

Salazar v Hartigan

2019 NY Slip Op 31681(U)

June 14, 2019

Supreme Court, New York County

Docket Number: 157483/2018

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

KRISTOFER SALAZAR,

Plaintiff,

- v -

INDEX NO. 157483/2018

MOTION DATE _____

MOTION SEQ. NO. 001

PATRICK HARTIGAN, MACAO ENTERPRISES
LLC D/B/A MACAO TRADING COMPANY,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10-43 were read on this motion for default judgment.

By notice of motion, plaintiff moves for an order granting him a default judgment against defendant Hartigan and scheduling an inquest on his damages. Defendant Macao Enterprises LLC d/b/a Macao Trading Company cross-moves for an order granting it a default judgment on its cross claims against Hartigan. Hartigan opposes both motions.

I. BACKGROUND

Plaintiff sues Hartigan for an assault and battery and Macao for a violation of the Dram Shop Act and negligence. (NYSCEF 2). A police complaint form reflects that plaintiff had told the police that at Macao’s bar/nightclub, following a verbal dispute, Hartigan punched him in the face and broke his nose. Hartigan was arrested months later, but the complaint indicates that the case was closed. (NYSCEF 12).

Hartigan was allegedly served with the summons and complaint on September 7, 2018 at 2:17 pm at 127 7th Avenue in Manhattan, by delivery to Samantha Stobo, his alleged co-worker, and by subsequent mailing. (NYSCEF 4). A further affidavit from the process server details his

efforts at serving Hartigan:

The server was given the address of 25 Washington Street in Brooklyn as Hartigan's address, but when the server went to the address, neither the building superintendent nor the tenant in the apartment listed for Hartigan knew of him. He then went to Core Real Estate, at 104 Fifth Avenue in Manhattan. The receptionist for Core told the server that while the address was Core's headquarters, Hartigan worked at a branch located at 127 Seventh Avenue in Manhattan. When the server arrived at 127 Seventh Avenue, entered Core's office and asked for Hartigan, he was told by Stobo, that Hartigan was not there in the office. The server then handed the pleadings to Stobo. (NYSCEF 16).

By letter dated October 18, 2018 and addressed to Hartigan at the Seventh Avenue location, and an additional letter dated November 29, 2018 and sent to a law firm, plaintiff notified Hartigan that he was in default, and enclosed additional copies of the pleadings. While the letters were allegedly sent by certified mail, return receipt requested, neither of the return receipts is signed by the addressee. (NYSCEF 17, 18). By email dated December 11, 2018, the law firm advised plaintiff's counsel that it was not representing Hartigan and was not authorized to accept service on his behalf. (NYSCEF 19).

In an affidavit notarized on February 27, 2019, Hartigan asserts that he assaulted plaintiff in self-defense after plaintiff, drunk and belligerent, started an altercation with him, and that while he was arrested, the charges against him were dismissed in 2017, observing that plaintiff did not appear for any of the criminal court dates. Hartigan denies having been served with the pleadings, and denies that he transacts any business with or through Core or that Core's office is his actual place of business. Rather, he contends that he was required to be sponsored and supervised by a New York State licensed real estate broker in order to obtain his real estate

license, and that he listed Core as his sponsor as he had a friend who worked for it. Hartigan alleges that he learned of the lawsuit when the law firm notified him. (NYSCEF 40).

By affidavit dated February 26, 2019, Stobo denies knowing Hartigan or having met him, and alleges that the process server would not tell her why he was asking about Hartigan, and thus, believing that the server was a customer of Core, she told him that Hartigan was not available. Had she known that the server was attempting to serve process on Hartigan, she would have had him speak with a Core supervisor to clarify the situation. (NYSCEF 42).

Martin Purcell, a Core employee, attests that Hartigan is not a Core employee, nor does he transact business through Core, but that he is affiliated with Core solely through listing Core as his supervisor and sponsor for his real estate license. (NYSCEF 41).

II. PLAINTIFF'S MOTION

Pursuant to CPLR 308(2), pleadings may be served on the person to be served by delivery to a person of suitable age and discretion at the person's "actual place of business." A person's actual place of business is one where he is physically present with regularity and at which he regularly transacts business. (*1136 Realty, LLC v 213 Union St. Realty Corp.*, 130 AD3d 590 [2d Dept 2015]).

Here, even assuming that plaintiff's affidavit of service establishes, *prima facie*, proper service on Hartigan, Hartigan's detailed denial, supported by the affidavit of Stobo, who has personal knowledge of the process server's attempted service, and Purcell's affidavit, sufficiently controvert the process server's allegations and requires a traverse hearing to resolve whether Hartigan was served at his actual place of business. (*Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538 [1st Dept 2009] [defendant's sworn, nonconclusory denial of service sufficiently controverted veracity or content of affidavit of service to require traverse hearing]).

That the affidavits submitted by Hartigan in his opposition papers were not notarized until after the return date of the motion but before oral argument and submission of the motion is not fatal absent any prejudice articulated by plaintiff.

The real estate listings, downloaded from the internet and submitted by plaintiff, reflecting that Hartigan is affiliated in some way with Core do not disprove Hartigan's claim that the Core office on Seventh Avenue is not his actual place of business, as he does not deny some affiliation with Core. Notably, in none of the listings does Hartigan provide a business address. (*Saxon v Finkelstein*, 34 Misc3d 1206[A], 2012 NY Slip Op 50007[U] [Sup Ct, Kings County 2012] [that doctor affiliated with particular hospital did not render hospital his actual place of business]). In any event, the documents are not authenticated.

Moreover, Stobo's alleged representation that Hartigan worked at Core's office does not relieve plaintiff of his burden of showing that he served Hartigan at his actual place of business. (*Continental Hosts, Ltd. v Levine*, 170 AD2d 430 [2d Dept 1991] [process server's alleged reliance on representation that employee was authorized to accept service for him did not obviate burden of proving that delivery was made to actual place of business]).

III. MACAO'S CROSS MOTION

As Macao's cross motion does not seek relief against plaintiff, but rather a non-moving party, it is not a proper cross motion and is not considered. (*See Muqattash v Choice One Pharmacy Corp.*, 162 AD3d 499 [1st Dept 2018] [court properly declined to consider cross motions for relief against non-moving parties]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a default judgment against Hartigan is held in

abeyance pending a traverse hearing on whether Hartigan was properly served with the summons and complaint; it is further

ORDERED, that the traverse hearing is referred to a special referee to hear and determine, and counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED, that the cross motion is denied.

20190614161304B/AFFE9020P48A9EA403B973873406ABC82FA

6/14/2019

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

¹ Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website at <http://www.courts.state.ny.us/supctmanh>.