

<b>Maxim Group LLC. v SML Capital LLC</b>
2017 NY Slip Op 32586(U)
December 1, 2017
Supreme Court, New York County
Docket Number: 650703/2014
Judge: Barry Ostrager
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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARRY R. OSTRAGER  
*Justice*

PART 61

-----X

MAXIM GROUP LLC,

INDEX NO. 650703/2014

Plaintiff,

MOTION DATE 11/22/2017

- v -

MOTION SEQ. NO. 002

SML CAPITAL LLC, STEVEN LIEBMAN, BRETT HIRSCH

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this application to/for Vacate - Decision/Order/Judgment/Award

Upon the foregoing documents, it is

OSTRAGER, J.

An evidentiary hearing was held on November 30 and December 1 with respect to defendant Brett Hirsch's motion to vacate a default judgment entered against him on October 5, 2015. Defendant Hirsch also seeks to have restraints on his assets lifted and to have any enforcement of the judgment stayed.

Defendant Hirsch was served at his former marital residence by process server Steve Kemp who testified that on April 8, 2014 he personally served Hirsch's ex-wife Sarah who accepted service. Kemp testified that consistent with his long experience as a process server he would not have left the papers with Sarah Hirsch if he was not satisfied that she was accepting

service for Brett Hirsh at his usual place of abode. The testimony adduced from Sarah and Brett indicated that the couple had separated prior to April 8, 2014 when process was served although the couple did not formally divorce until several months later. Sarah and Brett Hirsch testified that Brett Hirsch no longer resided at the 73 Dorothy Street residence on April 8, 2014 when process was served. Brett testified that after April 8, 2014 he stopped by his former residence on occasion and Sarah testified that she bundled for Brett Hirsch whatever mail or papers were delivered to Brett Hirsh at 73 Dorothy Street. Passing the issue of whether the Court finds the testimony of Sarah and Brett Hirsh completely credible (which the Court does not), the Court finds it counter-intuitive and contrary to the credible evidence that Sarah Hirsch did not both accept service on behalf of Brett Hirsch and give whatever mail and papers had been addressed to him on any visits that he made to 73 Dorothy Street. This case is thus on all fours with the case of *CC Home Lenders v. Cioffi, et al*, 294 AD. 2d 325, 742 N.Y.S. 2d 101 (2002) where the Second Department reversed a finding that service of a summons and complaint was improper because the marital residence was no longer the defendant's "usual place of abode" where, as here the defendant never notified the post office, the Department of Motor vehicles, or anyone else that he was no longer living in his marital residence. On the basis of the testimony adduced at the evidentiary hearing, the Court questions the credibility of any testimony suggesting that Sarah Hirsch did not accept service on behalf of Brett Hirsch or that Brett Hirsch did not receive the complaint. The Court nevertheless finds that the default was excusable given the volume of mail that he claims accumulated at his former marital residence.

The complaint against Hirsch relates to the non-payment of securities transactions that were executed for the account of SML Capital by Maxim. The plaintiff in this action initiated an arbitration against Steven Liebman, the owner of SML Capital and, after discontinuing this

action against SML Capital and Liebman, received an arbitration award which was never satisfied. Hirsch was apparently also named in the arbitration but did not appear but the arbitration award (which was not part of the record of the hearing) was apparently against Liebman and Hirsch jointly and severally. Hirsch claims to have neither been served with any notice to arbitrate nor have any knowledge of the arbitration. Liebman has submitted an affidavit in this case stating that defendant Hirsch has no ownership interest in SML Capital. Consequently, Hirsch asserts that he has a meritorious defense to this action and the record before this Court does not permit the Court to make any findings with respect to the arbitration award.

Hirsch is now a non-domiciliary with a rather checkered history with respect to securities scams and taking liberties with the truth. It would be extremely prejudicial to the plaintiff to release the restraints that plaintiff has obtained on Hirsch's assets.

Therefore, given the strong policy in the law of resolving cases on the merits, the default judgment is vacated, Hirsch will answer the complaint within 20 days, and the parties will complete all discovery within 60 days in contemplation of a prompt trial on the merits of what appears to be an extremely simple issue of fact (*i.e.*, whether Hirsch is liable for the unsuccessful trades in the SML Capital LLC account for which plaintiff Maxim was not paid and, perhaps, whether the arbitration award is relevant to a merits disposition of this case). In the latter connection, the default judgment against Hirsch which Maxim obtained was assigned to a Mr. Shapiro, but that is not relevant to any issues before the Court. Pending the resolution of the disposition of this action on the merits, plaintiff and its assignee are enjoined from taking any steps to enforce the default judgment which is hereby vacated in favor of a pre-trial attachment on the funds that were previously subject to the restraint obtained by the plaintiff.

The Clerk is directed to restore this action to the Court's calendar.

12/1/2017

DATE



BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER

JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE