

Financial Pacific Leasing, LLC v Bloch Group, LLC

2014 NY Slip Op 30891(U)

April 4, 2014

Sup Ct, New York County

Docket Number: 652595/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FINANCIAL PACIFIC LEASING, LLC, as assignee of
HORIZON KEYSTONE FINANCIAL,

Plaintiff,

Index No. 652595/13

-against-

DECISION/ORDER

THE BLOCH GROUP, LLC d/b/a LASER COSMETICA
and RYAN BLOCH a/k/a RYAN T. BLOCH a/k/a
RYAN A. BLOCH a/k/a RYAN BLOCK a/k/a RYAN
BLOCK BANGAY, Individually,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition to the Motion	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Financial Pacific Leasing, LLC ("FPL"), as assignee of Horizon Keystone Financial ("Horizon"), commenced the instant action to recover certain amounts allegedly due and owing pursuant to a written commercial equipment lease agreement (the "Lease") executed by defendant The Bloch Group, LLC d/b/a Laser Cosmetica ("The Bloch Group") and guaranteed by defendant Ryan Bloch a/k/a Ryan T. Bloch a/k/a Ryan A. Bloch a/k/a Ryan Block a/k/a Ryan Block Bangay ("Mr. Bloch"). Plaintiff now moves for an Order (1) pursuant to CPLR § 3212 for summary judgment against Mr. Bloch; (2) pursuant to CPLR § 3211(b) striking Mr. Bloch's Verified Answer; and (3) pursuant to CPLR § 3215 for a default judgment against The Bloch

Group for its failure to answer or otherwise appear in the within action. Plaintiff's motion is resolved as follows.

The relevant facts are as follows. On or about August 7, 2012, Horizon and The Bloch Group entered into the Lease pursuant to which Horizon agreed to finance The Bloch Group's purchase of certain computer equipment, software, attachments and accessories (the "Equipment") from CT Networks, a non-party. On that same date, Mr. Bloch signed the Lease's Guarantee pursuant to which he agreed to "unconditionally guarantee[] to [Horizon] the prompt payment when due of all [The Bloch Group's] obligations to [Horizon]." By written assignment dated August 20, 2012 (the "Assignment"), Horizon assigned all of its rights, title and interest in the Lease to plaintiff. Plaintiff alleges that The Bloch Group received delivery of the Equipment from CT Networks but that The Bloch Group defaulted under the terms and conditions of the Lease by failing to remit the monthly payment due on February 1, 2013 and continuing thereafter. Plaintiff then commenced the instant action against defendants seeking to recover the amount due and owing under the Lease plus interest, costs and disbursements and attorney's fees.

As an initial matter, that portion of plaintiff's motion for an Order pursuant to CPLR § 3215 for a default judgment against The Bloch Group is granted as The Bloch Group has failed to answer or otherwise appear in the within action and its time to do so has expired. To oppose a motion for a default judgment, a defendant must demonstrate a reasonable excuse for the delay or default. *See* CPLR § 3012(d). Here, The Bloch Group has not offered any excuse for its failure to answer or appear in the within action. Its assertion that the court lacks personal jurisdiction over The Bloch Group due to improper service of the summons and complaint is unavailing as plaintiff has provided an affidavit of service affirming that the summons and complaint were

properly served on The Bloch Group via the Secretary of State, as required by Limited Liability Company Law (“LLCL”) § 303(a). “With respect to personal jurisdiction, it is well established that the affidavit of a process server constitutes *prima facie* evidence of proper service.” *See In re de Sanchez*, 57 A.D.3d 452, 454 (1st Dept 2008). “The mere denial of receipt of service ‘is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service.’” *Id.*, citing *De La Barrera v. Handler*, 290 A.D.2d 476, 477 (2d Dept 2002).

The court next turns to plaintiff’s motion for an Order pursuant to CPLR § 3212 for summary judgment against Mr. Bloch. As an initial matter, Mr. Bloch’s assertion that plaintiff’s motion for summary judgment should be denied on the ground that this court lacks personal jurisdiction over him due to improper service of the summons and complaint is without merit. Plaintiff has provided an affidavit of service affirming that the summons and complaint were properly served on Mr. Bloch, which is considered *prima facie* proof of proper service. *See In re de Sanchez*, 57 A.D.3d at 454. Pursuant to CPLR § 308(2), the summons and complaint must be delivered “to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served...” and must also be mailed either to the defendant’s “last known residence” or “actual place of business.” Here, the affidavit of service affirms that Mr. Bloch was served at his residence located at 71 Nassau Street, Apt. 16, New York, New York 10038 on July 29, 2013 at 9:39 a.m. by delivering and leaving a copy of the summons and complaint with the building’s doorman who refused the process server entry to the premises and by depositing in the mail a copy of the summons and complaint to Mr. Bloch’s address via first class mail marked personal and confidential on July 30, 2013 as required by CPLR § 308(2). It is well-settled that an apartment building doorman has been held to qualify as

a person of suitable age and discretion under CPLR § 308(2). *See Braun v. St. Vincent's Hospital and Medical Center*, 57 N.Y.2d 909 (1982). Additionally, Mr. Bloch has not alleged that the address on which process was served is not his residence. However, even if such service was improper, which it was not, Mr. Bloch has waived the defense of lack of personal jurisdiction. “[A]n objection that the summons and complaint...was not properly served, is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading....” CPLR § 3211(e). It is undisputed that Mr. Bloch raised the defense of lack of personal jurisdiction due to improper service of the summons and complaint in his answer but that he failed to move for judgment on that ground within sixty days of service of his answer.

Additionally, Mr. Bloch’s assertion that plaintiff’s motion for summary judgment should be denied on the ground that this court lacks subject matter jurisdiction over the instant action because New York State is an improper forum pursuant to the Lease is without merit. Pursuant to Paragraph 5 of the Lease

All matters involving the construction, validity, performance, or enforcement of this lease shall be governed by the laws of the state of Washington. [The Bloch Group] consents to the personal jurisdiction of the courts of the State of Washington and agrees that at [Horizon’s] sole option, jurisdiction and location for any dispute, suit or action arising under or in relation to the lease, and all documents executed in connection therewith, shall be in King County, State of Washington. [The Block Group] waives the right of jury trial. [Horizon] shall have the option of commencing an action in any court having jurisdiction over the subject matter and parties to the transaction.

Thus, as the Lease makes clear, plaintiff may bring this action before this court as it, as Horizon’s assignee, had “the option of commencing an action in any court having jurisdiction over the

subject matter and parties to the transaction.” The instant action may be brought in this court as it has jurisdiction over both the subject matter and parties to the transaction. As an initial matter, the court has subject matter jurisdiction over the action as the subject transaction took place in New York, both Mr. Bloch’s residence and business are located in New York and this is a court of general jurisdiction which may hear breach of contract actions such as this one.

Mr. Bloch’s assertion that this court lacks subject matter jurisdiction over the instant action because plaintiff is in violation of Business Corporation Law (“BCL”) § 1312 is also without merit. Pursuant to BCL § 1312(a), “[a] foreign corporation doing business in [New York State] without authority shall not maintain any action or special proceeding in [New York State] unless and until such corporation has been authorized to do business in [New York State]....” Mr. Bloch asserts that plaintiff is not authorized to do business in New York State because it does not have active status. However, plaintiff has affirmed that FPL is authorized to do business in New York State. Specifically, plaintiff has provided evidence of such authorization in the form of a New York State Department of State Division of Corporations Entity Information Sheet which establishes that on or about October 17, 2013, *after* the commencement of the action, FPL terminated its “active” status and simultaneously registered Financial Pacific Leasing, Inc. as an “active” entity authorized to do business in the State of New York and that plaintiff did so for the sole purpose of changing its corporate name.

This court now finds that plaintiff is entitled to summary judgment against Mr Bloch without opposition as plaintiff has established that The Bloch Group defaulted under the Lease by failing to remit the monthly payment due to plaintiff on February 1, 2013 and continuing thereafter and that Mr. Bloch was the Guarantor under the Lease. Pursuant to Paragraph 19 of

the Lease, upon default and the commencement of an action pursuant to the Lease, plaintiff is entitled to reasonably attorney's fees in addition to costs and disbursements. Further, pursuant to the provisions of the Guarantee, the Guarantor agreed to pay plaintiff reasonable attorney's fees in addition to costs and disbursements incurred by plaintiff in the enforcement of the Guarantee. As the court has granted plaintiff's motion for summary judgment against Mr. Bloch, it need not address that portion of plaintiff's motion which seeks to strike Mr. Bloch's affirmative defenses.

Mr. Bloch's assertion that both he and The Bloch Group are improper parties to the action because they did not have any contractual relationship with plaintiff or Horizon is unavailing. While it is undisputed that The Bloch Group contracted with CT Networks for the Equipment, it is also undisputed pursuant to the Lease that The Bloch Group contracted with Horizon for the financing for such Equipment and that Horizon assigned its rights and title to the Lease to plaintiff. Additionally, it is undisputed that Mr. Bloch has a contractual relationship with plaintiff pursuant to the Lease's Guarantee.

Finally, Mr. Bloch's assertion that the action should be dismissed on the ground of *forum non conveniens* is without merit. "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, *on the motion of any party*, may stay or dismiss the action in whole or in part on any conditions that may be just." CPLR § 327(a)(emphasis added). Thus, this court may not dismiss the instant action on the ground of *forum non conveniens* as it is undisputed that neither Mr. Bloch nor The Bloch Group has moved for such relief.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an Order pursuant to CPLR § 3215 for a default

judgment against The Bloch Group is granted; and it is further

ORDERED that plaintiff's motion for an Order pursuant to CPLR § 3212 for summary judgment against Mr. Bloch is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$72,024.20 plus interest thereon from February 1, 2013 at the statutory rate, together with costs and disbursements; and it is further

ORDERED that that portion of plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendants is referred to a Special Referee to hear and report. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

Dated: 4/9/14

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.