

Borges v Gonzalez
2019 NY Slip Op 32613(U)
August 19, 2019
Supreme Court, Kings County
Docket Number: 514918/2018
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 514918/2018

Motion Date: 8-5-19

Mot. Cal. No.:

-----x
ALBA BORGES,

Plaintiff,

-against-

DECISION/ORDER

ARMANDO GONZALEZ, EVELYN GONZALEZ,
EDMUNDO ROMAN PEREZ and DIANA SERRANO,

Defendants.
-----x

The following papers numbered 1 to 5 were read on these motions:

Papers:

Numbered:

Notice of Motion and Notices of Cross-Motion

Affidavits/Affirmations/Exhibits/Memos of Law..... 1-3

Answering Affirmations/Affidavits/Exhibits/Memos of Law..... 4-5

Reply Affirmations/Affidavits/Exhibits/Memos of Law.....

Other.....

Upon the foregoing papers, the motion is decided as follows:

In this action to vacate an alleged fraudulent deed, the plaintiff, ALBA BORGES, moves for an order granting her a default judgment against all defendants due to their default in failing to answer her complaint. Defendants, ARMANDO GONZALEZ and EVELYN GONZALEZ, cross-move for an order denying plaintiff's motion, or in the alternative, if it is determined that they are in default, for an vacating their default and permitting them to interpose a late answer. Defendant, DIANA SERRANO, cross-moves for an order denying plaintiff's motion, or in the alternative, if it is determined that she is in

MS #02-MBAI
MS #03-MBAI
MS #04-XMD

default, for an vacating her default and permitting her to interpose a late answer. The three motions are consolidated for disposition.

Plaintiff's Motion for a Default Judgment Against Defendants Armando Gonzalez and Evelyn Gonzalez

Plaintiff's counsel claims that ARMANDO GONZALEZ and EVELYN GONZALEZ were served with the summons and complaint on July 23, 2018, when their attorney, Edward Hall, a member of Balsamo & Rosenblatt, accepted service of plaintiff's Order to Show Cause seeking a preliminary injunction, which included a copy of the summons and complaint as an exhibit. The Order to Show Cause directed plaintiff to serve a copy of the Order to Show Cause, as well as all supporting papers, upon Balsamo & Rosenblatt, by personal service, as well as by electronic mail, and upon all defendants, including ARMANDO GONZALEZ and EVELYN GONZALEZ, by personal service. Notwithstanding the service directives, plaintiff's counsel argues that since Mr. Hall signed his name on the upper left corner of the Order to Show above the words "Admission of Service upon Armando & Evelyn Gonzalez", he agreed to accept service of Order to Show Cause, as well as the summons and complaint, for his firm and his clients.

In opposition to the motion, Mr. Hall submitted an affirmation stating that when he signed the first page of the Order to Show Cause, the Order to Cause was still in possession of signing Justice and that plaintiff's counsel never thereafter served him a complete copy of the Order to Show Cause containing a copy of the summons and complaint.

In the Court's view, it is unclear whether Mr. Hall, by signing his name on the Order to Show Cause above the words "Admission of Service upon Armando & Evelyn

Gonzalez”, was admitting to service of only the Order to Show on behalf of Armando & Evelyn Gonzalez, both the Order to Show Cause and the summons and complaint or neither. Whether an agreement is ambiguous is a question of law for the courts (*Boster–Burton v. Burton*, 92 A.D.3d 909, 910, 940 N.Y.S.2d 111, quoting *Kass v. Kass*, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 696 N.E.2d 174). As this Court finds that Mr. Hall’s agreement as to service is ambiguous, an evidentiary hearing is necessary to resolve the ambiguity at which time extrinsic evidence may be presented to the trier of fact for consideration (*Boster–Burton v. Burton*, 92 A.D.3d at 910, 940 N.Y.S.2d 111). Further, since the circumstances underlying service of the Order to Show Cause upon Mr. Hall are disputed, an evidentiary hearing on the issues of whether Mr. Hall was actually served with an executed copy of the Order to Show Cause containing a copy of the summons and complaint must be held. For the above reasons, plaintiff’s motion for a default judgment against defendants Armando and Evelyn Gonzalez will be held in abeyance pending an evidentiary hearing. The evidentiary hearing is hereby referred to a JHO/Special Referee to hear and determine whether Mr. Hall was served with the summons and complaint and if so, whether he by signing the Order to Show Cause, he agreed to accept service of the summons and complaint on behalf of his Armando and Evelyn Gonzalez.

Plaintiff’s Motion for a Default Judgment Against Defendant Serrano

With respect to service of the summons and complaint upon defendant Serrano, plaintiff submitted an affidavit of service indicating that she was served by substituted service pursuant to CPLR 308(2). In her affirmation, Ms. Serrano denies being served and points out that plaintiff never filed an affidavit of service with the Court, a claim that

plaintiff does not dispute.

CPLR 308(2) provides that personal service upon a person can be made “by delivering the summons within the state to a person of suitable age and discretion at the ... dwelling place or usual place of abode of the person to be served and by ... mailing the summons to the person to be served at his or her last known residence ... in an envelope bearing the legend ‘personal and confidential’ ... such delivery and mailing to be effected within twenty days of each other.” The affidavit of service submitted by the plaintiff’s process server complied with these provisions. However, CPLR 308(2) also provides that “proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing.”

Here, the affidavit of service was not filed within 20 days of either the mailing or affixing; thus, service was never completed. Since service was never completed, the defendant Serrano’s time to answer the complaint has not started to run and, therefore, she can not be in default (*see Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d 749, 750, 983 N.Y.S.2d 587; *Bank of New York v. Schwab*, 97 A.D.2d 450, 467 N.Y.S.2d 415; *First Fed. Sav. & Loan Ass’n of Charleston v. Tezzi*, 164 A.D.3d 758, 759–60, 84 N.Y.S.3d 239, 241).

The “failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or *sua sponte* by the court in its discretion pursuant to CPLR 2004” (*Khan v. Hernandez*, 122 A.D.3d 802, 803, 996 N.Y.S.2d 667; *see Buist v. Bromley Co., LLC*, 151 A.D.3d 682, 683, 55 N.Y.S.3d 443; *Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d at 750, 983 N.Y.S.2d 587). Thus, upon service of this order, the Court

sua sponte deems the affidavit of service annexed to plaintiff's moving papers timely filed pursuant to CPLR 2004. Defendant Serrano, if she so chooses, shall serve an answer to the summons and complaint within 30 days of service of this order.

Turning to the cross-motion of Armando and Evelyn Gonzalez, assuming defendants are in default, to vacate their default, it was incumbent upon them to demonstrate a reasonable excuse for their delay in appearing and answering the complaint and a potentially meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116; *Hamilton Pub. Relations v. Scientivity, LLC*, 129 A.D.3d 1025, 12 N.Y.S.3d 234; *New York & Presbyt. Hosp. v. American Home Assur. Co.*, 28 A.D.3d 442, 813 N.Y.S.2d 186). While Mr. Gonzalez submitted an affidavit sufficiently demonstrating that he and his wife have a meritorious defense to the action, defendants' only excuse for their failure to appear is that they were never served with the summons and complaint. Since this issue will be resolved at the evidentiary hearing, the cross-motion of Armando and Evelyn Gonzalez will also be held in abeyance pending the evidentiary hearing.

Turning to the motion of defendant Serrano to dismiss the complaint due to plaintiff's failure to timely file an affidavit reflecting service of the summons and complaint upon her is **DENIED** for the reasons stated above. Defendant Serrano's motion to dismiss for lack of personal jurisdiction is denied without prejudice to renewal if defendant Serrano chooses to raises a jurisdiction defense in her answer to the complaint or chooses not to answer.

Accordingly, it is hereby

ORDERED that the motion and cross-motions are decided as indicated above. The evidentiary hearing referenced above shall be conducted by a JHO/Special Referee who shall hear and determine.

This constitutes the decision and order of the Court.

Dated: August 19, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C.

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