

Vance v Carter

2016 NY Slip Op 32553(U)

December 15, 2016

Supreme Court, New York County

Docket Number: 452849/15

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. MARTIN SHULMAN, JusticePART 1

Cyrus R. Vance, Jr., District Attorney of the County
of New York, in his capacity as

Plaintiff-Claiming Authority,

INDEX NO.: 452849/15

- v -

Simon Carter a/k/a Simone Carter,

Defendant.

In this CPLR Article 13-A forfeiture action, plaintiff-claiming authority ("plaintiff" or "DA") moves for a default judgment against defendant Simon Carter a/k/a Simone Carter ("Carter" or "defendant"). Defendant, who is self-represented and presently incarcerated, opposes the motion and cross-moves for an extension of time to interpose the proposed answer annexed to the cross-moving papers at Exhibit A. The DA has not submitted opposition to the cross-motion.

On October 3, 2014 defendant was arrested and ultimately indicted and charged with third and fourth degree grand larceny, first and second degree identity theft and fourth degree criminal possession of stolen property (Motion at Exh. 1). Carter is presently incarcerated, having pled guilty to third degree grand larceny (*id.* at Exh. 2).

The DA seeks judgment against defendant in the amount of \$13,579.28, alleged to be the proceeds or instrumentalities of defendant's crime. The DA alleges that Carter "presented herself as at least five different people by using their personal identifying information and credit card information in order to buy clothing and other items without their consent, knowledge, or authorization." See Goodman Aff. in Supp. of Motion, ¶14. The amount sought allegedly represents the value of those items

defendant illegally purchased which were not recovered by law enforcement and returned to the vendors.¹

Discussion

In order to successfully oppose a motion for a default judgment, defendant must demonstrate a justifiable excuse for her default and a meritorious defense. *Johnson v Deas*, 32 AD3d 253 (1st Dept 2006). To establish a reasonable excuse for her default, Carter alleges as follows: she has never been housed in the correctional facility indicated in the affidavit of service as the place where service of process was effectuated, and was not personally served with the summons and complaint at that location;² the DA will not be prejudiced in the event this court grants her an extension of time to answer; she has a meritorious defense; she was never notified that her time to answer began to run on the date of her sentencing when the statutory stay of this forfeiture action expired; and at the time of service, since the criminal action was pending and she was represented by counsel, it would stand to reason that if she had received the summons and complaint she would have given it to counsel.

As to defendant's lack of service claim, a sworn affidavit of service ordinarily constitutes prima facie evidence of proper service, but where there is a sworn denial that delivery was accomplished, the affidavit of service is rebutted and jurisdiction must

¹ Both the motion and the complaint detail each item defendant allegedly purchased (primarily designer shoes and handbags) via the internet, together with the date of the purchase, the amount and the vendor.

² Carter alleges she has been housed at correctional facilities located at 09-09 Hazen St., East Elmhurst, NY and 16-00 Hazen St., East Elmhurst, NY, but not at 15-15 Hazen St., East Elmhurst, NY (the "service address"), where the affidavit of service indicates that New York City Correction Captain Bramwell personally served her.

be established by a preponderance of the evidence at a hearing. *See Bank of Am. Natl. Trust & Sav. Assn. v Herrick*, 233 AD2d 351, 352 (2d Dept 1996). Here, in her carefully worded affidavit, Carter only denies being housed and served at the service address. Further, she does not dispute her physical description as detailed in the affidavit of service. Conclusory or bald denials of service, lacking specific rebuttals of the contents of the affidavit of service, are inadequate to trigger a jurisdictional hearing (*Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [2d Dept 1996]; *Fairmount Funding Ltd., v. Stefansky*, 235 AD2d 213 [1st Dept 1997]) and insufficient to establish improper service.³ The remainder of defendant's arguments similarly fail to establish a reasonable excuse for her default.

Having found Carter failed to establish a reasonable excuse for her default, it is unnecessary for this court to address the merits of her proposed defenses. Nevertheless, even if defendant established a reasonable excuse for her default, her proposed answer and defenses lack merit.

First, notwithstanding her guilty plea, Carter's proposed answer denies the majority of the complaint's allegations regarding the details of her crimes. However, her guilty plea precludes her from challenging plaintiffs' entitlement to judgment on default. A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts. *Graves v DiStasio*, 166 AD2d 261, 262-263 636 (1st Dept 1990). Therefore, a

³ Defendant also fails to allege lack of service as a proposed affirmative defense and fails to cross-move to dismiss this action on this ground or to seek a traverse hearing. Although she is self-represented, her opposition and cross-motion are well written and researched, indicating that she either received legal assistance or is a sophisticated litigant.

defendant who pleads guilty to a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based. *Id.*; *S.T. Grand, Inc. v City of New York*, 32 NY2d 300 (1973).

As to Carter's four affirmative defenses, the first alleges that, in violation of CPLR §§ 3013, 3014 and 3016(b) and (f), the complaint's allegations are not sufficiently particular to give notice of the transactions and occurrences intended to be proved and the material elements of each cause of action. Defendant bases this defense on the complaint's failure to identify the alleged victims of her crimes and submit affidavits from them. She also argues that the DA failed to comply with CPLR 3016's pleading specificity requirements for fraud causes of action (CPLR 3016[b]) and actions for the sale and delivery of goods (CPLR 3016[f]).

At the outset, this is an action for forfeiture pursuant to CPLR Article 13-A. It does not allege civil fraud nor is it based upon the sale and delivery of goods. As such, CPLR 3016 (b) and (f) are inapplicable. Moreover, the charts detailing the dates, vendors, items plaintiff illegally purchased and the purchase prices are sufficient to state a cause of action as well as to establish entitlement to judgment by default. Plaintiff relies upon the verified complaint's allegations to establish the facts constituting the claim and the amount due. See CPLR §3215(f). The complaint is verified by a State Police Investigator who attests to his participation in the investigation related to this action and the crimes described herein. For the foregoing reasons, Carter's first proposed affirmative defense lacks merit.

The second proposed affirmative defense is based upon a typographical error in the complaint, to wit, there are two (2) first causes of action. Carter points out that

paragraphs 15 through 23 of the complaint are identified as the first cause of action, yet the "wherefore" clause demands judgment based upon two alleged causes of action. It is apparent that paragraphs 20 through 23 should have been identified as the second cause of action. This mistake is of no moment and shall be disregarded in this court's discretion. See CPLR §2001. Defendant further claims the second cause of action is repetitive of the first. However, they are distinct in that the first cause of action seeks a money judgment for the amount Carter paid for illegally purchased items not recovered by law enforcement, while the second cause of action seeks forfeiture of the purchased items.

The third proposed affirmative defense alleges that the DA cannot maintain this action on behalf of a crime victim unless the victim received an award of financial assistance or compensation from the Office of Victim Services, for which the crime victim or representative becomes subrogated to the state (Executive Law, Article 22). This defense is wholly inapplicable to this CPLR Article 13-A forfeiture action and is not brought on behalf of the crime victims.

Finally, the fourth proposed affirmative defense alleges that, as part of her plea agreement and stipulation defendant was released from further liability for forfeiture. A review of that stipulation (Cross-Motion at Exh. B) reveals that it was applicable to illegally purchased items that were recovered, not those that were not recovered. Accordingly, this defense also lacks merit.

With respect to the cross-motion's request for an extension of time to answer, the DA has sufficiently demonstrated entitlement to the default judgment sought. In light of the foregoing findings regarding Carter's failure to establish a reasonable

excuse for her default or a meritorious defense, granting such an extension would serve no purpose. For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for a default judgment is granted and defendant's cross-motion is denied; and it is further

ORDERED that the New York County Clerk is directed to enter judgment in favor of plaintiff Cyrus R. Vance, Jr., District Attorney of the County of New York and against defendant Simon Carter a/k/a Simone Carter in the amount of \$13,579.28, with interest as calculated by the Clerk at the statutory rate from September 30, 2015, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to defendant and counsel for plaintiff.

Dated: December 15, 2016



Hon. Martin Shulman, J.S.C.