

Cohen Tauber Spievack & Wagner P.C. v US Capital Invests. LLC
2014 NY Slip Op 33303(U)
December 18, 2014
Supreme Court, New York County
Docket Number: 158462/2013
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X
COHEN TAUBER SPIEVACK & WAGNER P.C.,

Index No. 158462/2013

Plaintiff,
-against-

DECISION/ORDER

US CAPITAL INVESTMENTS LLC, UES DE LLC,
and URIEL FOXBRUNER, an individual,

Defendants.
-----X

HON. CYNTHIA 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>
Notice of Cross Motion and Affidavits Annexed.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Cohen Tauber Spievack & Wagner P.C. commenced the instant action against defendants US Capital Investments LLC, UES DE LLC and Uriel Foxbruner seeking to recover their fees for representation of said defendants. Plaintiff now moves for an Order punishing defendant Foxbruner for contempt based on his failure to comply with a subpoena served by plaintiff for a post-judgment deposition and discovery. Defendant Foxbruner cross-moves for an Order vacating the default judgment against defendants. The motions are resolved as set forth below.

The relevant facts are as follows. Plaintiff commenced the instant action by filing its summons and complaint in September 2013. Defendants failed to answer the complaint and

thereafter, plaintiff moved for a default judgment against defendants. In a decision dated December 17, 2013, this court granted plaintiff's motion and in April 2014, judgment was entered against defendants. Thereafter, plaintiff commenced its efforts to enforce the judgment and on June 19, 2014, it served defendant Foxbruner with a Subpoena Duces Tecum and Ad Testificandum (the "Subpoena") seeking documents and a deposition of defendant Foxbruner. However, defendant Foxbruner failed to show up for the deposition and failed to produce any of the requested documents. Additionally, plaintiff did not receive any objection to the Subpoena.

By motion, dated August 4, 2014, plaintiff moved for an Order compelling Foxbruner's compliance with the Subpoena and defendant Foxbruner did not oppose the motion. In a decision dated September 23, 2014, this court issued an order requiring Foxbruner to appear at the deposition and to produce the documents requested in the Subpoena. Since the date of that order, defendant Foxbruner has not responded to the Subpoena. Thus, plaintiff now moves for an Order punishing defendants for contempt based on their failure to comply with Subpoena. Defendant Foxbruner cross-moves for an Order vacating the default judgment entered against him on the ground that service of the Summons and Complaint was improper.

As an initial matter, to the extent defendant Foxbruner's cross-motion seeks to vacate the default judgment against the corporate defendants US Capital Investments LLC and UES DE LLC, such motion is denied as said corporate entities are not represented by an attorney as required under New York Law. Pursuant to CPLR § 321(a), an individual may prosecute or defend a civil action in person but a corporation must appear by attorney. As neither corporate defendant has retained counsel to appear in this matter, it cannot bring a motion to vacate a default judgment at this time.

As jurisdiction is a threshold issue, the court first turns to defendant Foxbruner's cross-motion to vacate the default judgment entered against him on the ground that the court lacks personal jurisdiction over him based on plaintiff's alleged failure to effectuate proper service pursuant to CPLR § 5015. Pursuant to that statute,

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
4. lack of jurisdiction to render the judgment or order.

CPLR § 5015(a)(4). It is well established that the affidavit of a process server constitutes *prima facie* evidence of proper service. See *Hinds v. 2461 Realty Corp.*, 169 A.D.2d 629 (1st Dept 1991). The mere denial of receipt of service "is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service." *Matter of de Sanchez*, 57 A.D.3d 452, 454 (1st Dept 2008). However, if the defendant provides "a sworn non-conclusory denial of service," such evidence will be "sufficient to dispute the veracity or content of the affidavit." *NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 (1st Dept 2004). It is at that point that a traverse hearing is required to determine whether service was proper. See *id.*

In the instant action, this court determines that a traverse hearing is needed to determine whether service was properly effectuated by plaintiff. As an initial matter, the plaintiff provided *prima facie* evidence of proper service by submitting the affidavit of the process server which establishes that defendant Foxbruner was served pursuant to CPLR § 308(2) at 12-40 Beach 9th Street - Apt 3, Far Rockaway, NY 11691 and that said address was confirmed as the correct one. However, defendant Foxbruner has sufficiently disputed the veracity of the affidavit of service based on his own sworn non-conclusory affidavit, in which he affirms that he has never lived at the address at which process was allegedly served but rather that he lives at 12-40 Beach 9th

