

Moriches Indus. Park, LLC v Rosenberg

2017 NY Slip Op 32691(U)

December 5, 2017

Supreme Court, Suffolk County

Docket Number: 204/2016

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MORICHES INDUSTRIAL PARK, LLC,

Plaintiff,

-against-

ALAN ROSENBERG and DEREK K. MILLER,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 8, 2016
FINAL SUBMISSION DATE: SEPTEMBER 22, 2016
MTN. SEQ. #: 002
MOTION: MOT D

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Upon the following papers numbered 1 to 7 read on this motion _____
TO VACATE ORDER AND JUDGMENT AND TO DISMISS

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Replying Affirmation and supporting papers 6, 7; it is,

ORDERED that this motion by defendant DEREK K. MILLER ("Miller") for an Order:

(1) vacating the Order of this Court dated July 7, 2016, and any subsequent Judgment resulting from that Order; or, alternatively

(2) dismissing this action with prejudice and imposing sanctions against plaintiff for the filing and maintenance of a frivolous lawsuit; or, alternatively

(3) granting Miller leave to file proposed responding papers,

is hereby **GRANTED** to the extent set forth hereinafter. The Court has received opposition to this application from plaintiff MORICHES INDUSTRIAL PARK, LLC ("plaintiff").

By Order dated July 7, 2016 ("Prior Order"), this Court granted a motion by plaintiff for summary judgment in lieu of complaint, pursuant to CPLR 3213, against defendant ALAN ROSENBERG ("Rosenberg") and Miller in the amount of \$160,245.00, together with interest thereupon from January 1, 2016, based upon an unconditional written personal guaranty executed by both defendants on August 8, 2008. The motion was unopposed. Plaintiff entered judgment against both defendants in accordance with the Prior Order on August 12, 2016 ("Judgment").

Miller has now filed the instant application to vacate the Prior Order and Judgment and/or to impose sanctions against plaintiff for the filing and maintenance of this "frivolous lawsuit."

On August 19, 2016, the Court (Pastorella, J.) issued the following temporary restraining Order ("TRO"):

That pending the return date of the relief requested by [Miller], stays and restrains [plaintiff] its agents and employees and any other person or party, be stayed from taking any action to enforce any judgment or order resulting from the [Prior Order].

A conference was held before the undersigned on September 8, 2016, and on September 15, 2016, this Court issued an Order extending the TRO pending resolution of the instant motion, provided that by September 22, 2016, Miller deposit with the Clerk of the Court the sum of \$25,000. Miller has submitted proof that he deposited the sum of \$25,000 with the Clerk on September 15, 2016.

Miller alleges that he entered into a business venture with Rosenberg to operate a fitness and gym business in Center Moriches, New York. Miller and Rosenberg formed a corporation for that purpose named "Moriches Fitness, Inc." ("Fitness"), which was doing business as Powerhouse Gym. Fitness rented space for its gym at 15 Frowein Road, Building D, Center Moriches, from plaintiff, owner of the premises, pursuant to a five-year lease that

was executed on August 11, 2008 ("Lease"). In connection with the Lease, on or about August 8, 2008, Miller and Rosenberg each signed a guaranty that they would be personally liable for the obligations of Fitness under the Lease ("Guaranty").

Miller contends that on or about January 10, 2011, he and Rosenberg decided to end the joint venture and agreed that Miller would sell his interest in the business to Rosenberg. Thereafter, Miller claims that the business and premises were entirely under the ownership and control of Rosenberg and Fitness. Miller contends that the Lease by its own terms expired on August 10, 2013, and that the Guaranty therefore expired on or about that date as well.

In or about June of 2015, Fitness defaulted in the payment of rent and, in or about December of 2015, plaintiff commenced a landlord-tenant proceeding to evict Fitness. At that time, plaintiff alleged that Fitness owed rent and additional rent in the amount of \$116,238. On or about December 22, 2015, Fitness filed a Chapter 7 bankruptcy petition.

The following month, on January 8, 2016, plaintiff commenced the instant action against Rosenberg and Miller by summons and notice of motion for summary judgment in lieu of complaint. Miller was served with the papers on January 13, 2016, by service upon a person of suitable age and discretion, to wit: "Lisa Miller, relative," at Miller's place of abode – 23 Duck Lane, West Islip, New York. As noted hereinabove, the Court, by the Prior Order, granted the motion for summary judgment, without opposition, against both Rosenberg and Miller in the amount of \$160,245.00, together with interest thereupon from January 1, 2016, based upon the Guaranty, and plaintiff entered the Judgment thereafter.

Miller now alleges that he never received the summons, and that if his wife was served with legal papers she would have immediately given them to him. It is " 'axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void' " (*Elm Mgt. Corp. v Sprung*, 33 AD3d 753, 755 [2006], quoting *McMullen v Arnone*, 79 AD2d 496 [1981]; see *Matter of Cartier v County of Nassau*, 281 AD2d 477 [2001]). Under CPLR 5015 (a) (4), a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (see *Citibank v Keller*, 133 AD2d 63 [1987]; see also *Harkless v Reid*, 23 AD3d 622 [2005]; *Steele v Hempstead Pub Taxi*, 305 AD2d 401 [2003]).

Here, the affidavit of service filed by plaintiff constitutes *prima facie* evidence of proper service of process upon Miller pursuant to CPLR 308 (2). The Court finds that Miller has failed to rebut the process server's affidavit by a detailed and specific contradiction of the allegations therein (*see Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343 [2003]). Miller merely denies receipt of the papers in a conclusory fashion. However, Miller does not deny that the address for service was his dwelling place or usual place of abode on January 13, 2016, and acknowledges that the person of suitable age and discretion served, "Lisa Miller," is his wife who lived at the premises on the date of service (*see* CPLR 308 [2]). Accordingly, the Court finds that personal jurisdiction was acquired over Miller.

Next, CPLR 5015 (a) (1) provides that on a motion to vacate a default in appearing, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense (*see Wright v City of Poughkeepsie*, 136 AD3d 809 [2016]; *Citicorp Trust Bank, FSB v Makkas*, 127 AD3d 907 [2015]; *Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (*see* CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (*see I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

In the alternative, Miller argues that plaintiff failed to follow the procedural steps for commencing an action by summons with notice of motion for summary judgment in lieu of complaint. Miller alleges that plaintiff failed to afford him sufficient time to answer/oppose the application, as the return date of the motion was less than forty days from the date of service (*see* CPLR 308 [2], 320 [a]). Further, Miller indicates that plaintiff failed to file the affidavit of service with the Clerk of the Court in order to begin the 40-day time period to answer. As such, Miller contends that service is not yet complete, and therefore he is not yet in default.

Moreover, Miller contends that he has a potentially meritorious defense to this action, namely that the Guaranty expired on or about August 7,

2013, well before Fitness breached the Lease with plaintiff in 2015. Although the Lease provided for renewal after the initial five-year period, Miller argues that Fitness was required to notify the plaintiff/landlord of its intention to renew no later than six months prior to the expiration date of the Lease, or by February 10, 2013. Fitness never notified plaintiff that it intended to renew the Lease; therefore, Miller argues that by its own terms the Lease, along with the Guaranty, expired on or about August 10, 2013. While there was correspondence between plaintiff and Rosenberg concerning a new and/or extended lease, such correspondence was sent approximately one year later in July of 2014, did not involve Miller and, notably, did not comport with the procedural notice requirements of Article XXIV of the Lease concerning the tenant's option to extend the term.

In opposition, plaintiff informs the Court that the subject affidavit of service was indeed filed with the Clerk of the Court, and that the Court administratively adjourned plaintiff's motion to three days after the earliest permissible return date. However, plaintiff has not indicated what date the affidavit of service was actually filed. Moreover, plaintiff argues that the Guaranty was irrevocable and unconditional, and that Miller waived any defenses thereto. In addition, plaintiff claims that the Guaranty continued throughout the extension of the Lease term, despite recognizing that the manner in which the option was exercised did not conform with the express requirements of the Lease.

CPLR 3213 is a hybrid procedure incorporating certain elements of an action and certain elements of motion practice. CPLR 3213 provides that the minimum time such motion shall be noticed to be heard shall be as provided by CPLR 320 (a) for making an appearance, depending upon the method of service. Thus, if service is made by substitute delivery to a defendant within New York, the earliest the motion can be made returnable is forty days after service of the summons, notice of motion, and supporting papers (see CPLR 308 [2], 320 [a], 3213; *Goldstein v Saltzman*, 13 Misc 3d 1023 [Sup Ct, Nassau County 2006]). As with CPLR article 22 motion practice, a party moving pursuant to CPLR 3213 can demand answering papers be served in advance of the return date. A plaintiff moving for summary judgment in lieu of complaint pursuant to CPLR 3213 may demand answer papers up to ten days prior to the return date of the motion; however, the plaintiff must add that number of days to the return date (*Goldstein*, 13 Misc 3d 1023).

In this matter, plaintiff filed its motion on January 8, 2016; made it returnable on February 19, 2016; demanded answering papers at least seven days prior to the return date, pursuant to CPLR 2214 (b); and served it by substitute service on January 13, 2016, pursuant to CPLR 308 (2), less than forty days prior to the return date. When a defendant has not been provided with the statutorily required time in which to answer a motion made pursuant to CPLR 3213, the court lacks jurisdiction to hear the motion, the motion must be denied without prejudice, and the action dismissed against that defendant (see CPLR 3213; *Bhanti v Jha*, 140 AD3d 685 [2016]; *Segway of N.Y., Inc. v Udit Group, Inc.*, 120 AD3d 789 [2014]; *Vladeck, Raskin & Clark, P.C. v Camme*, 2016 NY Slip Op 31042[U] [Sup Ct, New York County]; *Clinton Capital Corp. v 635 Realty Corp.*, 2015 NY Slip Op 30614[U] [Sup Ct, New York County]; *Goldstein*, 13 Misc 3d 1023).

Accordingly, the instant motion is **GRANTED** to the extent that this action is hereby dismissed without prejudice as asserted against Miller, and the Judgment is hereby vacated with respect to Miller only. Additionally, the TRO is hereby vacated in its entirety, and the sum of \$25,000 deposited with the Clerk on September 15, 2016, shall be released to Miller.

The foregoing constitutes the decision and Order of the Court.

Dated: December 5, 2017


HON. JOSEPH FARNETI
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION