

**Banco Popular N. America v GMM Baking Corp.**

2014 NY Slip Op 33590(U)

July 10, 2014

Supreme Court, New York County

Docket Number: 101824/09

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

BANCO POPULAR NORTH AMERICA  
Plaintiff

-against-

GMM BAKING CORP. and ABRAHAM KAFF  
Defendants.

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INDEX NO. 101824/09  
MOTION DATE  
MOTION SEQ. 002  
MOTION CAL. NO.

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FILED

JUL 16 2014

The following papers, numbered 1 - 5 were considered on this motion to vacate default judgment:

NEW YORK  
COUNTY CLERK'S OFFICE

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	<u>4, 5</u>
Replying Affidavits _____	_____
Cross-Motion: [ ] Yes [X] No	_____

Upon the foregoing papers, it is ordered that this motion to vacate the default judgment entered against defendants GMM Baking Corp. and Abraham Kaff is decided, as indicated below.

Defendant Abraham Kaff moves to vacate a default judgment entered by plaintiff Banco Popular North America, on July 14, 2009, in the amount of \$105,641.35, and any other orders or judgments entered against defendant Kaff, on the basis that he has never been served with process. In the alternative, defendant Kaff seeks an order granting a traverse hearing.

It is well settled in New York that courts favor resolution of actions on their merits rather than on default. *Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1st Dept 1986). As such, there is a liberal policy towards "opening default judgments in furtherance of justice so that parties may have their day in court." *Id.* In order to vacate a default judgment, defendant must demonstrate: (1) a reasonable excuse for the default; and (2) a meritorious defense to the action.

*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 (1st Dept 2001). However, a defendant need not show a meritorious defense where a motion to vacate a default judgment is predicated on lack of personal jurisdiction. *International Business Machines Corp. v. Murphy & O'Connell*, 172 AD2d 157, 158 (1st Dept 1991).

Here, based upon the submissions, there are factual issues as to whether defendant has made the requisite showing needed to vacate the default judgment, and in particular, whether personal jurisdiction was obtained over defendant. Defendant contends that his default was due to the fact that he was never served with the pleadings. According to defendant and his wife, neither of them were ever served with the pleadings. Aff of defendant at 2; aff of defendant's wife at 1-2. Defendant also contends that he spoke with his wife and children and that none of them ever received a copy of the summons and notice of motion from anyone. Aff of defendant at 2. Furthermore, defendant argues that the process server's affidavit of service is "a complete fabrication," and he points out that the description of his wife that the affidavit contains is an inaccurate description of his wife. *Id.* at 2. Likewise, defendant's wife, in her sworn affidavit, states that the process server's affidavit of service "made a complete fabrication because he never came to my door to serve me and I never received anything form [sic] the process server." *Id.* at 1-2. Specifically, defendant and his wife state, in their respective affidavits, that the process server's description of defendant's wife, Gitty Kaff, as a 30-year-old female weighing 185 pounds, 5'8" tall, and wearing a turpin, is a fabricated description since the defendant's wife was, at the time of alleged service of process, 36 years old, weighed 265 pounds, and was wearing a wig with dark brown/black hair and no turpin. Aff of defendant at 2; aff of defendant's wife at 1.

A process server's affidavit is not conclusive proof of service if, as here, there is a sworn denial of receipt. See *Matter of St. Christopher-Ottillie (Devon M.)*, 169 AD2d 690, 691 (1st

Dept 1991); *NYCTL 1998-1 Trust and The Bank of New York v Rabinowitz*, 7 AD3d 459, 460 (1st Dept 2004); *see also Empire Natl. Bank v Judal Constr. of New York*, 61 AD2d 789, 789 (2d Dept 1978). When affidavits of process servers are in conflict with the sworn denial by the defendant that process was received, a hearing is required to determine if service was actually made. *See Ananda Capital Partners, Inc. v Stav Elec. Sys. (1994) Ltd.*, 301 AD2d 430, 430 (1st Dept 2003); *see also Green Point Sav. Bank v Taylor*, 92 AD2d 910, 910 (2d Dept 1983). Thus, defendant Kaff has sufficiently refuted plaintiff's allegation of service to warrant that a traverse hearing be held on the issue of service.

Defendant argues and this court agrees, in light of the above factual disputes as to the validity of service upon defendant Kaff, that he is not required to provide a meritorious defense for vacatur of the judgment because the court may lack personal jurisdiction over him. *See Ananda Capital Partners, Inc. v Stav Elec. Sys. (1994) Ltd.*, 301 AD2d at 430-431; *Cipriano v Hank*, 197 AD2d 295, 298 (1st Dept 1994).

Accordingly, it is

ORDERED that the motion by defendant Kaff to vacate the default judgment is granted to the extent that this matter is referred to a Special Referee for a traverse hearing to hear and report with recommendation on the issue of service of process, 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 such issue; and it is further

ORDERED that **such granting of a traverse hearing and referral is conditioned on defendant Kaff serving a copy of this order, within 30 days of entry of this order, with**

notice of entry, upon all parties and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar<sup>1</sup>; and it is further

ORDERED that **defendant Kaff's failure to timely serve the order on the Special Referee Clerk shall result in the denial of the within motion to vacate the default judgment;** and it is further

ORDERED that *the stay provided in this order to show cause with respect to execution of the subject judgment, shall remain in effect until final determination of this motion/traverse hearing;* and it is further

ORDERED that this matter is scheduled for September 30, 2014, at 10:15AM, Room 428, 60 Centre Street, New York, NY, for a control date, for counsel to advise the court as to the status of the referral, which may be adjourned by joint letter or letter with copy to the other side, if the Referee Clerk was served as indicated above.

The Clerk shall send a copy of this order to all parties.

Dated: 7/10/14

**FILED**

JUL 16 2014

**NEW YORK COUNTY CLERKS OFFICE**

DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

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<sup>1</sup> If plaintiff seeks to expedite the hearing, plaintiff may also serve the Clerk to schedule.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LING COHAN  
Justice

PART 36

BANCO POPULAR NORTH AMERICA  
- v -  
G M M BAKING CORP.,  
ETAL

INDEX NO. 101824/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 02  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: \_\_\_\_\_ J.S.C.

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