

Citibank, N.A. v K.L.P. Sportswear, Inc.

2014 NY Slip Op 33475(U)

December 8, 2014

Supreme Court, New York County

Docket Number: 651688/10

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 11

-----X
CITIBANK, N.A.,

Plaintiff,

INDEX NO. 651688/10

-against-

K.LP. SPORTSWEAR, INC. D/B/A LUXE ELEVEN,
and YAACOV GOLOB,

Defendant.
-----X

JOAN A. MADDEN, J.:

Defendant Yaacov Golob moves for an order pursuant CPLR 5015(a)(1) vacating the default judgment in the sum of \$225,889.46 as entered against him on August 18, 2011, and dismissing the action; or permitting him to appear and defend the action on the merits on the grounds that his default in appearing is excusable, he was neither served with process nor served of notice of the entry of the judgment, and he has meritorious defenses. Plaintiff opposes the motion.

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 dismiss 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).

Defendant Golob contends, inter alia, that the court lacks personal jurisdiction over him based on improper service. Defendant objects that the affidavit of service “says nothing about him [the process server] trying to get into the building” or “trying to actually come up to my apartment,” or that the “purported concierge (questionably referred to as ‘John Smith’) refused to allow him into the building.”

The affidavit of service states that the process server, Juan Delgado, served defendant Yaacov Golob on October 18, 2010, at 225 W. 83rd Street, Apt. 18D, New York, New York, by delivering the papers to “John Smith” a person of suitable age and discretion at the recipient’s “dwelling house” and “usual place of abode,” who identified himself as “Concierge.” The affidavit of service also states that a follow-up mailing was made on the next day, October 19, 2010, by first class mail to the same address in an envelope marked personal and confidential.

The affidavit of service is insufficient on its face. While delivery of the papers to concierge of the building where defendant resides may be sufficient to effectuate service pursuant to CPLR 308(2), the process server must be denied access to defendant’s specific apartment. See Menkes v. Beth Abraham Health Services, 120 AD3d 408 (1st Dept 2014); Soils Engineering Services, Inc v. Donald, 258 AD2d 425 (1st Dept 1999); McCormack v. Goldstein, 204 AD2d 121 (1st Dept 1994), lv app den 85 NY2d 801 (1995).

Here, the affidavit of service fails to indicate that process server was denied entry into defendant's building before leaving the papers with the concierge. In opposition to the motion, plaintiff does not submit an additional affidavit from the process server or an affidavit from the concierge. Plaintiff's attorney merely argues that the affidavit of service creates "the reasonable inference that a process server will generally not be let up to serve process by a doorman in a Manhattan apartment building." Thus, since an issue of fact exists as to whether the process server was denied access to the building thereby necessitating service of process on the concierge, the court is ordering a traverse hearing. See Soils Engineering Services, Inc v. Donald, supra; McCormack v. Goldstein, supra.

The Court notes, that if the traverse hearing is resolved in plaintiff's favor and service is sustained, the default judgment shall stand. Defendant Golob is not entitled to relief under CPLR 5015(a)(1), as he has not offered any excuse for his default other than lack of personal jurisdiction based on improper service, and in the absence of a reasonable excuse, the court need consider whether he has a potentially meritorious defense. See Tribeca Technology Solutions, Inc v. Goldberg, 110 AD3d 536 (1st Dept 2013); Bendeck v. Zablah, 105 AD3d 457 (1st Dept 2013); Admiral Insurance Co v. Marriott Int'l, Inc, 79 AD3d 572 (1st Dept 2010), lv app den 17 NY3d 708 (2011); Caba v. Rai, 63 AD3d 578, 582 (1st Dept 2009); Time Warner City Cable v. Tri State Auto, Inc, 5 AD3d 153 (1st Dept), lv app disp 3 NY3d 656 (2004).

Accordingly, it is

ORDERED that the motion by defendant Yaacov Golob is granted only to the extent of referring the issue of service of process on such defendant to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the

parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referee Part (Part SRP), which, in accordance with the Rules of that Part (posted on the Court's website www.nycourts.gov/supctmah at the "References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another, and counsel for defendant Yaacov Golob shall, within 15 days from the date of this decision and Order submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (available at the "References" link on the court's website) containing all the information called for therein, and as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear for the reference hearing with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part; and it is further

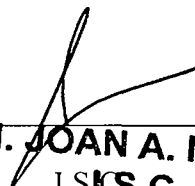
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(s)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned Special Referee

for good cause shown, the trial of the issue specified above shall proceed from day-to-day until completion; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for Trial Courts.

DATED: December 8, 2014

ENTER:


HON. JOAN A. MADDEN
J.S.C.