

Allen v Ahmed

2013 NY Slip Op 30198(U)

January 30, 2013

Sup Ct, Queens County

Docket Number: 27412/2007

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

DOROTHY ALLEN, Index No.: 27412/2007
Plaintiff, Motion Date: 12/20/12
- against - Motion No.: 1
Motion Seq.: 3

ISHTIAQ AHMED, WALSH LIMOUSINE
SERVICE, INC., and "John Doe,"
intended to be the driver,

Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by
defendant, ISHTIAQ AHMED, for an order vacating the judgment of
this court dated March 18, 2010, granted on default, in favor of
the plaintiff on the issue of liability and damages in the amount
of \$128,113.00:

Papers Numbered

Order to Show Cause-Affidavits-Exhibits.....1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 9
Reply affirmation.....10 - 12

This is a personal injury action in which plaintiff, Dorothy
Allen seeks to recover damages for injuries she sustained as a
result of a motor vehicle accident that occurred on November 5,
2004. At the time of the accident, the plaintiff was a backseat
passenger in the rear of the limousine owned by defendant, WALSH
LIMOUSINE SERVICE, INC. when it was struck in the rear by the
vehicle owned and operated by defendant ISHTIAQ AHMED. The
accident occurred on westbound Northern Boulevard near its
intersection with the Brooklyn-Queens Expressway. As a result of
the impact the plaintiff sustained injuries to her neck and
shoulder.

The plaintiff commenced this action by the filing of a summons and complaint on November 5, 2007. The affidavit of service filed with the Court, dated November 29, 2007, states that defendant was served by nail and mail pursuant to CPLR 308(4) on November 23, 2007 at 79-12 APT. #1, 32nd Avenue, Jackson Heights, New York, which was the address on file for defendant with the Department of Motor Vehicles. On November 29, 2007, a copy of the summons and complaint was mailed to the defendant at the same address. The defendant failed to file a timely answer with the Court.

In December 2009, plaintiff moved for a default judgment against all defendants on the issue of liability on the ground that the defendants were properly served with a copy of the summons and complaint, that the time to appear or answer had expired and that none of the defendants had either appeared or answered the complaint. The defendant did not oppose the motion for a default judgment.

By decision and order dated January 9, 2009, this Court granted the plaintiff's motion for a default judgment without opposition and set the matter down for an inquest/assessment of damages before this court.

On December 7, 2009, the inquest on damages proceeded before this court. After hearing the plaintiff's testimony with regard to the injuries she sustained in the subject accident this Court awarded damages in the amount of \$125,000 against all defendants. A judgment for said amount, plus interest, for a total of \$128,113.00 was entered in the County Clerk's Office on March 18, 2010. On March 30, 2010, a copy of the judgment with notice of entry was served on the defendant at both 79-12 32nd Avenue, Jackson Heights NY, and at 31-19 75th Street, East Elmhurst, New York.

By order to Show Cause dated July 12, 2012, defendant Ahmed moves for an order vacating the default judgment pursuant to CPLR 5015(a)(1) and CPLR 317; for an order dismissing the plaintiff's complaint on the ground of excusable default claiming that the defendant was not served with a copy of the summons and complaint. Alternatively, defendant moves for an order extending the defendant's time to answer and compelling acceptance of defendant's answer and restoring the matter to the trial calendar.

In support of the motion, defendant's counsel, Shahid Ali, Esq., contends that personal jurisdiction was not obtained over the defendant because he did not receive the summons and

complaint because nail and mail service was made to the wrong address. Counsel claims that on the date of service of the summons and complaint, the defendant did not reside at 79-12 32nd Avenue, Jackson Heights N.Y., where nail and mail service was purportedly made, but rather, lived at 31-19 75th Street Jackson Heights N.Y. Defendant Ahmed submits an affidavit dated September 9, 2012 stating that he presently lives at 31-19 75th Street, Jackson Heights and has lived there since October 2005. He states that prior to October 2005 he lived at 79-12 32nd Avenue Jackson Heights New York. He states that he never received the summons and complaint in this matter and only discovered the judgment when he attempted to sell his house. Counsel claims that on October 12, 2005, subsequent to the date of the accident, the defendant purchased and closed on a house at 31-19 75th Street, Jackson Heights and moved in immediately. Counsel attaches a copy of the deed indicating that defendant purchased the premises located at 31-19 75th Street on October 12, 2005. Thus, defendant alleges that on November 23, 2007, the date of service of the summons and complaint, he no longer lived at the address where nail and mail service was made. Defendant also states that he never received a copy of the judgment with notice of entry. .

In addition defendant submits an affidavit dated June 30, 2012 stating that he has no recollection of an automobile accident in 2004. He does however recall an incident where a limousine in front of him stopped and he also stopped and but there was no contact between the vehicles.

Defendant contends that his default was excusable in that service was improperly made at an address where he no longer lived at the time of nail and mail service. Defendant also claims that he has a meritorious defense in that there was no contact between his vehicle and the vehicle in which the plaintiff was a passenger.

In opposition, plaintiff's counsel submits proof that a copy of the judgment with notice of entry was served on the defendant on March 30, 2010 at 79-12 32nd Avenue Jackson Heights and at 31-19 75th Street, East Elmhurst, New York. Plaintiff submits an affidavit dated August 17, 2012 stating that she was injured in an automobile accident on November 5, 2004. She states that at the time of the accident the defendant Mr. Ishtiaq Ahmed stopped his car. She states that she was able to obtain information about him at the scene including his address, insurance information and vehicle information. At the scene he stated to the plaintiff that he resided at 79-12 32nd Avenue Jackson Heights, New York 11370.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds as follows:

Pursuant to CPLR 5015(a)(1) the court may vacate a default judgment on the grounds of excusable default, "if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party." Here, the instant motion to vacate the default judgment pursuant to CPLR 5015 is untimely as the judgment with notice of entry was served on the defendant March 30, 2010 more than one year prior to service of this motion in July 2012 (see Sussman v Jo-Sta Realty Corp., 99 AD3d 787 [2d Dept. 2012]; US Natl. Bank Assn. v Melton, 90 AD3d 742 [2d Dept. 2011]; Matter of Weintrob v Weintrob, 87 AD3d 749 [2d Dept. 2011]; Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc., 83 AD3d 1080 [2d Dept. 2011]). In addition, defendant failed to offer a reasonable excuse for failing to move to vacate the judgment within one year after service thereof (see Santiago v Honcrat, 79 AD3d 847 [2d Dept. 2010]; Malik v Noe, 54 AD3d 733 [2d Dept. 2008]).

Further, a party seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense (see Velasquez v Gallelli, 44 AD3d 934 [2d Dept. 2007]; Choudhry v Edward, 300 AD2d 529 [2d Dept. 2002]). Here, the defendant attempted to excuse his default by asserting that he was served with the summons and complaint at an address where he no longer resided. Defendant claimed that he moved in October 2005 two years prior to the purported service of the summons and complaint. However, the abstract from the Department of Motor Vehicles from November 2007, when the action was commenced, shows defendant's address to be the address where mail and service was made. Therefore, the defendant is estopped from challenging the propriety of service, for purposes of showing excusable default as he did not notify the Commissioner of the Department of Motor Vehicles of his change in address prior to the time of service (see VTL § 505(5); Wauchope v Williams, 71 AD3d 876 [2d Dept. 2010]; Kalamadeen v Singh, 63 AD3d 1007 [2d Dept. 2009]; Walker v Reyes, 59 AD3d 436 [2d Dept. 2009]; Velasquez v Gallelli, 44 AD3d at 935 [2d Dept. 2007].).

Pursuant to CPLR 317, a person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action by seeking to vacate a default judgment within one year after he obtains knowledge of entry of the judgment upon demonstrating a

potentially meritorious defense. Therefore, with respect to vacating the judgment pursuant to CPLR 317 defendant's motion was also untimely as it was brought in July 2012 more than one year after a copy of the judgment was served upon him with notice of entry (see US Natl. Bank Assn. v Melton, 90 AD3d 742 [2d Dept. 2011]; Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc., 83 AD3d 1080 [2d Dept. 2011]; De La Barrera v. Handler, 290 A.D.2d 476 [2d Dept 2002]).

Accordingly, for all of the above-stated reasons, it is hereby,

ORDERED, that the motion by defendant, ISHTIAQ AHMED, to vacate the judgment entered on March 18, 2010 in favor of the plaintiff Dorothy Allen is denied and it is further,

ORDERED, that the stay of enforcement of the judgment contained in the order to show cause dated July 12, 2012 is hereby vacated.

Dated: January 30, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.