

<b>Access Group, Inc. v Morano</b>
2015 NY Slip Op 31505(U)
August 11, 2015
Supreme Court, New York County
Docket Number: 155300/2012
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
ACCESS GROUP, INC.

Plaintiff,

-against-

RACHEL MORANO

Defendants.  
-----X

DECISION AND  
ORDER

Index Nos.  
155300/2012  
Mot. Seq. 002

HON. ANIL C. SINGH, J.:

In an order dated January 9, 2014, this Court granted plaintiff's motion for default judgment in the amount of \$65, 327.74. The judgment was entered on September 22, 2014. Plaintiff received payment in full satisfaction of the judgment entered against the defendant on February 11, 2015 from the marshal in connection with a bank levy. Defendant now moves, pursuant to CPLR § 5015, to vacate the default judgment, the return of all sums obtained by or on behalf of plaintiff in full or partial satisfaction of the judgment and a dismissal of the matter for lack of personal jurisdiction. In the alternative, defendant seeks leave to respond to the Complaint filed by plaintiff in this action and a stay of all judgment enforcement pending a decision on the instant application.

Defendant has asserted that the judgment should be vacated on the basis of excusable default (CPLR 5015[a][1]). It is axiomatic that a party seeking to vacate

a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense (Benson Park Associates, LLC v. Herman, 73 A.D.3d 464, 465 [1<sup>st</sup> Dept., 2010]). In considering whether to exercise its discretion to vacate the judgment, the court must consider such relevant factors as the extent of the delay, prejudice or lack of prejudice to the opposing party and lack of willfulness, as well as the strong public policy in favor of resolving cases on the merits (Smith v. Getty Petroleum Marketing, Inc., 103 A.D.3d 790, 791 [2d Dept., 2013]). Defendant has demonstrated a reasonable excuse. Defendant claims that she resides in Florida and therefore, was never served with the summons and complaint in New York. Plaintiff's affidavits of service do not disprove defendant's claim. Indeed, in the supporting documents to the underlying action (Exhibit A of Plaintiff's Affirmation in Opposition), defendant's address is listed in Florida.

Defendant argues that she has a meritorious defense, namely, a lack of jurisdiction. Pursuant to CPLR Rule 5015 (a)(4), a party may be relieved from a court's order of judgment upon the ground of the court's lack of jurisdiction to render the judgment or order. Here, plaintiff argues that CPLR Rule 5015(a)(4) does not apply as payment has been made in full satisfaction of the judgment. However, this court notes that the payment was made in connection with a bank levy. This case is analogous to HSBC Bank USA v. A & R Trucking Co.Inc., 66

A.D.3d 606, 607 (1st Dep't., 2009). In HSBC Bank USA, the court held that there is a difference between a defendant who “either explicitly or implicitly participated in the action, thus acknowledging the validity of the judgment, or demonstrated a lack of good faith or delay in asserting [his] rights” and one who only learns of the judgment when his bank account is levied. The court decided that the defendant in that case did not waive the jurisdictional objections to default judgment.

Plaintiff's reliance on H.D.I. Diamonds Inc. v. Frederick Modell, Inc., 86 A.D. 2d 561 (1st Dep't., 1982) is misplaced; the court did not deal with a defense of lack of jurisdiction and the defendant failed to demonstrate a valid excuse for default and delayed in moving to vacate. Here, there is no suggestion that defendant ever acknowledged the validity of the judgment. Her first notice of the lawsuit was a garnishment letter sent to her by her bank in November 2014. On February 11, 2015, plaintiff entered full satisfaction of the judgment against the defendant from the marshal in connection with a bank levy. About 4 months later, defendant moved to vacate the judgment. Once again, the circumstances from the case at hand is distinguished from H.D.I. Diamonds Inc where the court held that the default was willful and the eleven month delay from the payment and satisfaction of the judgment in moving to vacate was unjustifiable. Here, there is no indication that defendant demonstrated a lack of good faith, or was dilatory in asserting her rights.

Accordingly, it is hereby

ORDERED that a Judicial Hearing Officer or Special Referee shall be designated to hear and report to this Court on the issue of service; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part, which, in accordance with the Rules of that Part, shall assign this matter to an available JHO/ Special Referee to hear and report as specified above; and it is further

ORDERED that the remainder of the motion shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

Date: August 11, 2015  
New York, New York

  
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Anil C. Singh