

High-Tech Plumbing & Heating, Inc. v Foster

2017 NY Slip Op 31358(U)

June 20, 2017

Supreme Court, New York County

Docket Number: 653807/2016

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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High-Tech Plumbing & Heating, Inc.,

Plaintiff,

Index No.
653807/2016

**DECISION and
ORDER**

- against -

Mot. Seq. #001

Darren Foster,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, unjust enrichment, *quantum meruit*, account stated, fraud, and fraud in the inducement. Plaintiff High-Tech Plumbing and Heating, Inc. (“High-Tech” or “Plaintiff”) claims to have provided plumbing repairs and heating system updates for the vacation home in Manchester, Vermont belonging to defendant Darren Foster (“Foster” or “Defendant”). In the verified complaint, Plaintiff alleges that Defendant retained Plaintiff in February 2016 and was first invoiced by Plaintiff on February 23, 2016 for \$7,895.00. Defendant promptly made payment on this invoice. Plaintiff then sent a second letter detailing plumbing services dated March 1, 2016 and later performed said services prior to receiving a response from Defendant. Plaintiff alleges to have alerted Defendant of his outstanding balance of \$11,340.00 on April 18, 2016, and claims to date, the invoice remains due and owing to Plaintiff.

Plaintiff commenced the action on July 20, 2016, by summons and verified complaint. Plaintiff now moves for an order, pursuant to CPLR 3215, directing the entry of Judgement in favor of the Plaintiff and against Defendant in the amount of \$11,340.00 with interest, costs, and disbursements.

In support of its motion, Plaintiff submits the attorney affirmation of Melissa A. Cavaliere; a copy of Plaintiff’s summons and verified complaint; a copy of the affidavit of Richard Pearce, principal of Plaintiff corporation; copies of the letters

sent by Plaintiff to Defendant listing the work to be performed, dated February 23, 2016 and March 1, 2016; copies of the invoices sent by Plaintiff to Defendant dated March 1, 2016 and April 18, 2016; a copy of Kevin McCarthy's affidavit of service, dated August 22, 2016, with respect to the summons and complaint served on August 18, 2016 upon "Jessica 'Last Name Refused'", a concierge of suitable age and discretion; a copy of the supplemental summons and complaint upon the Defendant via first-class mail; and a copy of Eva Campoli's affidavit of service dated September 23, 2016 with respect to the Notice of Motion for Default Judgment and Affirmation with Exhibits upon Defendant via mail.

Defendant opposes and cross-moves for an Order, pursuant to CPLR 327¹ and CPLR 3211 (a) (8), (a) (4), and (a) (7)², dismissing Plaintiff's complaint on the grounds of *forum non conveniens*, lack of jurisdiction due to improper service, failure to state a cause of action and based on another action pending between the parties in Vermont. In the alternative, Defendant cross-moves for an Order directing Plaintiff to post security for costs pursuant to CPLR 8501³ and if costs are not so posted, dismissing the action pursuant to CPLR 8502⁴. In opposition, Defendant submits the affidavit of Defendant Foster; a copy of Defendant's action pending between the parties in Vermont; a copy of Kevin McCarthy's affidavit of service with respect to the summons and complaint served on August 18, 2016 upon "Jessica 'Last Name Refused'"; a copy of Plaintiff's verified complaint; the invoices from Plaintiff and a Memorandum of Law. Plaintiff opposes Defendant's cross-motion.⁵

¹ CPLR 327 (a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just."

² CPLR 3211 (a) (8) provides for a motion to dismiss for lack of jurisdiction; CPLR 3211 (a) (4) provides for a motion to dismiss when there is an action between the parties pending in a different state; CPLR 3211(a) (7) provides for a motion to dismiss when the pleading fails to state a cause of action.

³ CPLR 8501 (a) provides "[e]xcept where the plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made."

⁴ CPLR 8502 provides that "[u]ntil security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor."

⁵ Plaintiff submits a Memorandum of Law in Opposition to Defendant's Cross-Motion to Dismiss; a copy of the summons and verified complaint; a copy of Kevin McCarthy's affidavit of service with respect to the summons and complaint served on August 18, 2016 upon "Jessica 'Last Name Refused'"; copies of the letters and invoices sent by Plaintiff to Defendant; a photocopy of two checks issued by Defendant to Plaintiff dated February 20, 2016 and

CPLR 3215 provides, in relevant part: “[o]n any application for judgment by default, the applicant shall file proof... of the facts constituting the claim, the default and the amount due by affidavit made by the party.” CPLR 3215 (f) permits a party to use a verified complaint as the “affidavit of facts constituting the claim.” (CPLR 3215 [f]) The standard of proof on an application for judgment by default is not stringent, “amounting only to some firsthand confirmation of the facts.” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994])

CPLR 3215 (g) (3) (i) requires:

When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend “personal and confidential” and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence.

CPLR 308 (2) allows service of process upon an individual who is not the defendant on behalf of the defendant by:

February 22, 2016; a copy of Defendant's business card; a copy of 914 Equities LLC's registration with the New York State Division of Corporations; and an affirmation certifying the exhibits accompanying the verified complaint. Defendant responds by submitting a Reply Affidavit in Support of its Cross Motion to Dismiss; copies of earlier invoices from Plaintiff to Defendant, dated from December 10, 2015 through March 1, 2016; a copy of a letter showing Plaintiff has retained counsel in the pending action between the parties in Vermont as well as a copy of the Demand for Documents in that action; and a copy of Plaintiff's Discovery Order in the Vermont action.

delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence...

“In order to successfully oppose a [motion for] default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense” (*ICBC Broadcast Holdings—NY v Prime Time Adv.*, 26 AD3d 239, 240 [1st Dept 2006]). However, where there is a defense of lack of personal jurisdiction, a defendant need not show a reasonable excuse and meritorious defense (*see Ortiz v Santiago*, 303 AD2d 1, 4 [1st Dept 2003]; *European Am. Bank v Legum*, 248 AD2d 206, 208 [1st Dept 1998]). The affidavit of plaintiff’s process server constitutes prima facie evidence of proper service (*see Matter of Nazarian v Monaco Imports, Ltd.*, 255 AD2d 265 [1st Dept 1998]). To rebut this prima facie showing, defendant is required to submit a sworn, non-conclusory denial of service or swear to specific facts to rebut the statements in the process server’s affidavit (*see NYCTL 1998—1 Trust v Rabinowitz*, 7 AD3d 459, 777 [1st Dept 2004]). Where, as in this case, there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing (*see Bank of Am. Natl. Trust & Sav. Assn. v Herrick*, 233 AD2d 351, 352 [1996]).

According to Plaintiff’s affidavit of service, Plaintiff’s process server, Kevin McCarthy, attempted to serve Defendant at Five Renaissance Square, apartment 16C, White Plains, NY 10601 on August 18, 2016. McCarthy states in his affidavit that he delivered a true copy of the summons and verified complaint upon “Jessica ‘Last Name Refused’”, a concierge in the building who confirmed that this address was Defendant’s residence within the State of New York. The affidavit also states that on August 22, 2016, McCarthy mailed a copy of the same documents addressed to Defendant at the Five Renaissance Square address.

Defendant, in his affidavit, avers that he permanently resides at 48 West Road, Manchester Village, Vermont. He states that the address in White Plains, NY is not his residence and Plaintiff was aware that Defendant resided in Vermont. (aff of Foster at 3) Defendant further avers that “[s]ince service was not at my residence, and Plaintiff has always known where my residence is (in Vermont), I am advised by counsel that the service is invalid. Accordingly, I could not be in default in this action, and this Court lacks jurisdiction over me.” (aff of Foster at 4)

Defendant Foster has provided a sworn affidavit denying that Five Renaissance Square, apartment 16C, White Plains, N.Y. 10601 is his “actual... dwelling place or usual place of abode” (CPLR 308 [2]). Because Defendant avers in his affidavit dated October 24, 2016 that “[he] resides in Manchester Village, Vermont, at the Premises. High-Tech knows this...” Defendant has submitted a sworn denial that delivery to the defendant was accomplished. Therefore, Defendant has rebutted the Kevin McCarthy affidavit of service dated August 22, 2016 wherein Kevin McCarthy avers that he served Defendant through “Jessica ‘Last Name Refused’” by personal delivery as well as by post-paid mail. Thus, defendant’s sworn statement raises issues of fact as to proper service, and is sufficient to warrant a traverse hearing. In light of this determination, at this juncture, the Court does not reach the Plaintiff’s remaining contentions (*see Banker Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003]).

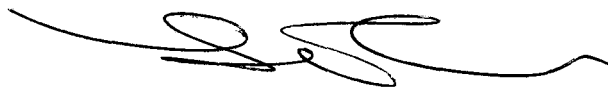
Wherefore, it is hereby,

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119 A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 20, 2017



EILEEN A. RAKOWER, J.S.C.