

Gabriel v Michel
2019 NY Slip Op 32094(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 655888/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS

PART

IAS MOTION 7EFM

Justice

-----X

INDEX NO. 655888/2016

PASCAL GABRIEL,

MOTION DATE 02/06/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

RAYMOND MICHEL and ELIDE MICHEL,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for

VACATE JUDGMENT*Gelb & Black, P.C.* (James I. Gelb of counsel), for plaintiff.*Herzfeld & Rubin PC* (Herbert Rubin of counsel), for defendants.

Gerald Levovits, J.:

This case concerns the propriety of service of process to natural defendants. Defendants Raymond Michel (Raymond) and Elide Michel (Elide) move under CPLR 5015 (a) and CPLR 317 to vacate on grounds of improper service the default judgment entered against them on June 27, 2017, for \$50,000. Defendants also move to vacate enforcement of the default judgment through which plaintiff seized Raymond's New York Taxi Medallion 7A94. (the Medallion 7A94.) And they seek leave to answer the verified complaint.

I. Background

On November 9, 2016, plaintiff filed a complaint alleging that the defendants had failed to pay back \$50,000 in loans that he had extended on July 29 and August 3, 2015 — \$10,000 and \$40,000, respectively — which defendants allegedly promised would be used as an investment for real-estate property located in Port-au-Prince, Haiti (the property). In his complaint, plaintiff contends that defendants promised to pay back the principal and interest within three months of the loan's extension but that after the loan became enforceable, defendants refused to repay the loan.

On November 21, 2016, plaintiff personally served the summons and the complaint on Elide at her home at 292 Manhattan Avenue, New York, NY 10026. (Plaintiff's Affidavit in Opposition to Motion, Exhibit D and E.) On that same date, plaintiff served an additional copy of the summons and the complaint on Raymond by first-class mail addressed to that same address. (Plaintiff's Affidavit in Opposition to Motion, Exhibit E.)

On February 22, 2017, plaintiff moved for entry of default judgment, after defendants failed to appear in court. (Defendants' Affidavit in Support of Order to Show Cause, Exhibit D.) On April 4, 2017, the court ordered the entry of default judgment (the Order of Entry), which plaintiff served on defendants by mail on April 21, 2017. (Plaintiff's Affidavit in Opposition to Motion, Exhibit G.) On June 27, 2017, the court clerk entered a default judgment (the Entered Judgment) against the defendants; plaintiff was awarded \$50,000 in addition to the statutory interest for a total of \$59,256.16. (Defendants' Affidavit in Support of Order to Show Cause, Exhibit A.)

On October 4, 2017, pursuant to the enforcement of the Entered Judgment, plaintiff served All Taxi Management, Inc. (All Taxi) — lessee of Medallion 7A94 — a restraining notice enjoining All Taxi from disposing of Medallion 7A94. (Defendants' Affidavit in Support of Motion, Exhibit C.) A year later, on October 29, 2018, plaintiff seized Medallion 7A94 through an assigned recovery agent who claimed to be a NYC Marshal. (Defendants' Affirmation in Support of Motion, Exhibit B.) On November 5, 2018, All Taxi sent a letter informing defendants about Medallion 7A94's seizure.

Defendants move to vacate the Entered Judgment under CPLR 5015 (a) and CPLR 317 on the grounds that they were not personally served and have a meritorious defense.

Upon review of the submitted papers, the motion to vacate the Entered Judgment and the seizure of Medallion 7A94, as well as the motion for leave to serve the proposed answer, is granted under CPLR 317.

II. Defendants' CPLR 5015 (a) motion

CPLR 5015 (a) specifies the following grounds for vacatur of an order or judgment: excusable default; newly discovered evidence; fraud, misrepresentation, or other misconduct; or the court's lack of jurisdiction. (CPLR 5015 [a] [1]-[a] [4].) Courts have also held that "section 5015 (a) does not provide an exhaustive list as to when a default judgment may be vacated" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), allowing vacatur of an order or judgment "in the interest of substantial justice in light of its inherent discretionary power" (*id.*, at 68).

Defendants argue that the plaintiff failed to properly serve the summons and the complaint and contend that they learned about the litigation when All Taxi informed them about the Medallion 7A94's seizure on November 5, 2018. Defendants also argue that this court lacks personal jurisdiction because service of process was invalid.

In opposition, plaintiff alleges that the process server's affidavit of service on defendants on November 21, 2016 is prima facie evidence of proper service.

According to the records, the plaintiff intended personally to serve the defendants by delivering the summons and the complaint in their place of abode. Once the process server was unable to personally serve Raymond, he delivered a copy of the papers to Elide and mailed an

additional copy to Raymond. Service to Elide and Raymond is reviewed under CPLR 308 (1) and CPLR 308 (2), respectively.

Defendants' denial of the receipt of service is insufficient to rebut the plaintiff's "prima facie evidence of proper service, as demonstrated by the affidavit of the process server." (*Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015].)

In support of the motion, Elide submitted a sworn affidavit denying service and attesting that as an elderly and handicapped woman, she does not open the door to anyone unless she expects the visit, especially on a November night at 8:45 pm (which is when the service is alleged to have occurred). (Defendant Elide's Affidavit in Reply, at ¶ 5.) Also, Raymond submitted two sworn affidavits: the first, attesting to the lack of receipt of any court papers (Defendant Raymond's Affidavit in Support of Order, at ¶ 6), and the second, that the description of the service, as attested in the process server's affidavits from November 21, 2016, merely reflected information given to the process server by the plaintiff (who assertedly has known Elide, and defendants' residence, for many years. (Defendant Raymond's Affidavit in Reply, at ¶ 25.)

To the extent that defendants argue that service was improper through mere conclusory denials of service, lacking specific facts to refute the statements in the affidavits, their arguments are "insufficient to raise an issue of fact to be resolved at a traverse hearing." (*Marston v Cole*, 147 AD3d 678, 681 [1st Dept 2017].) (*Compare Haberman v Simon*, 303 AD2d 181 [1st Dept 2003] [ordering a traverse hearing where defendant asserted that his physical description did not match the description of him as attested in the affidavit of service]; *Ananda Capital Partners, Inc. v Stav Elec. Sys. (1994) Ltd.*, 301 AD2d 430, 430-431 [1st Dept 2003] [remanding for a traverse hearing because defendant claimed he was at a meeting in Brooklyn at the same time as the process server swore to have served him in Manhattan].)

Further, defendants' contention that the slot in the door prevents the delivery of bulky mail fails to rebut the presumption of proper delivery of the Order of Entry served via mail to defendants on April 21, 2017, because the Order of Entry was only a two-page document. Defendants have no excusable default and the one-year period to move for relief under CPLR 5015 (a) (1) has run.

Because defendants failed to overcome the presumption of proper service of process, they have too failed to establish this court's lack of jurisdiction. Defendants' motion to vacate the Entered Judgment under CPLR 5015 (a) (1), CPLR 5015 (a) (3) and CPLR 5015 (a) (4) is denied.

III. Defendants' CPLR 317 motion

Defendants' arguments under CPLR 317, even though raised for the first time in their reply papers, are reviewed pursuant to the court's "discretion to treat a CPLR 5015 (a) motion as having been made as well pursuant to CPLR 317." (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., Inc.*, 67 NY2d 138, 143 [1986].)

Under CPLR 317, a defendant who has been “served with a summons other than by personal delivery” and has not appeared to defend “may be allowed to defend the action” upon a finding of the court that the defendant “did not personally receive notice of the summons in time to defend and has a meritorious defense.” (CPLR 317.) A defendant so served may be allowed to defend the action “within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry.” (*Id.*) “A judgment is entered when, after it has been signed by the clerk, it is filed by him.” (CPLR 5016.)

In opposition, plaintiff alleged giving notice of the Entered Judgment to defendants but failed to assert the method and date of such notice or submit evidence to contend that the defendants had knowledge of the Entered Judgment. Thus, defendants, as asserted in their affidavits, lacked knowledge of the Entered Judgment until All Taxi informed the defendants about the Medallion 7A94’s seizure on November 5, 2018.

Accordingly, November 5, 2018 is the date when the defendants are deemed to have obtained knowledge of the Entered Judgment. Plaintiff does not affirmatively challenge November 5 as the date on which defendants received notice of the Entered Judgment. Because a defendant moving under CPLR 317 needs not “show a reasonable excuse for its delay [in appearing and answering the complaint]” (*Eugene Di Lorenzo, Inc.*, 67 NY2d at 141), the defendants’ motion to vacate the default judgment is timely.

That is, the motion was made within one year after defendants obtained *actual knowledge* of the Entered Judgment and within five years after its *entry*. (*See Olivaria v Lin & Son Realty, Corp.*, 84 AD3d 423, 423 [1st Dept 2011] [distinguishing between an order for entry and an entered judgment, and finding that the statutory period to move for vacatur of a default judgment commenced when the clerk filed the judgment, rather than when the court granted the plaintiffs’ motion for default].) This conclusion is further supported because the court “has the inherent power to consider applications seeking relief from a default judgment made more than one year after entry of the default judgment.” (*Hunter v Enquirer/Star Inc.*, 210 AD2d 32, 33 [1st Dept 1994].)

Defendants also submit sufficient evidentiary proof for a meritorious defense regarding the loan as alleged by plaintiff, as well as plaintiff’s conclusory denials of the property’s purchase. To demonstrate a meritorious defense, “a party must submit an affidavit from an individual with knowledge of the facts.” (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997].)

The submissions include the following: (1) the power of attorney executed by Elide in favor of Raymond on June 25, 2015, authorizing the sale of the property to the plaintiff (Defendant Raymond’s Affidavit in Reply, Exhibit J); (2) the letter executed by defendants acknowledging receipt of the \$10,000 check for the property’s purchase on July 29, 2015, which was, as alleged by defendants, deposited simultaneously with the \$40,000 check on August 3, 2015 (Defendant Raymond’s Affidavit in Reply, Exhibits H, K, and L); (3) the certificate of property executed by a notary public from Haiti that recorded the property’s sale on April 8, 2016 (Defendant Raymond’s Affidavit in Reply, Exhibit M); and (4) an affirmation of November 12, 2015, prepared by a lawyer in Haiti, who assisted the defendants in the eviction action

against tenants who had been occupying the property, attesting to the eviction claim. (Defendant Raymond's Affidavit in Reply, Exhibit N.)

The evidence submitted and the parties' allegations raise not only the defendants' potential meritorious defenses but also issues of plaintiff's credibility regarding the conclusory denials of purchasing the property, as well as the lack of evidence to support the loan as alleged in his verified complaint.

In view of (1) defendants' showing that Raymond was served in a manner other than by personal delivery; (2) defendants' timely application to vacate the default judgment; (3) defendants' demonstration to have a meritorious defense to the action, and (4) "the strong policy favoring adjudication on the merits" (*Natl. Union Fire Ins. Co. of Pittsburgh, PA v Diamond*, 39 AD3d 360, 361 [1st Dept 2007]), defendants' motion to vacate the default judgment is granted.

Accordingly, it is

ORDERED that defendants' CPLR 5015 (a) motion to vacate the default judgment is denied; and it is further

ORDERED that defendants' CPLR 317 motion to vacate the default judgment is granted; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the plaintiff and on the Office of the County Clerk, which shall vacate the default judgment accordingly;

ORDERED that defendants' motion to vacate the seizure of Medallion 7A94 is granted, and plaintiff is directed to return Medallion 7A94 to defendant Raymond Michel within thirty days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants' motion for leave to serve the proposed answer is granted, and defendants shall serve the proposed answer within thirty days of entry of this order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 7 of this court, Room 345, 60 Centre Street, on August 28, 2019, at 11:00 a.m.

7/8/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

GERALD LEBOVITS, J.S.C.