

LVNV Funding LLC v Agosto
2016 NY Slip Op 31111(U)
May 23, 2016
Supreme Court, Bronx County
Docket Number: 301423/15
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 301423/15**

LVNV Funding LLC,
Plaintiff,

-against-

DECISION and ORDER

Felix Agosto,

Present:

Defendants.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant’s motion to vacate a default judgment, lift all liens and restraints, allow time to interpose an answer, and/or set this matter down for a traverse hearing.

<u>Papers Submitted</u>	<u>Numbered</u>
OSC, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

In the instant action, plaintiff seeks to recover \$42,157.89 from defendant, the amount plaintiff alleges is due inclusive of interest and fees, pursuant to a Retail Charge Account Agreement between defendant Felix Agosto and Citibank. This obligation was ultimately assigned to plaintiff LVNV Funding LLC (“LVNV”) which commenced the instant action. A Judgment on Default was entered with the Bronx County Clerk, in the amount of \$42, 157.89, on June 17, 2015. Defendant now moves, by order to show cause, to vacate that judgment pursuant to CPLR 5015(a)(4) on the ground that he was not properly served with the summons and complaint and, therefore, the Court never obtained jurisdiction over him.

In support of the motion, Agosto submitted, *inter alia*, his affidavit and the affidavit of service of the summons and complaint. In his affidavit, Agosto states the he was never served with the summons and complaint in this action and “received no copies from any source whatsoever.” Agosto also states that the first time he learned that an action had been commenced against him was when he received a Notice of Garnishment in late July or early August. Agosto attached a copy of the notice, dated July 21, 2015, to his affidavit. It was only then, he claims, that he found out that LVNV had obtained a judgment against him. Agosto

disputes the affidavit of service of the summons and complaint and alleges that “[n]o person fitting the description of a Female with Brown skin and Black hair age 35 of 5 ft 6" lives in my home or lived in my home on or about April 9, 2015. According to Agosto, his wife is the only adult woman “who lives with us” and she is of Irish decent with very light skin. Nor did he receive a copy of the summons and complaint via mailing at his home. Agosto claims that he has meritorious defenses to the action including that he does not have a contractual relationship with LVNV, he never received notice that LVNV may own a debt that he owes, he never received any notice that any debt he may owe was assigned, he does not believe he owes the debt alleged, and any debt he may have owed to Citibank is barred by the six-year statute of limitations. Agosto requests that he been given the opportunity to defend against this action and for this Court to set the matter down for a traverse hearing. In his reply affidavit, Agosto states that “there is and has not been any female in my apartment nor one who would fit the person described.”

The affidavit of service of the summons and complaint in this action indicates that on 4/9/15 at 11:39 AM, a process server delivered a summons and complaint on Felix Agosto at 225 E. Mosholu Pkwy N, Apt. 2G, Bronx, NY 10467 by delivering and leaving a copy of the documents with a “CO-TENANT” who refused to give her name. The affidavit indicates that said woman “stated that said premises is intended recipients residence within the state.” The woman is described as having brown skin and black hair, being 35 years-old, 5ft 6" tall and weighing 121-140 lbs. The affidavit also indicates that, on April 15, 2015, copies of the documents were mailed to defendant at 225 E. MOSHOLU PKWY N, APT 2G, BRONX, NY 10467 by 1st class mail marked personal & confidential.

In opposition to the motion, LVNV submitted several letters mailed by its counsel to Felix Agosto at the Mosholu Pkwy address regarding the original Citibank/VISA debt in the amount of \$28,928.34 (Charge Off date 12/14/2009) and an audio CD. A January 28, 2015 letter demands repayment of the outstanding indebtedness and states that Agosto could call the office “with a view towards reaching a resolution.” A March 6, 2015 letter indicates that LVNV authorized counsel “to accept any reasonable settlement amount in order to satisfy this debt in

full.” To avail himself of this opportunity, the letter states that Agosto had to call the office within ten (10) days of receiving the letter. An April 14, 2015 letter indicates that Agosto could call account representative Judith Taylor to “attempt to come to an amicable resolution.” An April 21, 2015 letter indicates that counsel’s office had received an affidavit of service from a process server that indicates that a summons and complaint had been served upon Agosto with respect to this debt. A courtesy copy of the summons and complaint was enclosed in that mailing. Again, Agosto was encouraged to contact counsel’s office at his “earliest convenience” to discuss the matter “to curtail any further litigation.”

The audio CD contains an undated telephone conversation between Agosto and Judith Taylor. In that CD, when asked about the nature of his call, Agosto answered that he received a summons and complaint about the subject debt. Notably, at no time does Agosto dispute that he owes the money to LVNV. Rather, Agosto indicates that he has been trying for a “long time” to work out a settlement in this matter and that he had been previously offered a deal whereby he could satisfy the debt by paying only 30% of the total outstanding amount. Agosto states that his “terms” are that he pay 30% of the outstanding debt in installment payments over a two-year period. Taylor informed him that there was no record of the alleged “deal” to which Agosto referred and that, under no circumstances would LVNV settle the debt with him unless he made a lump-sum payment of some amount initially. Also, Taylor doubted that LVNV would reduce his debt by 70%. Agosto responded by saying that he wanted to resolve the debt but only under his terms, i.e., 30% over a two-year period with no initial lump-sum payment. Agosto told Taylor that he works in IT at Harlem Hospital and that he could not afford to pay any more than what he offered because he has a daughter in Catholic School and pays \$1600.00 monthly in rent. Taylor told Agosto that she would relay that information to LVNV and should get an answer by the next day. Taylor advised Agosto to call back the next day. There is no evidence that Agosto called the next day or on any other subsequent date.

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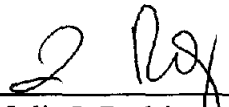
CPLR R 5015(a)(4) provides that the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested party upon

the ground of lack of jurisdiction to render the judgment or order. A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2). *See NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 777 N.Y.S.2d 483 (1st Dept. 2004). Here, Agosto claims that he was not served with the summons and complaint and, therefore, the court lacks jurisdiction over him. However, the statements in his affidavits are inconsistent to the extent that, in his initial affidavit, he states that his wife, a fair Irish woman, lives with him yet in his reply affidavit he states that "there is and has not been any female in my apartment." Notably, the affidavit of service sets forth in detail a physical description of the person served at the proper address for Agosto, who indicated that she was a co-tenant, followed by the required mailing. Also, by letter dated April 21, 2015, LVNV's counsel informed Agosto that it received confirmation that a summons and complaint had been delivered to his residence, and a copy of the summons and complaint was enclosed with that letter. This belies Agosto's claim that the first time he found out that a complaint had been filed against him was when he received a Notice of Garnishment in late July or early August of 2015. Due to the inconsistencies in Agosto's statements, his conclusory allegations that he was never served with the summons and complaint are insufficient to either establish that the court lacked jurisdiction over him or to create an issue of fact and require a traverse hearing. *See Rosario v. Beverly Rd. Realty Co.*, 38 A.D.3d 875, 833 N.Y.S.2d 166 (2nd Dept. 2007); *96 Pierrepont v. Mauro*, 304 A.D.2d 631, 757 N.Y.S.2d 468 (2nd Dept. 2003).

Nor does the court find any merit to Agosto's claim that he has a meritorious defense to the action. As noted above, he does not dispute that he owes the money. And, his claim that the statute of limitations has expired for LVNV's claims lacks merit. His last payment was received on July 23, 2010 and the instant action was commenced on March 16, 2015. Nor does the court find any merit to his remaining claims.

Based on the foregoing, Agosto's motion is **denied** in its entirety.

Dated: Bronx, New York
May 23, 2016



Hon. Julia I. Rodriguez, J.S.C.