Dejesus v Ortecho
2015 NY Slip Op 30172(U)
January 5, 2015
Supreme Court, Bronx County
Docket Number: 17136/2005
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

JOSHUA DEJESUS, an infant by his mother and natural guardian, LYDIA DEJESUS and LYDIA DEJESUS,

Plaintiffs,

-against-

RICHARD ORTECHO, CHANDRA-DAT MOTIE and LOLITA MOTIE,

Defendants.

INDEX NUMBER: **17136/2005**

Present:
HON. **ALISON TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion to Vacate Default Judgment

O n Calendar of **7/14/11**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition and Exhibits 2

Reply Affirmation 3

Upon the foregoing papers, defendants Chandra-Dat Motie and Lolita Motie's motion to vacate a default judgment is denied for the reasons set forth herein.

The within is an action for personal injury of the infant plaintiff arising out of the alleged lead poisoning at two premises; the first premises owned by defendant Richard Ortecho and the second premises owned by defendants Chandra-Dat Motie and Lolita Motie. The Motie defendants failed to serve an Answer to the Summons and Complaint and, pursuant to a motion, plaintiffs were granted a default judgment by decision and Order dated February 24, 2014. Defendants now seek to vacate the default judgment.

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.S2d 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).

Defendants' motion must be denied. Defendants do not have an excuse for not timely answering the Summons and Amended Complaint, which was served on them on October 1, 2012, pursuant to C.P.L.R. §308(2), upon a person of suitable age and discretion, followed by mailing, as evidenced by the Affidavits of Service. A process server's sworn affidavits of service constitutes prima facie evidence of proper service and creates a presumption that service was effected. See, Caba v. Rai, 882 N.Y.S.2d 56 (1st Dept. 2009); In re de Sanchez, 870 N.Y.S2d 24 (1st Dept. 2008). A blanket conclusory assertion by defendant that she was never served is insufficient to rebut this presumption. See, NYCTL 1998-1 Trust v. Rabinowitz, 777 N.Y.S.2d 483 (1st Dept. 2004)(A sworn non-conclusory denial of service by a defendant is sufficient to rebut the veracity or content of a process server's affidavit of service). Where defendant provides only a conclusory affidavit denying receipt of the pleadings, defendant has not met her burden to rebut the presumption of service created by the process server's affidavit. See, Gonzalez v. City of New York, 965 N.Y.S.2d 46 (1st Dept. 2013) citing Grinshpun v. Borokhovich, 954 N.Y.S.2d 520 (1st Dept. 2012). "A properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." Kihl v. Pfeffer, 94 N.Y.2d 118, 122 (1999). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing (Skyline Agency v. Coppotelli, Inc., 502 N.Y.S.2d 479 (2d Dept. 1986), no hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's affidavits' ". Scarano v. Scarano, 880 N.Y.S.2d 682, (2d Dept. 2009) quoting Simonds v. Grobman,

716 N.Y.S.2d 692 (2d Dept. 2000); Countrywide Home Loans Servicing, LP v. Albert, 912 N.Y.S.2d 96 (2d Dept. 2010); City of New York v. Miller, 898 N.Y.S.2d 643 (2d Dept. 2010); Carrenard v. Mass, 782 N.Y.S.2d 810 (2d Dept. 2004). "A court need not conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service". Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v. Ellner, 869 N.Y.S.2d 591 (2d Dept. 2008).

"Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state. C.P.L.R. §2103(f)(1). A properly executed affidavit of service raises a presumption that proper mailing occurred. See, Kihl, 94 N.Y.2d at 118; Engle v. Lichterman, 62 N.Y.2d 943, 944-945 (1984).

Plaintiffs moved this Court for an Order for permission to file the affidavits of service in order to complete service in order to commence defendants' time to serve an Answer to plaintiffs' Supplemental Summons and Amended Complaint. Plaintiffs provide this Court with a copy of the Supplemental Summons and Amended Complaint and the affidavits of service concerning defendants Chandra-Dat Motie and Lolita Motie. The motion was served on defendants on January 8, 2013 and it was granted unopposed by these defendants. A copy of this Order was served by plaintiffs on these defendants on March 27, 2013. Defendants then had until May 1, 2013 to answer, move or otherwise appear in the action. When they failed to do so, plaintiffs moved for a default judgment which was granted on February 24, 2014. Defendants do not contest that service was made pursuant to C.P.L.R. §308(2). Instead, they ignore it. They do not even attach a proposed Answer to their papers as a showing of good faith. Defendants' counsel asserts that service was not made upon defendants. She relies upon C.P.L.R. §308(1) and, without basis, states that this Court does not have jurisdiction. Defendants were however served pursuant to C.P.L.R. §308(2). There is no fair reading of these affidavits of service that would allow defendants to assert that they were not properly served pursuant to C.P.L.R. §308(2). See, U.S. Bank v. Arias, 927 N.Y.S.2d 362, 363 (2d Dept. 2011).

Moreover, defendants have failed to establish that they have a meritorious defense to this action. Defendants' counsel does not articulate what the meritorious defense is in her affirmation in support. Counsel annexes to her motion a letter dated March 4, 2014, from her to this Court, requesting that the default be "reopen[ed]". She states on her "client's behalf: Excusable default-Client was never served the Supplemental

and Amended Complaint a meritorious defense to this cause of action because the co-defendant's herein has proof that no lead based paint was found in apartment 2L." In this letter, she never raises any meritorious defenses, such as that defendants were unaware that a child under seven years of age was residing in the dwelling. Additionally, in defendants' affidavit in support of the motion, they state that the apartment was lead-free based upon a dust wipe sample taken on February 13, 2006. However, they fail to disclose that they received an Order to Abate Nuisance dated August 18, 2005 from which set forth that a child was lead poisoned in their premises; that it conducted an inspection and found a lead hazard therein. Defendants also fail to state that there was lead abatement work performed in the subject premises to remedy the lead violation, which work was completed in January 11, 2006, approximately five months after the Order to Abate Nuisance was issued. During this time period, the infant plaintiff's lead levels remained elevated.

Accordingly, the motion is denied as defendants have failed to offer a reasonable excuse for their default and a meritorious defense to this action.

This constitutes the decision and order of this Court.

Dated: 1/5/15

Hon. Alison Y. Tuitt