

Cabezas v La Nueva Giralda Bakery, Inc.

2014 NY Slip Op 32664(U)

September 3, 2014

Supreme Court, Bronx County

Docket Number: 310271/2010

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

JUAN CABEZAS,

INDEX NUMBER: 310271/2010

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

LA NUEVA GIRALDA BAKERY, INC. and
SIMPSON WEST REALTY, LLC,

Defendants.

LA NUEVA GIRALDA BAKERY, INC.,

INDEX NUMBER: 84047/2012

Third-Party Plaintiff,

-against-

SIMPSON WEST REALTY, LLC,

Third-Party Defendant.

The following papers numbered 1-3,

Read on this Third-Party Defendant's Motion to Vacate the Default Judgment and Vacate Note of Issue

On Calendar of 3/10/14

Order to Show Cause-Exhibits, Affirmation 1

Affirmations in Opposition 2, 3

Upon the foregoing papers, defendant/third party defendant Simpson West Realty, LLC's (hereinafter "Simpson") motion to vacate the default judgment in the third-party action and to vacate the plaintiff's Note of Issue and Certificate of Readiness is denied for the reasons set forth herein.

The within action involves plaintiff's claim that he sustained personal injuries on June 14, 2010, as a result of falling down a set of interior stairs leading to the basement while making a delivery to the defendant bakery, La Nueva Giralda Bakery, Inc. (hereinafter "La Nueva"). Originally, plaintiff commenced the within personal injury action only against defendant La Nueva by filing a Summons and Complaint on December 13, 2010. Following the completion of discovery, plaintiff filed his Note of Issue on May 1, 2012. Thereafter, La Nueva filed a third-party action on or about October 3, 2012 against Simpson, the owner of the premises where the alleged incident occurred. Plaintiff then filed an Amended Complaint on naming the third-party defendant as a direct defendant in the action. Having never received an Answer to the Third-Party Summons and Complaint or to plaintiff's Amended Complaint, defendant/third-party plaintiff La Nueva moved for a default judgment against Simpson which was granted by this Court by decision and Order dated December 20, 2012. Subsequently, on or about April 5, 2013, Simpson served an Answer in response to the Amended Complaint.

Simpson now moves to vacate the default judgment arguing that it "has no record of ever receiving" the Third-Party Summons and Complaint. However, it concedes, upon information and belief, that La Nueva served the Third-Party Summons and Complaint through the Secretary of State on or about August 23, 2012. Simpson contends that it was not aware of the third-party action until a copy of the Third-Party Summons and Complaint was served upon them as an attachment to plaintiff's Amended Summons and Complaint. Simpson's counsel argues that it has a reasonable excuse for defaulting as it was not aware of the action against it. Moreover, Simpson's counsel argues that it has a meritorious defense to the action because it was an out of possession landlord who leased the premises to La Nueva and pursuant to the lease between Simpson and La Nueva, Simpson was only responsible for structural repairs. Simpson's counsel further argues that Simpson did not have notice of any problem with the stairs. Simpson also seeks to vacate plaintiff's Note of Issue and Certificate of Readiness arguing that it has not had an opportunity to depose the parties in the action.

Simpson is a domestic limited liability corporation. Pursuant to Limited Liability Company Law §303, "service of process [of the summons and complaint] on such limited liability company shall be complete when the secretary of state is so served." No follow-up service or mailing by a plaintiff is required. See, SP & S Associates, LLC v. Insurance Co. of Greater New York, 915 N.Y.S.2d 543, 544 (1st Dept. 2011)(Pursuant to

Limited Liability Company Law §303, receipt of service of pleadings by the Secretary of State, as a party's designated agent, constitutes receipt by the party itself.) In the instant matter, Simpson concedes that, upon information and belief, it was served with the Third-Party Summons and Complaint through the Secretary of State on August 23, 2012. The affidavit of service filed with the Court shows that Simpson was served through the Secretary of State on September 13, 2012, as is evidenced by the receipt of the Secretary of State. The Secretary of State served Simpson at its designated address, 1430 Broadway, Suite 1103, New York, New York 10018. Although not legally required, pursuant to the affidavit of service filed with the Court, La Nueva also personally served Simpson on September 11, 2012, through process server Eric Averbach by leaving a copy of the Third-Party Summons and Complaint with "Julius Faham" the "managing agent" authorized to accept service for Simpson, at Simpson's address, 1430 Broadway, Suite 1103, New York, New York 10018.

Simpson's contention that it never received the Summons and Complaint is without merit. The process server's affidavit that service upon Simpson was effected by delivery of the Third-Party Summons and Complaint to the Secretary of State is sufficient to create the presumption of service. Trini Realty Corp. v. Fulton Center LLC, 861 N.Y.S.2d 743 (2d Dept. 2008). Here, as in Trini, defendant does not contend that the address on file with the Secretary of State was incorrect; in fact, the copy of the lease that Simpson annexes as an exhibit to its motion papers confirms Simpson's address. Moreover, in order to challenge the presumption of service, one must make factual assertions that directly contest the assertions of the affidavit of service. See, Slimani v. Citibank, N.A., 849 N.Y.S.2d 541 (1st Dept. 2008); Ananda Capital Partners, Inc. v. Stav Electrical Systems, 753 N.Y.S.2d 488 (1st Dept. 2003); De La Barrera v. Handler, 736 N.Y.S.2d 249 (1st Dept. 2002). Here, Simpson's contention that it never received the Summons and Complaint is a bare conclusory statement with no evidence to support it. It is Simpson's attorney that makes the argument. Simpson fails to provide an affidavit from its managing agent, Julius Faham, denying receipt of the papers. The mere denial of receipt of the Summons and Complaint is insufficient to rebut the presumption of proper service created by the affidavit of service. Id. at 744. Furthermore, it strains credibility that not only did Simpson not receive service at its office address through its managing agent, but that the Secretary of State also failed to properly serve the papers.

In order to prevail on a motion to vacate a prior order pursuant to C.P.L.R. 5015, the movant must make a showing of excusable default and a meritorious defense within one year entry of the order. See, Adefioye v. Volunteers of America, Inc., 634 N.Y.S.2d 696 (1st Dept. 1995)(Holding that a party seeking to

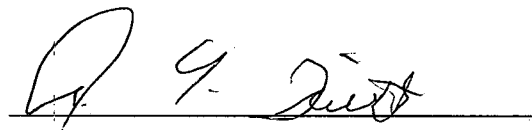
vacate a default must not only show that there was a reasonable excuse for the default but must demonstrate that he or she has a meritorious cause of action by submitting an affidavit of merit by someone with personal knowledge of the facts); Isaacs v. 455 West 34, 717 N.Y.S.2d 531 (1st Dept. 2000)(Defendant's motion for vacatur properly denied since defendant failed to show that it possessed a meritorious defense; defendant never offered the affidavit of a knowledgeable fact witness); Wynyard v. Antique Co. of New York, Inc., 668 N.Y.S.2d 617 (1st Dept. 1998)(Court properly exercised its discretion in denying the motion to vacate entered on default since petitioners failed to satisfy their burden of demonstrating a reasonable excuse for the default by submitting an affidavit by someone with personal knowledge of the material facts).

Pursuant to C.P.L.R. §5015(a)(1), the motion to vacate must be brought within one year after service of the default order.

Simpson's Order to Show Cause with respect to the default order must be denied as Simpson fails to demonstrate in its moving papers that it has a meritorious defense and a reasonable excuse for failing to appear. Additionally, the Order to Show Cause is untimely. Pursuant to C.P.L.R. §5015(a)(1), this instant application must be denied because it was not brought within one year after service of the default order. The decision and Order was served with Notice of Entry on January 18, 2013 and Simpson did not file the instant application until February 11, 2014.

This constitutes the decision and Order of this Court.

Dated: 9/3/14



Hon. Alison Y. Tuitt