

Stellar W. 100 LLC v Olavson
2014 NY Slip Op 31422(U)
May 30, 2014
Sup Ct, New York County
Docket Number: 105162/11
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

STELLAR WEST 100 LLC,
Plaintiff,

FILED

INDEX NO. 105162/11

JUN 02 2014

MOTION SEQ. NO. 006

- against -

NILS THOMAS OLAVSON, a/k/a NITOM OLAVSON
ANNE LORRIE HARRISON, a/k/a LORRIE HARRISON,
Defendants.

The following papers, numbered 1 to 3 were read on this motion by defendant Anne Lorrie Harrison to confirm a Referee's Report.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2</u>
Replying Affidavits (Reply Memo) _____	<u>3</u>

Cross-Motion: Yes No

Before the Court is defendant Anne Lorrie Harrison a/k/a Lorrie Harrison's (Harrison) motion to confirm the Report of Special Referee/Judicial Hearing Officer Ira Gammerman (JHO Gammerman), which was So-Ordered on March 4, 2014. Harrison also seeks an order dismissing the complaint pursuant to CPLR 3211(a)(8), vacating the default judgment previously entered against her pursuant to CPLR 5015(a)(1), and directing the New York City Department of Finance, or any legal entity in possession of the \$12,312.87 levied from Harrison's bank account, to release such funds to Harrison. Plaintiff is in opposition to this motion.

BACKGROUND

On or about February 23, 2012 plaintiff moved for a default judgment against both defendants, which was granted without opposition by an Order of this Court dated February 25,

2013. Annexed to the motion for a default judgment were affidavits of service on the defendants, which evidence that plaintiff served Harrison through nail and mail after three unsuccessful attempts at service were made at 2754 Broadway, Apt 5S, New York, NY, Harrison's "dwelling house (place of abode) within the state." On August 14, 2013, plaintiff secured a default judgment against Harrison in the amount of \$37,156.27, alleging that Harrison breached her apartment lease agreement from the year 2011.

On December 31, 2013 Harrison moved, *pro se*, by Order to Show Cause (OSC) to vacate and set aside the default judgment entered against her on the basis that the Court lacks *in personam* jurisdiction over her as she was never served by the plaintiff with service of process. Harrison also sought the immediate release of the funds frozen by the plaintiff from her bank account, and monies levied in an attempt to collect on the judgment. In support of her motion Harrison maintained that she never received a copy of the summons and complaint nor had any notice of plaintiff's prior motion for a default judgment. Specifically, Harrison proffered that she had documentary evidence to support the contention that she does not live at the aforementioned residence where plaintiff served her with process. In opposition, plaintiff maintained that Harrison's motion must be denied because she has not shown excusable default and she offers no probative facts to support this claim, which is insufficient in the face of a properly executed affidavit of service of the process server. Additionally, plaintiff proffered that Harrison has not shown a meritorious defense.

The Court notes that since Harrison's OSC was brought, this Court granted a motion by Harrison (motion sequence 004) wherein the Court, in an order dated February 5, 2014, ordered plaintiff, or New York City Marshall Ronald Moses, plaintiff's agent and/or contractor or whatever legal entity is currently in custody and control of the sum of money levied against Harrison's bank to pay directly into the Court and/or the New York City Department of Finance the sum of \$12,387.35 or the precise amount of money levied from Harrison's bank account

pending a hearing and decision on Harrison's motion to vacate the default judgment and for the release of frozen funds. The Court also barred plaintiff from restraining and/or seeking to restrain any further monies of Harrison as well as serving any further subpoenas in furtherance of its attempt to restrain any monies of Harrison until the Court, after a hearing, determines Harrison's application to vacate the default judgment against her.

In an Interim Order dated February 20, 2014 and entered on February 21, 2014, this Court referred the jurisdictional issue to a traverse hearing before a Special Referee to hear and report with recommendations on the issue of whether service of process was properly effected upon Harrison and whether the Court has personal jurisdiction over her. On February 25, 2014, JHO Gammerman held a Traverse Hearing and issued a decision by so-ordering the transcript on March 4, 2014, which was entered on March 5, 2014. JHO Gammerman found that the plaintiff did not establish service on Harrison, in that the affidavit of service submitted by the plaintiff was defective and thus there is no affidavit indicating that a summons and complaint was ever served. As a result thereof, JHO Gammerman recommended that service be disallowed and the complaint be dismissed. Harrison is now moving, *inter alia*, to confirm this Report. Plaintiff opposes Harrison's application.

DISCUSSION

"It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Steingart v Hoffman*, 80 AD3d 444, 445 [1st Dept 2011], citing *Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]; see also *Melnitzky v Uribe*, 33 AD3d 373 [1st Dept 2006]; *Kaplan v Einy*, 209 AD2d 248 [1st Dept 1994]; *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1st Dept 1985] lv dismissed sub nom *Walker v Sant'Andrea*, 72 NY2d 954 [1988]). "The Special Referee is considered to be in the best position to determine the issues presented" (*Nager v Panadis*, 238 AD2d at 136).

The Court finds that, contrary to plaintiff's assertions, the record fully supports JHO Gammerman's findings and conclusions of law. It is evident in JHO Gammerman's Report that he thoroughly reviewed the affidavit of service provided, heard the testimony of the process server, who was subject to cross-examination and his findings supported by the hearing transcript, warrants confirmation (*see Adelaide Prods., Inc. v BKN Intl. AG*, 51 AD3d 598 [1st Dept 2008]; *Nager*, 238 AD2d at 135-136 [the Special Referee clearly defined the issues and resolved matters of credibility, and had ample support of those findings in the record and his report warranted confirmance]). Based upon the foregoing, Harrison's motion to confirm the Report of JHO Gammerman is granted. Moreover, in light of this Court confirming JHO Gammerman's Report, which recommended dismissal of the complaint as against Harrison, the portion of Harrison's motion seeking vacatur of the default judgment entered against her on August 14, 2013 is hereby granted. Furthermore, the Court finds that as a result thereof Harrison is entitled to the release of any and all funds levied from her bank account.

CONCLUSION

Accordingly it is,

ORDERED that the portion of defendant Anne Lorrie Harrison a/k/a Lorrie Harrison motion to confirm the Report of Judicial Hearing Officer Ira Gammerman, which was So-Ordered on March 4, 2014 is granted; and it is further,

ORDERED that the portion of Harrison's motion seeking an order dismissing the complaint pursuant to CPLR 3211(a)(8) and vacating the default judgment dated August 14, 2013 previously entered against her is granted, and the complaint is hereby dismissed as against Harrison for failure to establish personal jurisdiction over said defendant; and it is further,

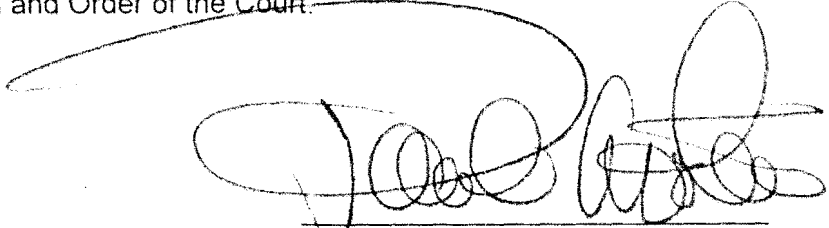
ORDERED that the portion of Harrion's motion for an order directing the New York City Department of Finance, or any legal entity in possession of the \$12,312.87 levied from

Harrison's bank account, to release such funds to Harrison is granted; and it is further,

ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, R. 2200, New York, NY 10007, is directed, upon receipt of a certified copy of this order, a Certificate of Deposit duly issued by the Department of Finance, and any other forms required by the Department, to turn over to defendant Anne Lorrie Harrison the funds deposited with that Department totaling \$12,312.87, as reflected in the Certificate, less the fee of the Department; and it is further,

ORDERED that counsel for Anne Lorrie Harrison is directed to serve a copy of this order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.


PAUL WOOTEN J.S.C.

Dated: 5-30-14

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
JUN 02 2014
COUNTY CLERK'S OFFICE
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