Gallar v Dapaah
2015 NY Slip Op 31166(U)
July 8, 2015
Supreme Court, New York County
Docket Number:
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MARIA NOELIA IBANEZ GALLAR,

Plaintiff,

Index No.
150926/2015

DECISION and ORDER

- against -

Mot. Seq. 001

RICHARD ALFRED DAPAAH,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Maria Noelia Ibanez Gallar, brings this action to recover on a Promissory Installment Note ("Note") dated January 15, 2008, pursuant to which Defendant, Richard Alfred Dapaah ("Defendant" or "Mr. Dapaah") allegedly agreed to pay Plaintiff $80,000 in five annual installments of $16,000, at an annual interest rate of 5.25%.

Plaintiff now moves for an Order, pursuant to CPLR §3213, for summary judgment in lieu of complaint, for the unpaid principal in the sum of $80,000, together with the contractual interest, plus costs, expenses, and attorneys' fees incurred in connection with enforcing the Note. Plaintiff submits a supporting affidavit, which annexes a copy of the Note and Default Notice.

Defendant opposes. Defendant submits the attorney affirmation of Stephen Basedow, Esq., and the affidavit of defendant, Mr. Dapaah.

As to service, Mr. Dapaah avers, "I was unaware of this action until a family member forwarded me a copy of the summons. It was left on the walkway at a residence where I do not reside in Hauppauge, NY. I reside in Seaford, Virginia."

Mr. Dapaah avers, "Despite the contention in Plaintiff's filed Affidavit of Service, I was not served personally on February 26, 2015." Mr. Dapaah attaches a copy of his Voter Registration form, which certifies that Mr. Dapaah's "registration application was received April 9, 2015, and it was accepted and successfully entered in the voter registration system."

As to the validity of the Note, Mr. Dapaah avers that he was married to Plaintiff in New York on August 30, 1996, that the parties were separated in 2006, and the divorce was finalized on April 9, 2008. Mr. Dapaah avers, "Plaintiff demanded that I sign the within 'Note in exchange for changing the grounds of divorce to 'abandonment' from 'cruel and inhuman treatment,'" and that "[a]ny interest that I had in attaching my name to the Note was induced by Plaintiff because I did not want the grounds of my divorce to be listed, although unwarranted, as cruel and inhuman treatment."

Mr. Dapaah further avers,

> Furthermore, any funds that are the subject of this motion and underlying Note were given to both Plaintiff and myself from Plaintiff's father. In fact, monies distributed by Plaintiff's father that are believed to be the concern of the subject matter of this Note were distributed not only to both of us, but also for the purpose of funding Plaintiff's and my business together. Additionally, upon information and belief, at the time said monies were distributed, there was never any indication that said monies distributed to us would need to be reimbursed to Plaintiff's father, let alone to Plaintiff herself as she now aims to prove. Therefore, in equity, I do not believe Plaintiff is entitled to the total amount of monies demand [sic] in the within motion.

CPLR § 3213 provides, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." A document comes within CPLR § 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document. (*Id.*). The test "is not what the instrument may be

reduced to by part performance or by elision of a portion of it ... but rather how the instrument is read in the first instance." (*Weissman*, 88 N.Y.2d at 445).

In an action to recover on a promissory note, the plaintiffs establish a prima facie case by submitting proof of the note and of the defendants' default. (*Bank of NY v. Sterlington Common Assocs.*, 235 AD2d 448). It is then incumbent on defendants to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense. (*Colonial Commercial Corp. v. Breskel Assocs.*, 238 AD2d 539).

Pursuant to CPLR §308(2), service of process may be made, inter alia, by delivery of the summons within the state to a person of suitable age and discretion "at the defendant's *actual place of business, dwelling place or usual place of abode*," and by mailing the summons to the defendant at either his or her last known residence or actual place of business. (emphasis added).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]).

Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz,* 7 A.D. 3d 459 [1st Dept. 2004]).

Here, in light of Mr. Dapaah's affidavit which rebuts the statements contained in the process server's affidavit, a traverse hearing is directed concerning whether Plaintiff served Defendant at his "actual place of business, dwelling place or usual place of abode."

Wherefore, it is hereby

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including Defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JULY 8, 2015

HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST X REFERENCE