

<b>Valley Natl. Bank v 212 Entertainment, Ltd.</b>
2016 NY Slip Op 32491(U)
December 19, 2016
Supreme Court, New York County
Docket Number: 108260/2011
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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VALLEY NATIONAL BANK,

Plaintiff,

-against-

212 ENTERTAINMENT, LTD., and  
HARRY SHASHO,

Defendants.

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DECISION AND  
ORDER

Index No.  
108260/2011

HON. ANIL C. SINGH, J.:

Defendants move by order to show cause to vacate the default judgment pursuant to CPLR 5015(a)(4) and CPLR 3211(a)(8), contending that: 1) service of process on individual defendant Harry Shasho was improper as he did not reside at the address stated in the affidavit of service; and 2) service of process on corporate defendant 212 Entertainment, Ltd., was improper because it was served at an unknown address. In the alternative, defendant moves to vacate the default judgment pursuant to CPLR 5015(a)(1) and CPLR 317, contending he has a reasonable excuse as he did not receive actual notice when the lawsuit was commenced. Plaintiff opposes the motion.

Plaintiff Valley National Bank commenced this action in 2011 by filing a motion for summary judgment in lieu of complaint to enforce a promissory note

against defendant 212 Entertainment, Ltd., and a personal guaranty executed by defendant/guarantor Harry Shasho.

A default judgment was entered on June 12, 2012.

“Where, as here, a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), and seeks a discretionary vacatur pursuant to CPLR 5015(a)(1), a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1)” (HSBC Bank USA v. Dalessio, 137 A.D.3d 860, 862-63 [2<sup>nd</sup> Dept., 2016] (internal quotation marks and citation omitted)).

#### Service on Defendant Harry Shasho

Generally, a process server’s affidavit of service constitutes prima facie proof of proper service (Summitbridge Credit Investments, LLC v. Wallace, 128 A.D.3d [2<sup>nd</sup> Dept., 2015]). The affidavit of service may be rebutted by a sworn denial of service (Rox Riv 83 Partners v. Ettinger, 276 A.d.2d 782 [2<sup>nd</sup> Dept., 2000]).

Defendant Harry Shasho states in a sworn affidavit:

Here, according to its affidavit of service, plaintiff purports to have served me under CPLR 308 by delivering and leaving summons and complaint on 7/26/2011 with a white male with black hair standing

5'9 and weighing 210 lb at 3939 Emmons Ave, #9, Brooklyn, NY 11235. This was not a proper service because on the day of the alleged service I did not reside at 3939 Emmons Ave, #9, Brooklyn, NY 11235. On 7/26/2011 I resided at my home located at 1449 Ocean Pkwy, Brooklyn, NY 11230. Further, I do not know a person described in plaintiff's affidavit of service.

For three reasons, the Court finds that defendant's affidavit is insufficient to rebut plaintiff's prima facie proof of proper service.

First, the Court finds that Shasho's contention that he does not match the description of the person served is without merit. "The fact that discrepancies may exist between defendants' actual weights and their weights set forth in the affidavits of service does not invalidate such service, particularly since all that is required is an approximation of weight" (Lincoln First Ban-Cent., N.A. v. Bombard Chevrolet, 55 A.D.2d 1048, 1049 [4<sup>th</sup> Dept., 1977]).

Second, Shasho does not state specifically that he was not served. The roundabout language he uses – "this was not a proper service" and "I do not know a person described in plaintiff's affidavit of service" – is ambiguous. Such words are not equivalent with a denial of service. Shasho fails to state literally and directly, for example, that "I was not served," or "I did not receive the summons."

Third, the process server's affidavit of service states that Shasho was served at 3939 Emmons Avenue in Brooklyn, and Shasho does not deny that the location

was his actual place of business.

New York law regarding service of a defendant at his actual place of business was summarized in Rosario v. NES Medical Services of New York, P.C., 105 A.D.3d 831 [2<sup>nd</sup> Dept., 2013]). There, the Court wrote:

CPLR 308(2) permits personal service on a natural person “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business” of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner. A person’s “actual place of business” must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location. CPLR 308(2) requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made.

(Rosario, 105 A.D.3d at 833)(internal quotation marks and citations omitted).

Plaintiff offers several documents in support of its contention that the Emmons Avenue location was both Shasho’s most recent and primary personal address at the time of service, as well as his actual place of business.

First, plaintiff exhibits the results of a public records search conducted in 2011 reflecting that Shasho used the address as his personal address on several public records and filings, including the most recent census data through May of 2011, motor vehicle registrations for numerous vehicles, voter registration records, and a judgment entered against him by Chase Bank (Dessberg Aff., exhibit N).

Second, plaintiff exhibits a copy of Shasho's drivers license that he provided to plaintiff at the time the loan was extended to comply with banking security regulations (Dessberg Aff., exhibit O). The license lists Shasho's address as 3939 Emmons Avenue in Brooklyn.

Third, plaintiff exhibits a Certificate of Assumed Name of defendant 212 Entertainment Ltd., a corporation owned by Shasho, establishing that this corporate defendant was doing business under the name of "212 Motoring" (Dessberg Aff., exhibit P).

Fourth, plaintiff exhibits additional loan documents provided and signed by defendants at the time of the loan acknowledging that defendant 212 Entertainment, Ltd., was "doing business as" 212 Motoring (Dessberg Aff., exhibit Q).

Fifth, plaintiff exhibits printouts from the website Google (Dessberg Aff., exhibit R). The map shows that 212 Motoring is located at 3939 Emmons Avenue, and the "street view" is a photograph of a one-story commercial building with a sign stating "212 Motoring."

Sixth, plaintiff exhibits printouts from 212 Motoring's Instagram and Facebook pages, which also show that it operates out of 3939 Emmons Avenue (Dessberg Aff., exhibit S).

Finally, plaintiff exhibits an article about Shasho that was published in the *Daily News* (Dessberg Aff., exhibit T). The article includes a large photograph of Shasho wearing a shirt emblazoned with the words "212 Motoring."

In light of the above evidence, the Court finds that plaintiff has established that 3939 Emmons Avenue #9 in Brooklyn was Shasho's actual place of business.

It is important to note that Shasho annexed certain exhibits to his reply papers. However, the Court cannot consider evidence submitted for the first time in reply (Jackson-Cutler v. Long, 2 A.D.3d 590 [2<sup>nd</sup> Dept., 2003]).

Moreover, defendant is not entitled to relief pursuant to CPLR 5015(a)(1), as he failed to set forth any reasonable excuse for his default, since the only excuse proffered was that service was improper. In the absence of a reasonable excuse, it is unnecessary to determine whether defendant demonstrated the existence of a potentially meritorious defense to the action.

Service on Defendant 212 Entertainment, Ltd.

Shasho contends in his sworn affidavit that service on 212 Entertainment, Ltd., was improper as the summons was mailed to an unknown address.

The process server's affidavit of service states that he delivered two copies of the summons to an authorized agent of the Secretary of State on July 26, 2011, pursuant to section 306 of the Business Corporation Law ("BCL").

When a defendant is a domestic corporation, it designates the secretary of state as its agent for service on any claim (BCL section 304). The method of service in such a case is governed by section 306(b) of the BCL, which consists of delivering to the secretary or the secretary's deputy or designee two copies of the summons. The secretary retains one for the secretary's files and sends the other by certified mail to the corporation at its office address as it appears in those files. The jurisdictional act is the delivery of the two copies to the secretary.

Defendants exhibit a printout from the Department of State's Division of Corporations dated July 26, 2016, listing 191-15 Jamaica Avenue, Hollis, New York 11423 as the address to which the secretary of state had to mail process (Motion, exhibit E). Defendants point out that the notice of default dated May 23, 2011, two months prior to the commencement of the litigation, was mailed to 2018 Hyland Boulevard, Staten Island, New York 10306. Accordingly, defendants assert that the documents mailed to 35 Neptune Avenue, Brooklyn, New York were mailed to an unknown address.

Plaintiff exhibits a copy of the written confirmation from the Secretary of State that it received a copy of process to serve on 212 Entertainment Ltd., having a "service of process" address at 35 Neptune Avenue, the address on file with the Secretary of State for purposes of service on July 26, 2011 (Dessberg Aff., exhibit

K).

Next, plaintiff exhibits a printout from the New York Secretary of State's Corporate Record's Division, confirming that at the time plaintiff commenced this action, the corporate defendant listed its address with the Secretary of State for purposes of service of process as 35 Neptune Avenue, Brooklyn, New York (Dessberg Aff., exhibit L).

Finally, plaintiff exhibits a copy of the corporate defendant's Biennial Statement that was filed with the Secretary of State with any updates to the corporation's information on file (Dessberg Aff., exhibit U). It reflects that the defendant did not change its address on file with the Secretary of State for purposes of process until 2013.

In reply, defendant asserts that it never received any notices from plaintiff because 35 Neptune Avenue has been occupied and leased by a restaurant called "1001 Nights" since 2010.

For two reasons, the Court finds that defendants have failed to state a reasonable excuse for the default.

First, it is difficult to understand how 35 Neptune Avenue could be an address unknown to the defendants when it was the defendants themselves who provided an address for service of process to the Secretary of State's office.

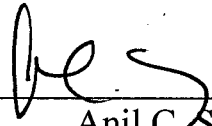
Second, “[f]ailure to file a change of address with the Secretary of State is generally not a reasonable excuse for such vacatur of a default judgment under CPLR 5015(a)(1)” (On Assignment v. Medasorb Technologies, LLC, 50 A.D.3d 342 [1<sup>st</sup> Dept., 2008]). While such a failure does not constitute a per se barrier to vacatur, and a court may allow some flexibility, flexibility is not warranted in this instance, given the significant passage of time when defendant’s address on file with the Secretary of State was not updated (id.).

Accordingly, it is

ORDERED that the motion to vacate the default judgment is denied.

The foregoing constitutes the decision and order of the court.

Date: December 19, 2016  
New York, New York

  
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Anil C. Singh