

Moschos v GMH Contr. & Mgt. Corp.

2020 NY Slip Op 31077(U)

March 3, 2020

Supreme Court, Queens County

Docket Number: 707193/15

Judge: Robert I. Caloras

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MAR 12 2020
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

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ANASTASIOS MOSCHOS,

Plaintiff,

-against-

**GMH CONTRACTING AND MANAGEMENT
CORP., GABRIEL MUNOZ INDIVIDUALLY,
and EMMANUEL J. KATERINIS, P.E.,**

Defendants.

Index No. 707193/15

Motion Date: 12/19/19

Motion Cal. No. 27

Seq. No. 3

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The following papers numbered E87-E102, E105-E121 read on this motion by the defendants for an order dismissing this action pursuant to CPLR 3211(a)(7) and 7503 on the ground that the Complaint fails to state a cause action, because by agreement between the parties all disputes between the parties to the contract at issue in this action were subject to arbitration, and the plaintiff has failed to seek arbitration prior to commencing this action; pursuant to CPLR 3211(a)(2) and 7503(a) dismissing this action, because by agreement between the parties, the Court is divested of jurisdiction, because all issues arising out the contract are issue in this case are to be submitted to arbitration, or in the alternative, staying this action, and compelling arbitration of all issues arising out of the contract at issue in this action; pursuant to CPLR 5015, 317 and 3012(d), vacating the defendants' default, and permitting the defendants to serve and file an Answer, and to defend this matter on the merits, on the ground that the defendants have an excusable default, and a meritorious defense to the cause of action; and pursuant to CPLR 3211(a)(1) dismissing the action as against the defendant Gabriel Munoz, as an individual who did not enter into any contracts with the plaintiff.

**PAPERS
NUMBERED**

Order to Show Cause-Affirmations-Affidavits-Exhibits.....	E87-E102, E105
Affirmation in Opposition-Exhibits.....	E106-E119
Reply Affirmation.....	E120
Sur-Reply.....	E121

Upon the foregoing papers, it is ordered that the defendants' motion is determined as follows:

The plaintiff initiated this action by filing a Summons and Verified Complaint on or about July 9, 2015. In a decision, dated August 16, 2016, Justice Diccia T. Pineda-Kirwan granted the plaintiff's motion for a default judgment against the defendants GMH Contracting and Management Corp. (hereinafter "GMH"), Gabriel Munoz, individually (hereinafter "Munoz"), and Emmanuel J. Katerinis PE. (hereinafter "Katerinis"), without

opposition. Thereafter, an Inquest was held before J.H.O. Sydney Strauss on December 19, 2017. At the Inquest, J.H.O. Strauss granted the plaintiff's motion in all respects, and directed entry of Judgment as follows: (I) against Munoz and GMH in the sum of \$711,355.00, plus interest from December 30, 2014; and (ii) against Katerinis in the sum of \$60,133.00, with interest from December 30, 2014. On May 9, 2018, a Judgment was entered, filed, and recorded.

Initially, the Court notes that it will not consider the Sur-Reply the plaintiff filed, because it was filed in violation of this Court's Part Rules and the plaintiff did not obtain permission from the Court to file a Sur-Reply.

The Court will first address the branch of the defendants' order to show cause seeking to dismiss this action due to lack of personal jurisdiction pursuant to CPLR 3211(a)(8).

In his affidavit, Munoz states that he is the principal of GMH. Munoz states that the first notice he received of this action, was a notice from the Sheriff seeking to collect on the Judgment. The Sheriff's Notice of Levy and Sale, dated January 10, 2019, (defendants' Exhibit B), stated that it was served upon the defendants at 102-63 Jamaica Avenue, Richmond Hill, New York 11418. In an Affidavit of Service, the plaintiff's process server stated that Munoz was served with the Summons and Complaint by substituted service on July 23, 2015 at 8:25AM, at 102-53 Jamaica Avenue, Richmond Hill, NY 11418. Munoz asserts that during January 2015 his construction company, GMH, had closed and moved out of its office located at 102-53 Jamaica Avenue, Richmond Hill, New York. Therefore, the location of the alleged substituted service upon him on July 25, 2015 at the Richmond Hill location was not his actual place of business. Consequently, Munoz argues that he was not properly served with process.

Munoz also claims that GMH never received any notices regarding this action from the Secretary of State. In an Affidavit of Service, the plaintiff's process server stated that the Secretary of State was served with process on behalf of GMH on September 3, 2015 at 11:05 PM. However, Munoz claims that the Secretary of State "most likely" mailed the Summons and Complaint to the Richmond Hill location. However, GMH had closed that location in January 2015. Munoz claims that GMH was not trying to evade service, and that it failed to appear in this action was because it did not have any knowledge of this action. As such, Munoz claims that GMH was never served with process.

In his affidavit, Katerinis also denies being served with process. In an Affidavit of Service, the plaintiff's process server stated that on October 28, 2015 at 10:35 AM at 37-39 30th Street, Long Island City, New York 11101, Katerinis was personally served with process. The process server described Katerinis as a 60 year old, 5 foot 9 inch to 6 foot tall, white

male, weighing 161-200 pounds, with gray hair. On the day of the alleged service, Katerinis claims that he was working for Twin Peaks, Inc., a testing laboratory located at 37-39 30th Street Long Island City, NY 11101. His daily routine, Monday through Friday, was to arrive at his office at 8AM, pick up his assignment, and leave for the location that he was required to inspect on that day. Katerinis was usually at his office for about one half hour, and left by 8:30AM. He would return to his office in the afternoon, usually by 4PM, to write his report. Katerinis claims that he was never at the office at 10:30AM. Therefore, Katerinis claims that he could not have been served at his office at the time of the alleged service, nor were any documents sent to him by mail.

Based upon the foregoing the defendants argue that they have established that issues of fact exist as to whether they were properly served with the Summons and Complaint, and request that this Court conduct a traverse hearing to determine these issues.

In opposition, the plaintiff argues that the Court has personal jurisdiction over all of the defendants, because they were properly and timely served with the Summons and Complaint. Plaintiff has submitted an Affidavit of Service, wherein the process server stated that on July 20, 2015 Munoz was personally served with a copy of the Summons and Complaint at his alleged residence, located at 297 W. 21st Street, Deer Park, New York 11729. Plaintiff's counsel concedes that this Affidavit of Service was not filed in this action, nor was it included with the motion for a default judgment. Plaintiff's counsel filed a Notice of Appearance on August 6, 2018, after the Inquest was held. Plaintiff's counsel claims that it received this Affidavit of Service on October 31, 2019, and is submitting it now pursuant to CPLR 3211(e).

Plaintiff also argues that GMH was properly served with the Summons and Complaint, pursuant to CPLR 311(a)(1) and BCL 306(b). Plaintiff argues that by failing to notify the Secretary of State of its change of address, GMH has failed to set forth a reasonable excuse for its default and has not rebutted the presumption of service via the Secretary of State. Plaintiff further argues that Katerinis was properly served with the Summons and Complaint. Plaintiff argues that Katerinis' general allegations of non-receipt, because he "could not have been served" at his office at 10:30 a.m., is insufficient to overcome the presumption of proper service from the process server's affidavit.

In reply, the defendants argue that the Affidavit of Service the plaintiff has submitted, which purportedly shows that Munoz was personally served with the Summons and Complaint, should not be considered by the Court. Defendants argue that it is improper for the plaintiff to submit this affidavit for the first time in its opposition, when this action was commenced in July 2015.

The Court finds that the defendants' objection to the Affidavit of Service the plaintiff submitted with its opposition is without merit. CPLR 3211(e) provides, in pertinent part, that "[t]he papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed". Therefore, the plaintiff properly submitted the Affidavit of Service, showing that Munoz was personally served with the Summons and Complaint, with his opposition papers. CPLR 308(1) provides that personal service upon a natural person shall be made by delivering the Summons within the state to the person to be served. Whereas service of process pursuant to CPLR 308(2) and (4) require that proof of service be filed with the Clerk of the Court, "service by personal delivery need not be followed by a filing of proof of service with the court" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C308:2, 2014 [Note: online version]). In addition, "[a] process server's affidavit of service constitutes prima facie evidence of proper service" (Mortg. Elec. Registration Sys., Inc. v Losco, 125 AD3d 733 [2d Dept. 2015]). Here, the Affidavit of Service the plaintiff submitted in opposition to the defendants' order to show cause demonstrated that Munoz was personally served with the Summons and Complaint. In its reply, the defendants merely objected to the Court considering this affidavit, and did not submit an affidavit from Munoz denying receipt of service of process. Consequently, the defendants have failed to rebut the presumption of proper service established by the process server's affidavit. Accordingly, the defendants' request to dismiss the Complaint as against Munoz pursuant to CPLR 3211(a)(8) is denied.

As to GMH, the Court finds that it has failed to demonstrate a reasonable excuse or its failure to appear in this action. It is well settled that a corporation is obligated to keep on file with the Secretary of State the current address of an agent to receive service of process, and failing to satisfy that obligation will not constitute reasonable excuse (Cedeno v Wimbledon Bldg. Corp., 207 AD2d 297, 298 [1st Dept. 1994], internal citations omitted, lv dismissed 84 NY2d 978 [1994]). Consequently, service of process on a corporation is deemed complete when the Secretary of State is served, regardless of whether such process ultimately reaches the corporate defendant (id.). Here, Munoz did not state whether he ever notified the Secretary of State of GMH's change in address, nor did he provide any explanation for his failure to do so. Consequently, the defendants failed to establish a reasonable excuse for GMH's failure to appear. Accordingly, the defendants request to dismiss pursuant to CPLR 3211(a)(8) as against GMH is denied.

As to Katerinis, the Court finds that his sworn statement failed to raise any issues of fact as to proper service, and is insufficient to warrant a traverse hearing. In his affidavit, Katerinis did not deny that he fit the process server's description of him. Moreover,

Katerinis failed to submit any documentary proof supporting his claim that he could not have been at his office at the time of the alleged service. Consequently, the Court finds that Katerinis has failed to rebut the presumption of proper service established by the process server's affidavit. Accordingly, the branch of the order to show cause seeking to dismiss the action pursuant to CPLR 3211(a)(8) as against Katerinis is denied.

The branch of the order to show cause seeking to vacate the defendants' default pursuant to CPLR 5015 upon the grounds that they have a reasonable excuse for their default and a meritorious defense, to vacate their default pursuant to CPLR 317, and for leave to serve and file an Answer pursuant to CPLR 3012(d) is determined as follows: As to the defendant Munoz, as set forth above, the Court finds that he has failed to set forth a reasonable excuse for his default. As such, his request to vacate his default pursuant to CPLR 5015 is denied. Munoz's request for leave to vacate his default pursuant to CPLR 317 is also denied. CPLR 317 requires, among other things, that the defendant must show that service was made in a manner other than personal delivery (or delivery to an agent designated under CPLR 318) (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C317:1 [Note: online version]). As set forth above, service of process was effectuated upon Munoz by personal service. Consequently, the defendants' request to vacate the judgment as against Munoz pursuant to CPLR 317 is denied. As such, defendants' request for leave to serve an Answer on behalf of Munoz pursuant to CPLR 3012(d) is denied.

The Court also finds that the defendants' request to vacate the default as against GMH pursuant to CPLR 5015 is denied. As set forth above, GMH failed to establish a reasonable excuse for its failure to appear. The Court also finds that GMH has failed to set forth a sufficient basis to vacate its default pursuant to CPLR 317. "Service on a corporation by delivering process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR 318" (Fleetwood Park Corp. v Jerrick Waterproofing Co., 203 AD2d 238, 239 [2d Dept. 1994]). Where the corporation changes its address, it is obligated to show that it was not on notice that its old address was on file with the Secretary of State (Grosso v MTO Assocs. Ltd. P'ship, 12 AD3d 402, 403 [2d Dept. 2004]), and must show that it did not receive notice in time to defend, as required by CPLR 317 (Fleetwood Park Corp. v Jerrick Waterproofing Co., supra). Here, Munoz stated that the first notice he received in this action was from the Sheriff. The Sheriff's Notice of Levy and Sale, dated January 10, 2019, (defendants' Exhibit B), stated that it was served upon the defendants at 102-63 Jamaica Avenue, Richmond Hill, New York 11418. This is the same address that GMH has listed with the Secretary of State. As such, the Court finds that GMH has failed to establish that it

did not receive notice in time to defend, as required by CPLR 317. Accordingly, the branch of the motion seeking to vacate GMH's default pursuant to CPLR 317, and file an Answer pursuant to CPLR 3012(d) is denied.

The Court also denies, Katerinis' request to vacate his default pursuant to CPLR 317, because the affidavit of service purportedly shows that he was personally served with process. As such, CPLR 317 is not applicable. Katerinis' request to vacate pursuant to CPLR 5015 is also denied due to his failure to set forth a reasonable excuse for his default, as set forth above.

The branches of the motion seeking to dismiss pursuant to CPLR 3211(a)(2) and 7503(a), and 3211(a)(2) and 7503(a) are denied as academic. The branch of the of the motion seeking to dismiss pursuant to CPLR 3211(a)(1) as against the defendant Munoz is also denied as academic.

Based upon the foregoing, the motion is denied.

Dated: March 3, 2020

ROBERT I. CALORAS, J.S.C.

FILED
MAR 12 2020
COUNTY CLERK
QUEENS COUNTY