

Banco Popular N. Am. v GMM Baking Corp.
2015 NY Slip Op 32914(U)
October 16, 2015
Supreme Court, New York County
Docket Number: 101824/09
Judge: Doris Ling-Cohan
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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.

INDEX NO. 101824/09
MOTION DATE
MOTION SEQ. 004
MOTION CAL. NO.

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The following papers, numbered 1-5 were considered on this motion to confirm referee's report/dismiss and cross-motion to reject the referee's report or extend time to serve pursuant to CPLR 306-b:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	1, 2
Answering Affidavits — Exhibits _____	5
Replying Affidavits _____	3, 4
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

FILED

OCT 26 2015

**NEW YORK
COUNTY CLERK'S OFFICE**

DORIS LING-COHAN, J.:

Before this court is defendant Abraham Kaff's motion to confirm the referee's report, to vacate the default judgment and all liens and restraints and to dismiss this case as against him, for lack of personal jurisdiction, as well as, plaintiff's cross motion to reject the referee's report, or, in the alternative, pursuant to CPLR 306-b, for an extension of time to serve defendant Kaff.

Motion to Confirm/Dismiss

Defendant Abraham Kaff ("Kaff") previously moved to vacate the July 14, 2009 default judgment entered against him, in the amount of \$105,641.35, on the basis that he was not served with process. By order of this court dated July 10, 2014, defendant Kaff's motion was granted to the extent that a traverse hearing was ordered to be conducted by a Special Referee, with respect to service of the pleadings upon defendant Kaff.

On September 15, 2014, a traverse hearing was conducted before Special Referee Phyllis Sambuco, at which witnesses testified and evidence was presented. In her report dated January 7, 2015, Special Referee Sambuco concluded that plaintiff failed to meet its burden in demonstrating that defendant Kaff was properly served in this action.

“It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved the matters of credibility..., since the Special Referee is considered to be in the best position to determine the issues presented”. *Nager v. Panadis*, 238 AD2d 135 (1st Dept 1997)(citations omitted). Here, upon review of the transcript of the hearing, the Special Referee’s report dated January 7, 2015 has a rational basis in law and fact; as such, defendant Kaff’s motion is granted to the extent that the Special Referee’s report dated January 7, 2015, is confirmed, in its entirety, and the judgment entered against defendant Kaff dated July 14, 2009, in the amount of \$105,641.35, and any and all liens and restraints entered against defendant Kaff or his property, are hereby vacated forthwith.

Motion for Extension of Time to Serve

Pursuant to CPLR 306-b¹, service of the summons and complaint on a defendant shall be made

¹ CPLR 306-b provides in relevant part that:

“[s]ervice of the summons and complaint...shall be made within one hundred twenty days after the commencement of the action or proceeding...If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall...upon good cause shown or in the interest of justice, extend the time for service”.

within 120 days after the commencement of the action or proceeding. If service is not made within such time period, the court, within its discretion, may extend plaintiff's time to serve the summons and complaint "upon good cause shown or in the interest of justice" CPLR 306-b. To demonstrate good cause, a plaintiff must show that reasonable diligence was exercised in attempting to timely serve a defendant. *Jordan v City of New York*, 38 AD3d 336, 339 (1st Dep't 2007). Alternatively, an extension of time request sought in the interest of justice does not, as a threshold matter, require diligent attempts at service. *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). Rather, other factors may be considered, such as the expiration of the statute of limitations, whether plaintiff has a meritorious action, the length of delay in service and in plaintiff's request for an extension, and prejudice to defendant. *Id.* at 105-06.

Applying such principles herein and, in the interest of justice, plaintiff's motion to extend time to serve defendant Kaff is granted. Plaintiff made a reasonably diligent effort, albeit unsuccessful, to serve defendant Kaff, prior to the expiration of the statute of limitations. Moreover, defendant did not seek to vacate the default judgment, until almost five (5) years from the judgment's entry, despite plaintiff's proof of numerous mailings with respect to this matter, to defendant Kaff, at his undisputed address, since the action's inception, including copies of the summons, notice of motion, order granting plaintiff's motion and the judgment with notice of entry, none of which, according to plaintiff's counsel, were returned by the U.S. Postal Service. Further, this action, which is based upon an instrument for the payment of money only², appears to have merit, as

² The instrument at issue is a note on a small business line of credit executed on or about December 15, 2006, by GMM Baking Corp., with a personal guaranty, which appears to have been signed by defendant Kaff, President of GMM Baking Corp. Notice of Cross-Motion, Exhibit B.

evidenced by the affidavit of plaintiff bank's employee Brian Rynes, and supporting documentation. Notice of Cross-Motion, Exhibit B. Additionally, plaintiff promptly cross-moved for an extension of time to serve defendant, in response to defendant's motion.

Accordingly, it is

ORDERED that the motion by defendant Kaff is granted to the extent that the Special Referee's Report dated January 7, 2015, concluding that service upon defendant Kaff was improper, is confirmed and the judgment entered against defendant Kaff dated July 14, 2009 and any and all liens and restraints with respect to such judgment, as executed on defendant Kaff and/or his property, shall be vacated forthwith; it is further

ORDERED that the portion of defendant Kaff's motion which seeks dismissal of this case as against him is denied, at this juncture, without prejudice; it is further

ORDERED that plaintiff's cross-motion for an extension of time to serve defendant Kaff, pursuant to CPLR 306-b, is granted and, as such, within 120 days of entry of this order, plaintiff shall serve defendant Kaff with the pleadings; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

FILED

Dated: October 16, 2015

OCT 26 2015

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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