

Patel v Molner

2019 NY Slip Op 32122(U)

July 11, 2019

Supreme Court, New York County

Docket Number: 160782/2018

Judge: David Benjamin Cohen

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. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

INDEX NO. 160782/2018

NEIL PATEL,

MOTION DATE 06/17/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

DAVID MOLNER, JOSEPH MELI, ADVANCE ENTERTAINMENT, LLC

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The portion of the motion seeking vacatur of the default judgment based upon 5015(a)(1) is denied as movant has failed to demonstrate any reasonable justification for his failure to answer. On November 21, 2018 defendant Molner was in the Courthouse on a separate action (Marc Adler, et al v. David Molner, et al, Index No. 154462/2017). It is undisputed that a person approached Molner in the hallway. According to Molner, he was engrossed in his papers in preparation for the upcoming Court appearance and refused to engage with this person. During oral argument, Molner expressed that he had no idea who this person was, or why he was approaching him. Molner claimed that he moved away from this person, was not presented with any papers or an envelope and was not told by the person that he was a process server attempting to serve the summons and complaint for this matter. It is undisputed that Molner did not accept the papers from the process server and that the process server left the papers on a bench in the Court hallway. The affidavit of service states that the papers were personally served on Molner.

Molner further claimed that it was only at a conference with the Court Attorney that he learned of the nature of this interaction when Mr. Davidoff (counsel to plaintiffs in the Adler

action and counsel to plaintiff herein) tried to discuss the attempted service. According to Molner, the Court Attorney asked Molner whether he had accepted any documents. Upon receiving a negative in response, Molner's papers stated that the Court Attorney "said words to the effect of "then you haven't been served" ([I] am paraphrasing the substance)." At oral argument, Molner explained that he believed that the Court Attorney's lack of discussion about the attempted service and the swift moving on to a discussion of the *Adler* matter (that was before the Court at that time), was the basis of his belief that he had not been served. In both his papers and at oral argument Molner conceded that during the discussion of the attempted service, the Court Attorney explicitly told him that the Court Attorney was not giving legal advice.

At present, Molner offers two reasons why he has a reasonable excuse for his failure to respond. First, he believes that service in a Courthouse was improper and fails to confer jurisdiction. Second, even if the service was proper, the Court Attorney's failure to spend any time on the service issue indicated to him and gave him a good faith basis to believe that he had not been served.

Molner's stated reasons are not a proper basis for a reasonable excuse to vacate a default judgment. Molner's argument about Courthouse immunity is incorrect. While the court looks at service provided in a courthouse with disfavor, it is not unlawful to effect service in a courthouse unless it directly interrupts or disturbs the proceedings of the court (*see Baumgartner v Baumgartner*, 273 AD 411 [1st Dept 1948]). A party can only avail itself of an immunity to service in a courthouse defense if they are (1) a nonresident of New York (2) whose sole reason in appearing is to attend legal proceedings and (3) there are no other means of acquiring jurisdiction over the person other than personal service in New York (*Brause 59 Co v Bridgemarket Associates*, 216 AD2d 200 [1st Dept 1995]).

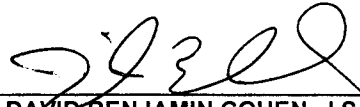
Molner's reliance on the case of *North Fork Bank v. Grover* is misplaced (3 Misc3d 341, 342 [Dist Co, Suffolk County, 2004]). First, this Court is not bound by the decision from the District Court of Suffolk County, particularly in the face on contrary First Department authority. Second, service in that case occurred in the Courtroom itself. Additionally, the defendant was only in the Courtroom for a traverse hearing and was re-served for the very same matter. That Court dismissed the action holding that "[A]llowing Re-service ... makes a mockery of the traverse hearing and essentially allows the plaintiff to use a defective default judgment as a weapon to compel the defendant to submit to the service of process" (*id.* at 344). Finally, that Court acknowledged the general rule that courthouse immunity "is only available to foreign state residents who come into New York's Courts to contest jurisdiction" (*id.* at 343). Additionally, given Molner's statements that he had no idea who the process server was or what he was doing, Molner certainly could not have relied on the courthouse immunity doctrine for his alleged failure to engage with said person.

Further, it is undisputed by the time the conference was completed Molner knew about the attempted service, had been specifically advised by the Court Attorney that no legal advice was being given with respect to the attempted service, yet he chose to not file an answer or take any action in this matter. In addition, at several Court appearances in the *Adler* matter, the dispute as to service was discussed, there was a motion for a default judgment and emails back and forth regarding the dispute. Molner knew about this action and affirmatively decided not to take any action. Therefore, if any portion of Molner's version of events (that he had no idea who the process server was, that the process server did not identify himself, nor try to hand him anything and that Molner, despite having no idea, still refused to talk this person), is found not to be correct (see below) and that Molner was served or simply had reason to know that someone was attempting to serve process, Molner should not benefit. A party has a duty to accept service

(Bossuk v Steinberg, 58 NY2d 916, 918 [1983]). If the defendant resists, service may be accomplished by leaving it in the “general vicinity” of the person resisting (id.). Molner’s attempt at avoidance of service and failure to take any steps to remedy his failure to answer or otherwise participate in this matter, until the eve of an inquest for damages should not be rewarded as no reasonable excuse for his failure to take any action other than refuse to participate in this action has been stated (see also Raymond v Marchand, 22 Misc 3d 1113(A) [Sup Ct, Kings Cty 2009]).

However, after review of the papers submitted by defendant David Molner, specifically that he was not presented with any papers or an envelope and was not told by the person that he was a process server attempting to serve the summons and complaint for this matter, and the affidavit of service that states that Molner was served personally, the Court finds that Molner has properly raised a jurisdictional question relating to service of process. Accordingly, a Traverse hearing is required to determine the issue. This matter shall be referred to a Special Referee to conduct a traverse hearing. It is therefore

ORDERED that 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 Sheet¹, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date.

<u>7/11/2019</u> DATE	 _____ DAVID BENJAMIN COHEN, J.S.C.				
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	HON. DAVID B. COHEN J.S.C.		
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART			<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER			<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT			

¹ Copies are available in Rm. 119M at 60 Centre Street and on the Court’s website at www.nycourts.gov/suptctmanh under the “References” section of the “Courthouse Procedures” link).