

Worldwide Asset Purch., LLC v Smith
2017 NY Slip Op 31010(U)
March 31, 2017
Supreme Court, Suffolk County
Docket Number: 20381/05
Judge: Thomas F. Whelan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

ORDERED that the cross motion (#003) by the petitioner and/or its assignee for an order correcting, *nunc pro tunc*, the name of the assignee set forth in an Assignment of Judgment filed with the County Clerk on January 19, 2016 to reflect the true and intended identity of the assignee, or leave to file an amended assignment, *nunc pro tunc*, to reflect the true and correct name of the assignee as Galaxy Portfolios, LLC, is granted to the extent set forth below; and it is further

ORDERED that upon the Court's own motion, counsel for the respective parties are directed to show cause why an order should or should not be made and entered imposing such sanctions and/or costs, if any, against the respondent's counsel pursuant to 22 NYCRR 130-1.1(c), as this court may find appropriate, by submission of an affirmation and/or affidavit on that issue to the Chambers of the undersigned and by serving a copy of the same on each other on or before **May 12, 2017**; and it is further

ORDERED that the Clerk of this IAS Part, shall forthwith serve a copy of this order upon appearing counsel by facsimile and regular mail.

In August of 2005, the petitioner commenced this special proceeding for an order confirming a June 14, 2004 arbitration award in the amount of \$23,712.91 in favor of the petitioner against the respondent, Rosemary A. Smith. By order dated October 28, 2005, this court granted the unopposed petition, as the respondent failed to appear herein by answer.

The documents now before the court include a September 9, 2005 affidavit of service by a process server which reflects that respondent Smith was served with the notice of petition, petition and other initiatory papers on September 3, 2005 by personal delivery of such papers to her at her home pursuant to CPLR 308(1). In an affirmation attached to the cross moving papers of the petitioner dated December 6, 2016, its former counsel avers that in response to such service, respondent Smith contacted him by phone in order to arrange a payment schedule and thereafter appeared at his office and executed a document under oath entitled "Affidavit of Confession of Judgment" dated September 21, 2005, which bears the caption and index number of this special proceeding. Therein, the respondent submitted to the jurisdiction of this court with respect to this special proceeding and agreed to pay the petitioner the sum of \$200.00 a month beginning on September 30, 2005 until the amount owed under the arbitration award was paid in full. Continuing, the petitioner's original counsel avers that respondent Smith paid a total of \$1,000.00 on the debt. However, the payments made were untimely and otherwise not in keeping with the terms of the Affidavit of Confession of Judgment. On November 9, 2005, counsel for the petitioner requested the Clerk to docket the October 28, 2005 order of this court as a judgment pursuant to CPLR 2222, and said order was so docketed.

In an affirmation by the petitioner's current counsel, she avers, among other things, that under a written assignment dated February 19, 2015, the petitioner assigned its judgment to Galaxy Portfolio, LLC, but the original of said assignment was lost and thus never filed with the Clerk. In December of 2015, a new Assignment of Judgment was executed by the petitioner in which it erroneously named itself as the assignee due to a clerical error. However, this error was not discovered prior to the forwarding of this assignment to the Clerk who filed it on January 19, 2016. The petitioner's current

counsel was then substituted for its original counsel by the filing of a consent to change attorney in January of 2016. In March of 2016, the plaintiff's counsel issued an Income Execution which the Suffolk County Sheriff executed upon the respondent's employer in November of 2016.

In response to service of that Income Execution, the respondent retained counsel who now appears, together with the respondent, in support of her motion (#002) to vacate said Income Execution and the other proceedings had herein and the other relief outlined above. In the Order to Show Cause dated December 2, 2016 [Molia, J], by which the respondent's motion was interposed, the relief requested is premised upon the following two grounds: 1) that the October 28, 2005 order confirming the arbitration award that was docketed as a judgment on November 9, 2005 is void due to a lack of jurisdiction over the respondent; and 2) that said order and judgment and the respondent's underlying default in answering be vacated pursuant to the discretionary excusable default grounds contemplated by CPLR 5015(a)(1) and that she be permitted to appear and defend on the merits pursuant to CPLR 3012(d). These two grounds are, however, enlarged in the supporting affirmation of respondent's counsel to include a claim for a vacatur of the October 28, 2005 order, docketed as a judgment on November 9, 2005, for lack of "subject matter jurisdiction" by virtue of a purported lack of standing or capacity to sue on the part of the plaintiff.

In support of those portions of her motion (#002) in which she seeks a vacatur of the judgment due to the purported absence of personal jurisdiction, respondent Smith avers in an affidavit dated November 29, 2016, as follows:

1. Within the last 2 weeks my employer informed me of its receipt of the Income Execution attached as Exhibit A. Sometime prior to this I had received this Income Execution from the Sheriff.
2. Before I received this Income Execution, I had no knowledge that I had been sued or there was a judgment (Exhibit B) against me.
3. Before I received this Income Execution, I never heard of World Wide Asset Purchasing, LLC or its attorney, Harris Beach PLLC.
4. My attorney informs me that Worldwide Asset Purchasing, LLC and its former attorneys, Fabiano & Associates, P.C. obtained the Judgment against me pursuant to a Petition (Exhibit C) filed in August 2005 to confirm an Arbitration Award (Exhibit D) issued in June of 2004.
5. I was never served with the Petition to confirm Arbitration Award. I never was served with any court papers before I received the Income Execution issued attached as Exhibit A. Nobody ever came to my house to try to serve with me with any papers. There were never any papers affixed to my door, I never received any legal papers in the mail before I received the Income Execution attached as Exhibit A.

The foregoing factual averments of the respondent are flatly contradicted by the content of the duly sworn "Affidavit of Confession of Judgment" dated September 21, 2005, in which, respondent Smith submitted to the jurisdiction of this court and agreed to make payments to the petitioner under the terms of the money judgment entered against her in November of 2005. The factual averments set forth in the respondent's November 29, 2016 supporting affidavit are also flatly contradicted by the factual averments set forth in the affirmation of petitioner's counsel regarding the petitioner's initial telephone contact with him and her execution of the Affidavit of Confession of Judgment. The November 29, 2016 factual averments of the respondent are further contradicted by the factual averments contained in the September 7, 2005 affidavit of the petitioner's process server who therein attested to his personal service of process upon the respondent on September 3, 2005 by in hand delivery. Although the September 7, 2005 affidavit of the petitioner's process server was not previously filed with the Clerk, this failure to file is of no consequence. There is no requirement for the filing of an affidavit of service reflecting in hand, personal delivery of process pursuant CPLR 308(1), except in mortgage foreclosure actions (*see* CPLR 308; 306; *cf.*, CPLR 3408).

The respondent's submissions in opposition to the petitioner's cross motion (#003) and in reply to the petitioner's opposition to the respondent's motion-in-chief take the form of an unsworn and unaffirmed Memorandum of Law that fails to address, let alone challenge in any manner, the factual averments set forth the September 7, 2005 affidavit of the petitioner's process server evidencing personal service of process upon the petitioner on September 3, 2005. Nor do the respondent's submissions address or challenge the content or authenticity of the September 21, 2005 Affidavit of Confession of Judgment executed by her under oath. Also not addressed nor contested are the factual averments set forth in the affirmation of the petitioner's original counsel, including the circumstances surrounding the respondent's execution of the September 21, 2005 Affidavit of Confession of Judgment and her payment of monies towards the outstanding balance following her execution of said Affidavit. Finally, the respondent's opposition/reply papers fail to address the averments contained in the affirmation of the petitioner's counsel regarding the affidavit of personal service and the filed affidavit of the mailing of the notice of petition and petition to the respondent pursuant to CPLR 3215(g) prior to the docketing of the October 28, 2005 order confirming the arbitration award as a judgment entered upon default.

For the reasons stated below, the respondent's motion (#002) is denied, while the petitioner's cross motion (#003) is granted to the extent set forth herein.

In accordance with the dictates of controlling decisional law emanating from the Appellate Division, Second Department, this court shall first consider the respondent's motion (#002), beginning with the demand for a vacatur of the money judgment entered against her on the ground that the court lacked jurisdiction over the person of the defendant due to the petitioner's failure to serve process upon her in a jurisdictionally proficient manner (*see Community West Bank, N.A. v Stephen*, 127 AD3d 1008, 9 NYS3d 275 [2d Dept 2015]; *E*Trade Bank v Vasquez*, 126 AD3d 933, 934, 7 NYS3d 285, 286 [2d Dept 2015]; *HSBC Bank USA Natl. Ass'n v Miller*, 121 AD3d 1044, 995 NYS2d 198[2d Dept 2014]).

“A process server's affidavit of service constitutes prima facie evidence of proper service” (*Scarano v Scarano*, 63 AD3d 716, 716; 880 NYS2d 682 [2d Dept 2009]; see *NYCTL 2009-A Trust v Tsafatinos*, 101 AD3d 1092, 1093, 956 NYS2d 571 [2d Dept 2012]). To rebut that presumption and succeed on a motion to vacate an order or judgment due to lack of personal jurisdiction pursuant to CPLR 5015(a)(4), the movant must submit a sworn denial of receipt of service containing specific facts to refute the statements in the affidavit of the process server (see *Wells Fargo Bank, N.A. v Tricarico*, 139 AD3d 722, 32 NYS3d 772 [2d Dept 2016]; *Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733 5 NYS2d 112 [2d Dept 2015]; *JPMorgan Chase v Todd*, 125 AD3d 953, 2015 WL 775077 [2d Dept 2015]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984–985, 912 NYS2d 96 [2d Dept 2010]). Bare and unsubstantiated denials of service are insufficient to rebut the presumption of proper service established by the duly executed affidavit of service of the plaintiff's process server, or even to require a hearing (see *Bank of New York v Krausz*, 144 AD3d 718, 41 NYS3d 84 [2d Dept 2016]; *US Bank Natl. Assn. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *Stevens v Charles*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *NYCTL 2009-A Trust v Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 [2d Dept 2012]; *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 826, 954 NYS2d 577 [2d Dept 2012]). Here, the respondent failed to submit a sworn denial of receipt of service containing specific facts which refute the statements in the affidavit of the plaintiff's process server.

In addition, the respondent waived the issue of lack of personal jurisdiction by appearing in this special proceeding by consent as stated under oath in her September 21, 2005 Affidavit of Confession of Judgment without raising said issue and by making payments under the terms that affidavit subsequent to its entry (see *Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 990 NYS3d 522 [2d Dept 2014]; *Calderock Joint Ventures, L.P. v Mitiku*, 45 AD3d 452, 848 NYS3d 452 [2d Dept 2007]). Those portions of this motion (#002) wherein the respondent seeks a vacatur of the judgment pursuant to CPLR 5015(a)(4) due to a purported lack of personal jurisdiction together with a vacatur of all post judgment enforcement proceedings brought thereunder are thus denied.

Also denied is the request for a vacatur of the judgment and all post-judgment proceedings due to a purported lack of subject matter jurisdiction. While this relief was not noticed in the Order To Show Cause by which the respondent's motion was interposed, it was addressed by petitioner's counsel in her opposition to the respondent's motion-in-chief and is thus before the court for determination.

The request for vacatur of the judgment due to a purported lack of subject matter jurisdiction is predicated upon a purported lack of standing or capacity to sue on the part of the petitioner due to its status as an unlicensed, foreign, limited liability company. However, both standing and a lack of capacity to sue are affirmative defenses that are not jurisdictional in nature (see *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242-244, 837 NYS2d 247 [2d Dept 2007]; see also *Bank of New York Trust Co., N.A. v Chiejina*, 142 AD3d 570, 36 NYS3d 512 [2d Dept 2016]; *Consumer Solutions, LLC v Charles*, 137 AD3d 952, 27 NYS3d 216 [2d Dept 2016]; *Mortgage Electronic*

Registration Systems, Inc. v Holmes, 131 AD3d 680, 17 NYS3d 31 [2d Dept 2106]; *JP Morgan Chase Bank Natl. Assoc. v Butler*, 129 AD3d 777, 12 NYS3d 145 [2d Dept 2015]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 962 NYS3d 301 [2d Dept 2013]). Consequently, those defenses were waived by the respondent's failure to raise them in either a timely, pre-answer motion to dismiss on those grounds or in a timely served answer containing one or more of such defenses (see CPLR 3018[b]; 3211[a], [e]; *US Bank Natl. Ass'n. v Konstantinovic*, 147 AD3d 1002, 48 NYS3d 182 [2d Dept 2017]; *Nationstar Mtge., LLC v Avella*, 142 AD3d 594, 595, 36 NYS3d 679 [2d Dept 2016]; *Bank of N.Y. Trust Co., N.A. v Chiejina*, 142 AD3d 570, *supra*; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242-244, *supra*). As such, they may not be used to support an application to vacate a default unless such default is or has been the subject of a successful application to vacate on excusable default on grounds pursuant to CPLR 5015(a)(1) or 3012(d) (see *Wells Fargo Bank, Natl. Ass'n. v Laviolette*, 128 AD3d 1054, 10 NYS3d 538 [2d Dept 2015]; *U.S. Bank, N.A. v Bernabel*, 125 AD3d 541, 5 NYS3d 372 [1st Dept 2015]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, 979 NYS2d 533 [2d Dept 2014]; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

The court further denies the respondent's demands for an order vacating the judgment and post-judgment proceedings pursuant to CPLR 5015(a)(1) and for leave pursuant to CPLR 3012(d) to appear herein by answer and defend against the merits of the petitioner's claim for confirmation of the arbitration award issued some twelve years ago. To be entitled to such relief, the movant must establish: 1) a reasonable excuse for the default; and 2) possession of a meritorious defense to the action (see *Wells Fargo Bank, N.A. v Stewart*, 146 AD3d 921, 45 NYS3d 207 [2d Dept 2017]; *Gershman v Ahmad*, 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; *Citimortgage, Inc. v Stover*, 124 AD3d 575, 2 NYS3d 147 [2d Dept 2015]; *HSBC Bank USA, Natl. Ass'n v Rotimi*, 121 AD3d 855, 995 NYS2d 81 [2d Dept 2014]; *Diederich v Wetzell*, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]; *Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *Ogman v Mastrantonio Catering, Inc.*, 82 AD3d 852, 918 NYS2d 375 [2d Dept 2011]; *Hossain v Fab Cab Corp.*, 57 AD3d 484, 868 NYS2d 746 [2d Dept 2008]). The material facts of the asserted meritorious defense must be advanced in an affidavit of the defendant or a proposed verified answer attached to the moving papers (see *Gershman v Ahmad*, 131 AD3d 1104, *supra*; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]). A review of the submissions of the respondent here reveal that none of the elements necessary for a discretionary vacatur were established. The application for relief under CPLR 5015(a)(1) and 3012(d) is thus denied.

In view of the foregoing, all demands for relief set forth in the respondent's motion (#002) are denied for want of merit.

The petitioner's cross motion (#003) for a nunc pro tunc correction of the Assignment of Judgment filed with the Clerk is denied, but the petitioner's alternate request for leave to file an

amended Assignment of Judgment reflecting the proper and intended assignee is granted to the extent that the petitioner is hereby granted leave to file a corrected assignment with the Clerk within 45 days of the date of this order, *nunc pro tunc* to January 19, 2016, the date the original incorrect assignment was filed.

The court finds it necessary to address several matters of deep concern arising from the papers submitted by respondent's on these current motions. As indicated above, the factual averments advanced under oath by respondent Smith in the November 29, 2016 affidavit she put before this court in support of her motion (#002) regarding her purported lack of any knowledge of the existence of this special proceeding anytime prior to the Sheriff's service of the Income Execution dated March 14, 2016, are flatly contradicted by those advanced in her September 21, 2005 Affidavit of Confession of Judgment. In addition, the November 29, 2016 factual averments of the respondent are also flatly contradicted by the factual averments regarding in hand, personal service of the notice of petition and petition advanced in the September 9, 2005 affidavit of the petitioner's process server. Moreover, the November 29, 2016 factual averments of the respondent are contradicted by the factual averments set forth in the December 6, 2016 affirmation of the petitioner's original counsel concerning the respondent's telephone contact with him five days after the notice of petition and petition were served upon her and the circumstances surrounding her execution of the September 21, 2005 Affidavit of Confession of Judgment.

The forgoing circumstances are profoundly disconcerting as they implicate conduct on the part of the respondent that may have been aimed at misleading the court. Such conduct includes the putting forth, under oath, delusive factual averments regarding the respondent's purported absence any of knowledge of this action for a period of twelve years following its commencement and the purported lack of service of process upon the respondent. The failure of respondent Smith to address the petitioner's testimonial and documentary evidence that directly refutes the factual averments set forth in the respondent's November 29, 2016 affidavit transforms the implication that false facts were put before this court into a presumption. Accordingly, the respondent is hereby advised that the court may direct a referral of the record of this proceeding to appropriate law enforcement officers for purposes of determining whether any crimes were committed. Such referral, if any, will issue after the further proceedings contemplated by this order are concluded.

Also of grave concern to the court is the conduct of defense counsel in failing to address, let alone explain or refute, the sharp contradictions in the factual averments advanced by his client in her November 29, 2016 affidavit support of her motion (#002) that arise from the unchallenged factual averments set forth in the affidavits/affirmations and documentation submitted by the petitioner in opposition to the respondents' motion, including the September 21, 2005 Affidavit of Confession of Judgment. As indicated above, the reply papers submitted by counsel took the form of an unsworn and unaffirmed "Memorandum of Law" which was silent with respect to petitioner's submissions. By virtue of this conduct, the factual averments set forth in the petitioner's opposing papers, including the affirmation of its original counsel, the affidavit of its process server and those set forth in the September 21, 2005 Affidavit of Confession of Judgment, were essentially admitted by the respondent and her counsel.

Under these circumstances, the court finds that defense counsel was under a duty to advise the court of an inability to challenge the content of the petitioner's opposing submissions and to withdraw so much of the motion the respondent's motion (#002) that was predicated upon the flatly contradicted factual averments of the respondent quoted above. Moreover, because these seemingly unvarnished averments served as the predicate for respondent's application to vacate the judgment due to a purported lack of personal jurisdiction, defense counsel's continuing pursuit of the remedy of vacatur based upon a purported lack of personal jurisdiction rendered the pursuit of that remedy without any basis in fact or in law. Defense counsel's conduct thus constituted frivolous conduct within the meaning of 22 NYCRR Part 130-1.1(c)(1) and (3). In addition, the conduct on the part of defense counsel in submitting the respondent's November 26, 2016 affidavit containing the mendacious averments of his client casts doubt upon the veracity of the certification of defense counsel's pre-filing engagement of a reasonable inquiry into the non-frivolous nature of the contentions advanced in the moving papers, which certification was executed by defense counsel and affixed to the legal back of the moving papers as contemplated by 22 NYCRR Part 130-1.1-a.

Accordingly, and upon the court's own motion pursuant to y 22 NYCRR § 130-1.1(d), counsel for the respective parties are directed to show cause why an order should or should not be made and entered imposing such sanctions and/or costs, if any, against the respondent's counsel pursuant to 22 NYCRR 130-1.1(c), as this court may find appropriate, by submission of an affirmation and/or affidavit on that issue to the Chambers of the undersigned and by serving a copy of the same on each other on or before **May 12, 2017**.

Dated: March 31, 2017



THOMAS F. WHELAN, J.S.C.