

Kidron v Sun Dragon Indus.
2017 NY Slip Op 32432(U)
November 15, 2017
Supreme Court, New York County
Docket Number: 653667/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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ADAM KIDRON,

Plaintiff,

Index No.
653667/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 003 &
004

SUN DRAGON INDUSTRIES, SAINT INDUSTRIES AND
SANDRO DARSIN,

Defendants.
-----X

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

Plaintiff Adam Kidron (“Kidron”) commenced this action for breach of contract, breach of express warranty and negligence on November 26, 2014 against Defendants Sun Dragon Industries (“Sun Dragon”), Sandro Darsin (“Darsin”), and Saint Industries. On November 19, 2015, Kidron moved for an Order, pursuant to CPLR 3215, granting judgment on default against Sun Dragon and Darsin. Neither defendant opposed the motion. On January 5, 2016, this Court granted default judgment and ordered an assessment of the damages. This assessment was assigned to the Honorable Ira Gammerman, J.H.O. (“Judge Gammerman”), who heard this matter on February 16, 2017. The resulting transcript of the hearing was so ordered by Judge Gammerman on April 13, 2017.

Motion Sequence 003

Kidron now moves for an Order confirming Judge Gammerman’s recommendation of damages. The transcript, of which there is only 7 pages, provides as follows,

“The Court: “Listen to me, let’s assume the basic contract, considering now all the change orders, if they had

performed [sic] everything they were supposed to do pursuant to the terms of the original contract, and pursuant to the terms of all the change orders, and they have performed it in a proper manner, and the[re] was no further work that needed to be done, how much would you have paid them?

Mr. Kidron: Around \$1.8 million.

The Court: Okay. How much did the project eventually cost you . . .

Mr. Kidron: 3.9 million.

The Court: So, if we take 1.8 from 3.9, that's the additional amount that you had to pay? . . .

Mr. Kidron: Yeah.

The Court: Okay. So, we're talking about two million-one hundred thousand dollars, is that correct?

Mr. Kidron: Correct.

The Court: That's what I recommend to Judge Rakower."

(tr at 6 -7)

No opposition to this Order to Show Cause is submitted.

Motion Sequence 004

Darsin, proceeding pro se, also moves by Order to Show Cause for an order vacating the default judgment and granting Darsin leave to interpose an answer. Darsin avers,

"I was never served with the following documents: Exhibit 'A', Exhibit 'B' & Exhibit 'C'. Please note post office marked same as 'unclaimed', "undeliverable as addressed' & 'Return to Sender'. Also, attached as 'Exhibit C' please

find copies of my passport showing that I was not in the U.S. for the period December 20th, 2014 to March 06th, 2015 [sic] and I did not find any papers to my door upon my return. Also please note last zip code used in some correspondence is not correct. As you may see correct code is 10512, not 12582 . . . The only reason I found out about this case is because I received the latest document, "Exhibit E" . . . via UPS at my office address. I understand that some correspondence was being sent to my former accountant's office but I have not been in touch with him since I had to close my business . . ."

(Order to Show Cause of Darsin at 2-3)

"I believe I have a meritorious defense and wish to be heard by the Court . . . it should be noted, that Plaintiff fails to state a sufficient legal basis to hold me personally, responsible when . . . work was done by the corporate defendants. All checks were made to the corporate defendants . . . No money was paid to me directly at any time."

(Order to Show Cause of Darsin at 2-3)

Appended to Darsin's Order to Show Cause as Exhibit A are photocopies of a letter from Kidron's counsel to Sun Dragon dated March 30, 2015. (Darsin's exhibit A) The letters state that Sun Dragon is in default because it did not interpose an answer. (Darsin's exhibit A) Also included is the photo copy of an envelope addressed to Sun Dragon Industries. (Darsin's exhibit A) The envelope is stamped, "RETURN TO SENDER," "UNCLAIMED," and "UNABLE TO FORWARD." (Darsin's exhibit A)

Appended to Darsin's Order to Show Cause as Exhibit B are photocopies of a letter from Kidron's counsel to Darsin dated March 30, 2015. (Darsin's exhibit B) The letters state that Darsin is in default because he did not interpose an answer. (Darsin's exhibit B) This exhibit also includes a photo copy of an envelope addressed to "Sandro Darsin 51 Crossroad Court." (Darsin's exhibit B) The envelope is stamped, "RETURN TO SENDER" and "UNDELIVERABLE AS ADDRESSED". (Darsin's exhibit B)

Exhibit C includes the affidavit of service wherein Christopher Haff (“Haff”) avers to serving the summons and complaint on January 14, 2015. (Darsin’s exhibit C) Haff states that he “served Sandra Darsin by duly posting the above listed documents by . . . affixing 1 true and correct copy(ies) . . . to the front door of the property known as 51 Crossroad Court, kent, Putnam County, NY 12582.” (Darsin’s exhibit C) “First class mailing was completed on 1/14/15 by depositing the above listed documents in a USPS Mailbox . . .” (Darsin’s exhibit C) Haff also avers that there was no answer at the door on December 22, 2014, December 30, 2014, and January 8, 2015. However he also states that on December 30, 2014, “Residency [was] confirmed by [the] Sun Dragon Industries vehicle parked on property.” (Darsin’s exhibit C)

No opposition to this Order to Show Cause is submitted.

Confirmation of Report

Pursuant to CPLR § 4403, the Court has the power to confirm or reject “in whole or in part ... the report of a referee . . . and may order a new trial or hearing.” A referee’s report should be confirmed where the report “clearly defined and addressed the issues raised, resolved matters of credibility, and made findings substantiated by the record.” (*Gass v. Gass*, 42 AD3d 393 [1st Dept 2007].)

Vacatur of Default Judgment

CPLR §§ 5015 (a) (1) and (4) provide that,

“The Court which rendered a judgment . . . may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or . . . lack of personal jurisdiction to render the judgment . . .”

“Where, as here, a defendant seeks vacatur of a default under both CPLR 5015 (a) (1) (excusable default) and CPLR 5015 (a) (4) (lack of jurisdiction), the court

should determine whether or not it has personal jurisdiction over the defendant before reaching the 5015 (a) (1) ground, [because] the defendant's 'lack of a reasonable excuse . . . is obviated if the court is without personal jurisdiction over defendant, and all subsequent proceedings would be rendered null and void.'" (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 522 [1st Dept 2016].) In *Wells Fargo Bank, N.A. v Jones*, the defendant moved to vacate a default judgment on the grounds that plaintiff did not effectuate substitute service. (*id.*) The First Department of the Appellate Division stated that Jones "submitted sufficient facts to rebut plaintiff's affidavit of service, entitling him to a traverse hearing on this issue." (*id.*) The court further noted that "should Jones prevail at the traverse hearing, the action must be dismissed. (*id.*) However, "if the motion court finds that service was properly effectuated on Jones, then it will have to address whether Jones has demonstrated a reasonable excuse and a meritorious defense under CPLR 5015 (a) (1)." (*id.*)

Validity of Service

"A process server's affidavit is prima facie evidence of proper service sufficient to withstand a naked denial of receipt of service." (*Nazarian v Moanco Import, Ltd.*, 255 AD2d 265, 266 [1st Dept 1998].) However, "a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit . . ." (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004].) Where factual issues as to the validity of service exist, the threshold issue of personal service should be resolved with a traverse hearing. (*Wells Fargo Bank, Nat. Ass'n v Ferrato*, 150 AD3d 546, 547 [1st Dept 2017].) A traverse hearing is necessitated where "there is a possibility that the default judgment may have been obtained without personal jurisdiction." (*Pasanella v Quinn* (126 AD3d 504, 505 [1st Dept 2015].) Accordingly, the First Department of the Appellate Division has ordered a traverse hearing when a defendant has shown that the plaintiff mailed the summons and complaint to an incorrect address. (*Chaudry Const. Corp. v James G. Kalpakis & Associates*, 60 AD3d 544, 545 [1st Dept 2009].)

Discussion

Here the report is a 7-page transcript wherein the referee did not make any credibility findings. (*see Gass v. Gass*, 42 AD3d 393 [1st Dept 2007].) From the Court's perspective, it is unclear whether the referee even reviewed the contract in this case and considered any provisions that bear on the issue of damages. Additionally, it is unclear whether any of the representations made by the

parties, including Kidron's statement that he would have paid "[a]round 1.8 million," are substantiated by the record. (*see Gass v. Gass*, 42 AD3d 393 [1st Dept 2007].) Therefore the Court rejects in whole the report of the referee. (*see CPLR 4403*)

Although Darsin seeks vacatur of the default judgment under CPLR 5015 (a) (1) (excusable default) and CPLR 5015 (a) (4) (lack of jurisdiction), the Court "should determine whether or not it has personal jurisdiction over Darsin before reaching the 5015 (a) (1) ground." (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 522 [1st Dept 2016].) The reason is that "all subsequent proceedings would be rendered null and void" should the Court find that it is without jurisdiction over Darsin (*id.*) Accordingly, the Court begins its analysis with Haff's affidavit wherein he avers to serving the summons and complaint on January 14, 2015. Haff's affidavit is "prima face evidence of proper service sufficient to withstand a naked denial of receipt of service." (*Nazarian v Moanco Import, Ltd.*, 255 AD2d 265, 266 [1st Dept 1998].) However, Darsin's sworn non-conclusory denial of service by Kidron is sufficient to dispute the veracity or content of Haff's affidavit. (*see NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004].) Whereas Haff avers to affixing the summons and complaint to 51 Crossroad Court, Kent, Putnam County, NY 12582 and then mailing a copy to that address, Darsin avers that this address is not his because his zip code is 10512. (Order to Show Cause of Darsin at 3) Darsin also submits as exhibit B, a photo copy of an envelope addressed to "Sandro Darsin 51 Crossroad Court" that is stamped, "RETURN TO SENDER" and "UNDELIVERABLE AS ADDRESSED". (Darsin's exhibit B) Because a factual issue as to the validity of service exists, the threshold issue of service "should be resolved with a traverse hearing." (*Wells Fargo Bank, Nat. Ass'n v Ferrato*, 150 AD3d 546, 547 [1st Dept 2017].) Like *Chaudry Const. Corp. v James G. Kalpakis & Associates* (60 AD3d 544, 545 [1st Dept 2009]), a traverse hearing is necessitated because the defendant has shown that the plaintiff may have served process at the wrong address. Should Darsin prevail at the traverse hearing, the action against Darsin must be dismissed. (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 522 [1st Dept 2016].) However, if the court "finds that service was properly effectuated on [Darsin], then it will have to address whether [Darsin] has demonstrated a reasonable excuse and a meritorious defense under CPLR 5015 (a) (1)." (*id.*)

Wherefore, it is hereby

ORDERED that Defendant Sandro Darsin's Order to Show Cause for an order vacating the default judgment and granting leave to interpose an answer is granted to the extent that a traverse hearing is directed; and it is further

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 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing; and it is further

ORDERED that plaintiff Adam Kidron's request to confirm the Report and Recommendation issued by the Honorable Ira Gammerman, J.H.O., and dated April 13, 2017 is denied; and it is further

ORDERED that the matter of the assessment of damages is held in abeyance until such time as this Court decides the question of whether it acquired personal jurisdiction over Defendant Sandro Darsin.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: November 15, 2017



Eileen A. Rakower, J.S.C.