of service upon Robert Sucarato, “and the fact that ‘Jane Doe’ replied that Mr. Sucarato was not in active military service, should lead the [c]ourt to conclude that the person served was Mr. Sucarato’s wife,” before adding that “[a]s far as plaintiff was aware, this was Mr. Sucarato’s last known residence” (Doc. 17, Frome affirm. at ¶ 6).

Related to the requirement that proof be provided that the defendant was not in active military service at the time of the default, Frome claims that when Robert Sucarato’s time to answer expired, and continually until this date, Robert Sucarato has been incarcerated in the Philadelphia Federal Detention Center. In support, Frome submits a copy of what appears to be an arrest warrant for Mr. Sucarato, dated April 16, 2010, indicating that on April 19, 2010, Sucarato was arrested in Somerville, New Jersey (Doc. 21, ex. F). She also submits a print-out from the Federal Bureau of Prisons “Inmate Locator” showing Robert Sucarato’s location as “Philadelphia FDC” (Doc. 22, ex. G). The affidavit of service upon Leigh Sucarato, arrest warrant, and Federal Bureau of Prisons print-out were not previously submitted on the underlying motion, nor were many of the facts alleged only in Frome’s affirmation.

Robert Sucarato submits an unsigned, “affidavit in opposition,” which is, of course, not notarized. He states that a notary public is not available to inmates at the Federal Detention Center where he currently resides. Sucarato states that he was not served with a copy of the complaint until he received one as part of plaintiff’s motion to renew and reargue the motion for a default judgment. He specifically denies that the 19 Habitat Lane address was his last known address, and states that plaintiff was aware of his incarceration at the time service was made. (Doc. 26, R. Sucarato opp.)

Rather than conduct a framed-issue hearing to determine whether the 19 Habitat Lane address was in fact Mr. Sucarato's last known address, because he has consented to an extension of the time for plaintiff to re-serve the complaint pursuant to CPLR 306-b (Doc. 26, R. Sucarato opp.), and because public policy favors resolution of disputes on their merits, the court directs that plaintiff re-serve Mr. Sucarato at the Federal Detention Center where he is currently residing with a hard copy of this order, together with notice of its entry and of the summons and complaint within 30 days of entry of this order. Defendant Robert Sucarato shall then have 20 days to answer the complaint. Any answer must be signed, and should be verified before a notary public. Over the many years of presiding over both criminal and civil matters, no prior litigant has ever stated to this court that a notary public was unavailable to notarize legal papers. If that is indeed accurate, Mr. Sucarato should submit a signed statement from the FDC warden, or other appropriate official, on official letterhead to such effect.

Accordingly, the branch of plaintiff's motion seeking leave to re-serve defendant Robert Sucarato beyond 120 days from filing is granted to the extent indicated.

Accordingly, it is

ORDERED that the branch of plaintiff's motion is granted solely to the extent that she is granted leave to re-serve defendant, Robert Sucarato, pursuant to CPLR 306-b, at the Federal Detention Center where he is currently residing with a hard copy of this order, together with notice of its entry and of the summons and complaint, within 30 days of entry of this order; and it is further

ORDERED that defendant Robert Sucarato shall then have 20 days to answer the complaint. is granted; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order, together with notice of its entry, upon all other defendants; and it is further

ORDERED that the compliance conference currently scheduled for January 18, 2012, in Part 12, is adjourned to February 29, 2012 at 2:15 p.m.; and it is further

ORDERED that plaintiff's counsel shall make appropriate arrangements with the Clerk of Part 12 for submission of an order directing the warden or other appropriate official at the Federal Detention Center housing defendant Robert Sucarato to produce him for a telephonic conference regarding discovery and/or other issues on February 29, 2012 at 2:15 p.m.; and it is further

ORDERED that the Clerk of Motion Support/E-filing shall permit defendant Robert Sucarato to serve and file papers in hard copy.

This constitutes the decision and order of the court.

Dated: January 6, 2012
New York, New York



J.S.C.