LBS, Inc. v Mountain of Fire & Miracle Ministries, Inc.
2013 NY Slip Op 34262(U)
February 13, 2013
Supreme Court, Bronx County
Docket Number: Index No. 21367/12E
Judge: Alexander W. Hunter, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A

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LBS, Inc. & Mariela Lopez,

Index No.: 21367/12E

Plaintiff,

Decision and Order

-against-

Mountain of Fire and Miracle Ministries, Inc..

Defendant.

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HON. ALEXANDER W. HUNTER, JR.

Plaintiffs' motion for an order pursuant to C.P.L.R. 3215; directing that a default judgment be entered against defendant Mountain of Fire and Miracle Ministries, Inc. ("Mountain of Fire"), is hereby reserved and a traverse hearing is ordered. Defendant's cross-motion for an order pursuant to C.P.L.R. 2004, to vacate defendant's default and extending defendant's time to appear, is denied.

The cause of action is for breach of contract for the sale of real property located at 125 St. Ann's Avenue, Bronx, New York 10454 (the "subject property"). Plaintiffs commenced an action for a declaratory judgment finding that defendant breached the agreement and to recover liquidated damages in the sum of $300,000.00 for defendant's negligence.

Plaintiffs' counsel asserts that defendant was served with a copy of the summons and notice and to date, defendant has failed to appear in this action or file a motion raising any defenses or objections to the summons with notice. As such, plaintiffs' counsel argues that a default judgment should be entered against defendant.

In support, plaintiffs submit the affidavit of service indicating service of the summons with notice on defendant. The affidavit of service indicates that defendant was served by personal delivery of the summons with notice on Pastor Abugado at 1416 Boston Post Road, Bronx, New York on July 10, 2012 at 4:58 P.M.

Plaintiffs also submit the affidavit of Mariela Lopez, the President and sole shareholder and director of LBS, Inc ("LBS"). Ms. Lopez avers that on August 5, 2010, plaintiffs and defendant executed an option agreement to purchase real estate (the "agreement") at the agreed upon price of $1,200,000.00. Pursuant to the agreement, defendant agreed to pay $20,000.00 for the exclusive option to purchase the subject property. Defendant was further obligated to inform Ms. Lopez of its intention to purchase the subject property no later than September 1, 2012. On or about September 1, 2010, defendant executed the contract of sale and delivered a down payment in the sum of $300,000.00 to plaintiffs' attorney. Ms. Lopez asserts that defendant failed to agree to schedule a closing date and it failed to use its best efforts to secure a mortgage.

Paragraph 13 of the Rider reads in pertinent part that "[n]otwithstanding anything to the contrary stated herein, this contract and the obligations of purchaser to close on the subject premises is subject to and conditioned upon purchaser obtaining financing in the sum of $880,000.00." Due to defendant's failure to fulfill its obligations, plaintiffs' lenders commenced a foreclosure action. The foreclosure action was thereafter discontinued after the subject property was sold at a significant loss of over $275,000.00 in March 2012.

Defendant cross-moves for an order vacating defendant's default and for an extension of time to appear and answer the summons with notice. Defendant's counsel asserts that on or about July 30, 2012, Pastor Tele Oluwadare informed his office that she received a summons with notice. Pastor Oluwadare was directed to leave the summons with a paralegal at the office, Anita Spearman. Defendant's counsel avers that he recently learned that Ms. Spearman had mistakenly failed to file the notice of appearance and demand for complaint. In her affidavit, Ms. Spearman asserts that she was unaware that the instant action had been filed electronically since the requisite "Notice of Commencement of Action Subject to Mandatory Electronic Filing" was not annexed to the papers. Consequently, Ms. Spears asserts that she failed to file the notice of appearance demand for complaint. Counsel maintains that defendant's default was not intentional and was simply a clerical error. In addition, defendants' counsel argues that defendant has a meritorious defense and that plaintiff will suffer no prejudice if defendant's time to answer the summons is extended.

Defendant submits the affidavit of Pastor Tele Oluwadare in support of its cross-motion. In accordance with the agreement, defendant applied for a mortgage in the sum of $880,000.00. However, defendant was unable to obtain a mortgage before plaintiffs terminated the agreement. Pastor Oluwadare asserts that in contravention of the agreement, plaintiffs have failed to return defendant's down payment in the sum of $320,000.00 despite written demand for same. Due to the housing market at the time, defendant was unable to obtain a mortgage, despite its best efforts. Contrary to plaintiffs' contentions, plaintiffs' counsel was one of the individuals helping with the mortgage process.

The return date of this motion was adjourned to November 16, 2012 at plaintiffs' request. However, plaintiffs did not serve or file its opposition papers to defendant's cross-motion until November 27, 2012. No excuse was offered to this court to explain plaintiffs' delay in submitting their opposition papers. As such, this court will disregard plaintiffs' opposition papers in deciding the motions herein.

C.P.L.R. 3012(d) provides that the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a reasonable excuse for the delay or default. Some of the factors that the court may consider include: 1) the length of the delay; 2) whether the delay was wilful; or 3) whether the delay was prejudicial to the other party. **Mitrani Plasterers Co., Inc. v. SCG Contracting Corp., 97 A.D.3d 552 (2nd Dept. 2012).** A defendant is not required to demonstrate a meritorious defense in order to be granted relief pursuant to C.P.L.R. 3102(d). **See, Empire Healthchoice Assur.**

Inc., v. Lester, 81 A.D.3d 570 (1st Dept. 2011); Nason v. Fisher, 309 A.D.2d 526 (1st Dept. 2003); DeMarco v. Wyndham Intl., 299 A.D.2d 209 (1st Dept. 2002). In addition, "there is a strong public policy favoring resolution of cases on the merits." **Ferguson v. Hess Corp., 89 A.D.3d 599, 599 (1st Dept. 2011).**

C.P.L.R. 2004 provides that "...the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown,...." While C.P.L.R. 2005 provides the court with discretion to excuse a default due to law office failure "in the interests of justice", a "pattern of wilful default and neglect should not be excused." **Gannon v. Johnson Scale Co., 189 A.D.2d 1052, 1052 (3d Dept. 1993).** When the default is due to law office failure, the movant must provide a "detailed and credible explanation of the default". **Kohn v. Kohn, 86 A.D.3d 630, 630 (2nd Dept. 2011).**

Since no default order or judgment has been entered in this matter, defendant herein is not required to make a showing of a meritorious defense. **See, Jones v. 414 Equities, LLC, 57 A.D.3d 65 (1st Dept. 2008); DeMarco v. Wyndham Intl., 299 A.D.2d 209 (1st Dept. 2002); Terrones v. Morera, 295 A.D.2d 254 (1st Dept. 2002).** This court finds that defendant has failed to show a reasonable excuse for its default. The affidavit of Ms. Spearman alleges that she failed to file the notice of appearance and demand for complaint because she was not aware of the fact that this action was filed electronically. However, she would have discovered that fact had she attempted to file a hard copy in person with the court. This court finds that defendant has failed to offer a sufficiently detailed and credible explanation for the default.

"With respect to personal jurisdiction, it is well established that the affidavit of a process server constitutes prima facie evidence of proper service. The mere denial of service 'is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service.'" **In re de Sanchez, 57 A.D.3d 452, 454 (1st Dept. 2008), *quoting* De La Barrera v. Handler, 290 A.D.2d 476, 477 (2nd Dept. 2002).** However, where a defendant submits a "sworn denial of service containing specific facts to rebut the presumption of proper service" the court conducts an evidentiary hearing to determine if service was attained over the defendant. **U.S. Bank v. Arias, 85 A.D.3d 1014 (2nd Dept. 2011).**

In the case at bar, the affidavit of service indicates that the process server, Omar R. Atkins, delivered a copy of the summons with notice to Pastor Abugado on July 10, 2012 at 4:58 P.M. pursuant to C.P.L.R. 311(a)(1). Plaintiffs have presented prima facie evidence of proper service. However, in her affidavit, Pastor Oluwadare asserts that she is not authorized to accept service on behalf of defendant. She further asserts that an individual left documents with her without asking her any questions. Pastor Oluwadare's affidavit makes no mention of Pastor Abugado who purportedly accepted service of process. Given the conflicting affidavits of service submitted by the parties, this court finds that a traverse hearing is needed in order to determine if defendant was properly served with the summons with notice and if this court has personal jurisdiction.

Accordingly, plaintiffs' motion for an order, directing that a default judgment be entered against defendant, is reserved pending the traverse hearing. The hearing will be held on Tuesday, March 12, 2013 at 9:30 A.M. in room 408, 851 Grand Concourse, Bronx, New York. Defendant's cross-motion for an order extending the time for defendant to appear and answer the summons with notice is denied.

Plaintiffs are directed to serve a copy of this order with notice of entry upon defendant and file proof thereof with the Clerk's office.

This constitutes the decision and order of this court.

Dated: February 13, 2013

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR