Johnson v Lui & Shields LLP
2013 NY Slip Op 33648(U)
September 18, 2013
Sup Ct, New York County
Docket Number: 154206/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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CHERYLANN JOHNSON, INDEX NO. 154206/12

Plaintiff,

-against-

LUI & SHIELDS LLP and CAROLYN SHIELDS,

Defendants.

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JOAN A. MADDEN, J.:

In this action for legal malpractice, plaintiff moves for an order pursuant to CPLR 3215 granting a default judgment and inquest against defendants based on their failure to appear and answer. Defendants appear in opposition to the motion and cross-move to dismiss the complaint for lack of personal jurisdiction based on improper service. Defendants also object that they were not served within 120 days after filing the summons and complaint, and assert that they have a meritorious defense to the action, and request that they be permitted to "defend" the action.

As a general rule, a defendant opposing a motion for a default judgment must demonstrate a justifiable excuse for defaulting and a meritorious defense. See New Media Holding Co LLC v. Kagalovsky, 97 AD3d 463 (1st Dept 2012); Zwicker v. Emigrant Mortgage Co Inc, 91 AD3d 443 (1st Dept 2012); Morrison Cohen LLP v. Fink, 81 AD3d 467 (1st Dept 2011); Singh v. Gladys Towncars Inc, 42 AD3d 313 (1st Dept 2007); ICBC Broadcast Holdings-NY, Inc v. Prime Time Advertising, Inc, 26 AD3d 239 (1st Dept 2006). However, a "strong public policy" favors the resolution of cases on the merits, and courts have broad discretion to

grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful and the opposing party is not prejudiced. Pagan v. Four Thirty Realty LLC, 50 AD3d 265 (1st Dept 2008); Heskel's West 38th Street Corp. v. Gotham Construction Co. LLC, 14 AD3d 306 (1st Dept 2005).

A properly executed affidavit of service raises a presumption of proper service, and a mere conclusory denial of receipt is not enough to rebut that presumption. See Kihl v. Pfeffer, 94 NY2d 118 (1999); Slimani v. Citibank, N.A., 47 AD3d 489 (1st Dept 2008); Northern v. Hernandez, 17 AD3d 285 (1st Dept 2005); Aames Capital Corp v. Ford, 294 AD2d 134 (1st Dept 2002); Fairmont Funding Ltd v. Stefansky, 235 AD2d 213 (1st Dept 1997).

Here, the affidavit of service for individual defendant Shields states that on July 12, 2012 at 41-60 Main Street, Ste 208, Flushing NY 11355, the papers were delivered to Michael DiGiaro, a person of suitable age and discretion at defendant's actual place of business, and that he "identified himself as the co-worker of the defendant." The affidavit of service for defendant Lui & Shields, LLP states that on July 12, 2012 at 41-60 Main Street, Ste 208, Flushing NY 11355, the papers were delivered to Michael DiGiaro, a person of suitable age and discretion at defendant's actual place of business, and that DiGiaro "identified himself as the General-Agent of the Defendant." The affidavits of service also state that on July 19, 2012, copies of the papers were mailed to each defendant at the same address, 41-60 Main Street, Ste 208, Flushing, NY 11355.

Contrary to defendants' assertion, the delivery of the papers to Michael DiGiaro, as a person of suitable age and discretion at defendants' actual place of business, was sufficient to effectuate service on both individual defendant Shields and defendant limited liability

partnership, Liu & Shields, LLP. CPLR 310-a governs service on a limited partnership and a limited liability partnership. Courts have interpreted that provision as permitting service on those entities pursuant to CPLR 308(2), upon a person of suitable age and discretion at the entity's actual place of business. See Green v. Gross & Levin, LLP, 101 AD3d 1079 (2nd Dept 2012); Bell v. Bell, Kalnick, Klee & Green, 246 AD2d 442 (1st Dept 1998); Lamba v. Lasala, 2001 WL 36385323 (Sup Ct, NY Co 2001); Maine v. Jay Street Realty Assocs, 187 Misc2d 376 (Sup Ct, NY Co 2001). For example, in Green v. Gross & Levin, LLP, supra, the Appellate Division Second Department held that in an action for legal malpractice, the defendant law firm, a limited liability partnership, was properly served pursuant to CPLR 308(2), by delivery of the papers to a paralegal at the firm, a person of suitable age and discretion at the firm's actual place of business.

In opposing the motion, defendant Shields submits an affidavit containing a vague legal statement that "I did not receive a copy of the Summons and Complaint by any method authorized by CPLR 308." Defendant Shields, however, does not does not deny receipt from DiGiaro, her "coworker" as described in the affidavit of service, and admits that he was employed as an associate at the law firm on July 12, 2012.

Defendant Shields also objects that the follow-up mailings were incorrectly sent to suite 208, and that the correct suite is 208A. Shields, however, does not deny that the papers were delivered in hand to DiGiaro at the suite number listed on the affidavit of service, "Ste 208." Notably, Shields acknowledges that she received "one copy" of the instant motion papers that were mailed to suite 208, and offers no explanation for the fact that she received the motion papers, but not the summons and complaint, even though the summons and complaint were delivered and mailed to her at the identical address where the motion papers were mailed. See

Ortiz v. Santiago, 303 AD2d 1 (1st Dept 2003).

DiGiaro submits an affirmation denying that he told the process server that he was the "general agent" of the law firm. DiGiaro, however, does not deny that he was employed as an associate of the law firm on July 12, 2012. He also does not deny that the papers were delivered to him on that date and he accepted such delivery, on behalf of individual defendant Shields and defendant law firm.

Based on the foregoing, defendants have failed to make a sufficient showing to create an issue of fact and rebut the presumption that service was properly effectuated as set forth in the affidavits of service. See Kihl v. Pfeffer, supra; Slimani v. Citibank, N.A., supra; Aames Capital Corp. v. Ford, supra; Fairmont Funding Ltd v. Stefansky, supra.

Defendants additionally assert that they were not served within 120 days after filing of the summons and complaint. The record clearly shows that the summons and complaint were filed on July 2, 2012, and defendants were served ten days later on July 12, 2012.

Finally, in the exercise of discretion, the court concludes that defendants shall be permitted to answer. The First Department holds that the issue of whether a reasonable excuse for a default exists, "is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." New Media Holding Co. LLC v. Kagalovsky, supra at 465 (quoting Richert v. Chestara, 56 AD3d 941, 942 [3rd Dept 2008]). "Moreover, courts have the inherent power to forgive even an unexplained default 'in the interest of justice.'" Id.

As determined above, the court has rejected defendants' excuse for defaulting which is based on their objections as to service of process. On the other hand, plaintiff has not alleged any demonstrable prejudice resulting from the delay, which is due in part to the fact that this is plaintiff's second motion for the identical relief. This court denied plaintiff's first motion for a default judgment based on plaintiff's failure to submit an affidavit of merit and an affidavit as to service of the motion.[1] With respect to a meritorious defense, plaintiff attempts to litigate the underlying and actual merits of defendants' defenses. In the context of a motion to vacate a default in answering or to compel the acceptance of a late answer, defendants need only show a defense that is possibly meritorious. See Nunez v. Bertam, 24 AD3d 523 (2nd Dept 2005); Sippin v. Gallardo, 287 AD2d 703 (2nd Dept 2001); Panchookian v. Huculiak, 257 AD2d 460 (1st Dept 1999); Aces Mechanical Corp v. Cohen Brothers Realty & Construction Corp, 99 AD2d 455 (1st Dept 1984). Based on the affidavit submitted by defendant Shields, it cannot be said, at least at this stage in the litigation, prior to discovery, that defendants do not have a possibly meritorious defense based on the nature and extent of the legal services they were hired to perform and actually did perform. Significantly, the retainer agreement merely describes the "work to be performed" as "negotiate recovery of personal property not including litigation."

Thus, under the circumstances presented and in view of the strong public policy favoring the resolution of matters on the merits, plaintiff's motion for a default judgment is denied and

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[1]Plaintiff's instant motion papers are silent as the prior motion for the identical relief, and do not include a copy of the court's February 13, 2013 order denying the prior motion, without prejudice and with leave to renew on papers in compliance with CPLR 3215(f). While plaintiff now submits an affidavit of merit and an affidavit of service as to the motion papers, plaintiff's counsel resubmits the affirmation he submitted in support of the prior motion, which is now incorrect in stating that "[n]o previous application for the relief requested herein has been made by plaintiff."

defendants shall be permitted to answer.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that defendants' cross-motion is granted only to the extent of permitting defendants to answer, and defendants shall serve and file their answer within 20 days of the date of this decision and order; and it is further

ORDERED that the balance of defendants' cross-motion is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on October 31, 2013 at 9:30 am, in Part 11, Room 351, 60 Centre Street.

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

DATED: September 18, 2013

ENTER:

J.S.C.