

Hamill v Glad Tidings Tabernacle, Inc.

2014 NY Slip Op 30185(U)

January 2, 2014

Sup Ct, New York County

Docket Number: 110070/10

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

BRYAN HAMM
- v -
GLAD THINGS THROUGHOUT INC

INDEX NO. 110070/10
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

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

JAN 24 2014

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Dated: January 2, 2014 _____ 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

BRYAN HAMILL,

Plaintiff,

INDEX NO. 110070/10

-against-

GLAD TIDINGS TABERNACLE, INC.,

Defendant.

-----X

JOAN A. MADDEN, J.:

FILED

JAN 24 2014

In this action for damages for personal injuries, plaintiff alleges he was injured when he fell from a ladder in the course of his employment with Camillo Construction Co., at premises owned by defendant Glad Tidings Tabernacle, Inc., ("Glad Tidings"). In November 2011, this court granted plaintiff's motion for a default judgment against Glad Tidings, based on its failure to appear and answer, and set the matter down for an inquest and assessment of damages. An inquest was held on May 29, 2012 and plaintiff was awarded \$640,000 in damages. The judgment has not yet been entered.

Glad Tidings is now moving for an order: 1) pursuant to CPLR 5015(a)(1) vacating its default in answering the complaint, in opposing plaintiff's motion for a default judgment and in appearing for the inquest; 2) vacating this court's November 14, 2011 order awarding plaintiff a default judgment; 3) vacating the May 29, 2012 decision of Justice Martin Schoenfeld awarding plaintiff damages after inquest; and 4) pursuant to CPLR 3211(a)(8), dismissing plaintiff's action for lack of personal jurisdiction over defendant. Plaintiff opposes the motion.

In support of the motion, Glad Tidings contends that it was not properly served. The

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affidavit of service states that service was made pursuant to “307 Business Corporation Law,” by delivering the summons and complaint to the Secretary of State, and mailing the papers by registered mail to 177 Franklin Street, New York, NY 10013. Glad Tidings asserts that it is a New York not-for-profit religious corporation organized and existing under Article 20 of the Religious Corporation Law, and as such is not registered with the Secretary of State for the purposes of service of process. Glad Tidings also asserts that its certificate of incorporation as a religious corporation was filed with the New York County Clerk on December 1, 1998, and that its “principal location” is 20 Murray Street, New York, New York, 10008. Glad Tidings admits it purchased the Franklin Street property in January 2008, but asserts it never occupied the premises because a “renovation project on the building was never completed.” Glad Tidings states it did not receive notice of the instant action until “outside counsel was perusing the court records in connection with another unrelated landlord tenant matter and found a notation of pending litigation.” Glad Tidings argues that since service is a nullity, so are all subsequent proceedings. Glad Tidings additionally argues that it has a meritorious defense, as all work was performed, supervised and controlled by the general contractor or the subcontractor, Camillo Construction Co., plaintiff’s employer.

In opposing the motion, plaintiff asserts that as indicated on the affidavit of service, service was made in accordance with Business Corporation Law §307, which according to plaintiff, is “specifically designed to permit substituted service upon corporations who have not designated the New York Secretary of State as an agent to accept service.” Plaintiff submits an affidavit from the process server that he has served religious corporations in this manner for 22 years, without incident. Plaintiff also asserts that the papers were properly mailed to the

Franklin Street address, since Glad Tidings admits it owns and entered into contracts to renovate that building, and such conduct is sufficient to “constitute doing business” at the premises.

Plaintiff also alleges that Glad Tidings registered 177 Franklin Street, as the address for receiving real estate tax bills in 2010. With respect the issue of a meritorious defense, plaintiff argues that under Labor Law §240(1), Glad Tidings, as the owner, is strictly liable for plaintiff’s injuries, and control, direction or supervision of the work is not necessary. Plaintiff asserts that for the purposes of liability under section 240(1), it is sufficient that there were no adequate safety device to prevent the ladder from slipping or to prevent plaintiff from falling.

In reply, Glad Tidings argues that BCL §307 is inapplicable for two reasons: 1) it is not a foreign corporation; and 2) under Religious Corporation Law § 2-b, which covers the applicability of the not-for-profit corporation law to religious corporations, Business Corporation Law §307 is inapplicable, and the Secretary of State is not an agent for service of process. With respect to its meritorious defense, defendant argues that a finding of liability under Labor Law §240 is not assumed by virtue of the fact plaintiff fell from a ladder, but plaintiff must prove he was not provided with proper protection for the work he was performing, and plaintiff’s claim is also subject to the affirmative defenses of sole proximate cause and recalcitrant worker.

A defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must establish both a reasonable excuse for its failure to appear and answer the complaint, and a meritorious defense to the action. See CPLR 5015(a); Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1986); 60 E 9th St. Owners Corp. v. Zihenni, 111 AD3d 511 (1st Dept 2013); Goldman v. Cotter, 10 AD3d 289 (1st Dept 2004). Where as here, the only excuse offered is lack of personal jurisdiction based on improper service, defendant is not obligated to

establish a meritorious defense. See Ayala v. Bassett, 57 AD3d 387 (1st Dept 2008); Johnson v. Deas, 32 AD3d 253 (1st Dept 2006); Boorman v. Deutsch, 152 AD2d 48 (1st Dept 1989), lv dismissed 76 NY2d 889 (1990). Moreover, if defendant demonstrates that service was defective as a matter of law, the default judgment is a nullity and must be unconditionally vacated, and a motion to dismiss for lack of personal jurisdiction should be granted. See Prudence v. Wright, 94 AD3d 1073 (2nd Dept 2012); Caba v. Rai, 63 AD3d 578 (1st Dept 2009).

CPLR 311(a)(1) provides that “[p]ersonal service upon a corporation . . . shall be made by delivering the summons . . . to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.” In the alternative, CPLR 311(a)(1) permits service on a corporation by personal delivery to the Secretary of State in accordance with Business Corporation Law §§ 306 and 307, and Not-For-Profit Corporation Law §§ 306 and 307.¹

Where as here, defendant is a religious corporation, service must also comply with the provisions of the Religious Corporations Law, which permits service on the Secretary of State only in the case of an unauthorized foreign religious corporation, and not a domestic religious corporation or an authorized foreign religious corporation. See Religious Corporation Law § 2-b(1) (c); Not-For-Profit Corporation Law §§306, 307; Daniel Perla Assocs, L.P. v. Cathedral Church of St. Lucy’s, 39 Misc3d 1205(A) (Sup Ct, Kings Co 2013); Schoenthal v. Beth Jacob Teachers Seminary of America, Inc, 176 Misc2d 958 (Sup Ct, Kings Co 1998). Under section 2-

¹The provisions authorizing service on the Secretary of State in section 306 of the Business Corporation Law and section 306 of the Not-For-Profit Corporation Law are identical, as are the provisions in section 307 of the Business Corporation Law and section 307 of the Not-For-Profit Corporation Law.

b(1) of the Religious Corporations Law, the Not-For-Profit Corporation Law is generally controlling with respect to religious corporations. Section 2-b(1)(c), however, provides for certain exceptions by enumerating the provisions of the Not-For-Profit Corporation law which “shall *not* apply to religious corporations.” One provision of the Not-For-Profit Corporation Law which does *not* apply to religious corporations is section 306 which authorizes service on the Secretary of State as the agent of a domestic corporation or an authorized foreign corporation.² While section 307 of the Not-For-Profit Corporation Law does apply to religious corporations, it authorizes service on the Secretary of State only with respect to unauthorized foreign religious corporation. See Religious Corporation Law § 2-b(1)(c); Not-For-Profit Corporation Law § 307; Daniel Perla Assocs, L.P. v. Cathedral Church of St. Lucy’s, supra.

It is undisputed that Glad Tidings was originally incorporated as a New York religious corporation in 1917 under the name Glad Tidings Assembly of God, and reincorporated in 1988 under the name Glad Tidings Tabernacle. Defendant submits an affidavit from its Pastor, Reverend Carl D. Keyes, stating that Glad Tidings Tabernacle, Inc., “an Assemblies of God Church, is a New York Religious Corporation organized existing pursuant to Article 20 of the New York Religious Corporation Law.” Defendant also submits a certified copy of its Certificate of Reincorporation as a religious corporation under Article 20 of the Religious Corporation Law, which was filed with the New York County Clerk on December 1, 1988.

²Religious Corporations Law §2-b(1)(c) also lists Not-For-Profit Corporation Law §§ 304 and 305 as inapplicable to religious corporations. Section 304 provides that the Secretary of State “shall be the agent of every domestic corporation formed under article four of this chapter and every authorized foreign corporation upon whom process against the corporation may be served.” Section 305 permits a domestic corporation or an authorized foreign corporation to “designate a registered agent in this state upon whom process against such corporation may be served.”

Defendant also submits the results of a search of NYS Department of State, Division of Corporations, which shows that defendant is not registered with the New York Secretary of State.

Based on the foregoing, it is clear that Glad Tidings is a domestic religious corporation. As determined above, under the Religious Corporations Law, as a domestic religious corporation, Glad Tidings could not be served by service on the Secretary of State, and the provision which would have permitted such service applies only to unauthorized foreign religious corporations. See Religious Corporation Law § 2-b(1)(c); Not-For-Profit Corporation Law §§306, 307; Daniel Perla Assocs, L.P. v. Cathedral Church of St. Lucy's, *supra*. Thus, since Glad Tidings was served by delivering the papers to the Secretary of State, such service was defective as a matter of law, and the court lacks jurisdiction over Glad Tidings. See Prudence v. Wright, *supra*. In view of this conclusion, the court need not consider whether Glad Tidings has demonstrated a meritorious defense. See Ayala v. A. R. Bassett, *supra*; Boorman v. Deutsch, *supra*. The default judgment, therefore, is a nullity and is unconditionally vacated, and Glad Tidings' motion to dismiss the action on the ground of lack of personal jurisdiction is granted. See Caba v. Rai, *supra*; Prudence v. Wright, *supra*.

Accordingly, it is

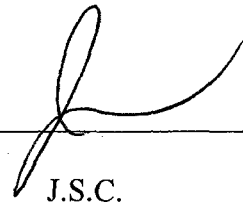
ORDERED that the motion by defendant Glad Tidings Tabernacle, Inc. to vacate the default judgment against it, is granted in its entirety; and it is further

ORDERED that the court's November 14, 2011 order awarding plaintiff a default judgment against defendant Glad Tidings Tabernacle, Inc. is vacated, and the May 29, 2012 decision of Justice Martin Schoenfeld awarding plaintiff damages after inquest against defendant Glad Tidings Tabernacle, Inc. , is vacated; and it is further

ORDERED that pursuant to CPLR 3211(a)(8), the action is dismissed without prejudice for lack of personal jurisdiction over defendant Glad Tidings Tabernacle, Inc.

DATED: January 2, 2014

ENTER:



J.S.C.

FILED

JAN 24 2014

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