

Ishola v BJ Org. of N.Y. Inc.

2020 NY Slip Op 31260(U)

May 6, 2020

Supreme Court, Kings County

Docket Number: 504809/2018

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

-----X

EMMANUEL ISHOLA,

Plaintiff,

-against-

BJ ORGANIZATION OF NEW YORK INC., AHMED
MOHAMED, and SHERIFF OF THE CITY OF NEW
YORK,

Defendants.

-----X

Decision and Order

Index No. 504809/2018

Cal. No.

Mot. Seq. 1&2

Date:

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

<p>Plaintiff's Notice of Motion for Default Judgment and Inquest on Damages, dated August 1, 2019; Attorney Affirmation of Steven Rabitz, Esq., affirmed on July 31, 2019;</p> <p>Exhibit A-Amended Summons with Notice dated June 26, 2018;</p> <p>Exhibit B-Affidavit of Service upon BJ Organization of New York Inc. on June 20, 2018 of Summons with Notice, sworn to on June 21, 2018 and Affidavit of Service upon Sheriff of the City of New York on July 6, 2018, sworn to on July 6, 2018;</p> <p>Exhibit C-Cover Sheet of transfer from Edgar A. Domenech, as Sheriff to BJ Organization of New York, Inc., dated April 10, 2012; DEP records; Affidavit of Emmanuel Ishola, sworn to on August 1, 2019; RJI; Electronic Notifications; Attorney Affirmation of Steven Rabitz, Esq., of non-military service, affirmed on November 14, 2019;</p> <p>Exhibit D-Status Report Pursuant to the Servicemembers Civil Relief Act, dated November 14, 2019.....</p>	<p>1</p>
<p>Defendant's Notice of Cross Motion to Dismiss the action pursuant to CPLR 3215(c), CPLR 306-b, CPLR 3211(3),(5),(7) and (d), dated February 17, 2020; Affidavit of Ahmed Mohamed, sworn to on February 17, 2020;</p> <p>Exhibit A-Real Property Search, cover sheet showing transfer from Ishola Kolawole to Mayiwa Edema on August 23, 2005, cover sheet showing transfer from Mayiwa Edema to Ishola Kolawole Jr. dated July 26, 2006, 264 Lander Avenue, Staten Island, cover sheet transfer from Ishola Kolawole to Grace 264 Lander Ave LLC;</p> <p>Exhibit B-Decision and Order of Hon. Philip G. Minardo dated June 14, 2010;</p> <p>Exhibit C-WebCivil Supreme-eFiled Documents Detail sheet, Memorandum of Law, dated</p>	

February 17, 2020.....	2
Plaintiff’s Attorney Affirmation of Steven Rabitz, Esq., in Reply, affirmed on February 28, 2020; Affidavit of Emmanuel Ishola, sworn to on February 28, 2020;	
Exhibit 1-Summons with Notice, dated March 7, 2018;	
Exhibit 2-Amended Summons with Notice dated June 26, 2018;	
Exhibit 3-Affidavit of Service upon BJ Organization of New York Inc, service on June 20, 2018 of Summons with Notice, sworn to on June 21, 2018;	
Exhibit 4-Affirmation of service upon BJ Organization of New York Inc. of Amended Summons with Notice, by US Mail on June 29, 2018, sworn to on February 28, 2020;	
Exhibit 5-Affidavit of Service upon Sheriff of the City of New York of Amended Summons with Notice, sworn to on February 2, 2019;	
Exhibit 6-Consent to Change Attorney from Kupillas, Unger & Benjamin, LLP to The Law Offices of Steven B. Rabitz, PC dated July 29, 2019;	
Exhibit 7-Decision/Order of Hon. Richard J. Montelione dated October 8, 2019 allowing the plaintiff to supplement his papers with an affidavit of merit and an affirmation of non-military service of the individual defendant, adjourning the motion to December 10, 2019;	
Exhibit 8-Affidavit in Support of Emmanuel Ishola, sworn to on August 1, 2019; Attorney Affirmation of Steven Rabitz, Esq., affirmed November 14, 2019, of non-military service;	
Exhibit 9-Transfer Cover Sheet from Record Filed in the Office of the City Register of the City of New York from Edgar A. Domenech, as Sheriff to BJ Organization of New York, Inc., recorded/filed on April 20, 2012;	
Exhibit 10-Petition for Name Change from Ishola Bola Kolawole to Emmanuel Oluwagbemi Ishola, dated March 12, 2010;	
Exhibit 11-Cover Sheet from Record filed in the Office of the City Register of the City of New York from Mayiwa Edema to Ishola Kolawole Jr. on July 26, 2006;	
Exhibit 12- Cover Sheet from Record filed in the Office of the City Register of the City of New York from Ishola Kolawole to Grace 264 Lander Ave. on November 16, 2006;	
Exhibit 13-Decision and Order of Hon. Philip G. Minardo entered on July 8, 2010.....	3

MONTELIONE, RICHARD J., J.

Plaintiff Emmanuel Ishola, formerly known as Ishola Bola Kolawole, moves for default judgment. Defendants cross-move to dismiss the plaintiff’s action because plaintiff allegedly failed to move for default judgment within one year after defendants’ default (CPLR 3215[c]) or to timely serve and file the Summons

with Notice or Amended Summons with Notice on defendants BJ Organization of New York, Inc. and Ahmed Mohamed. Plaintiff has not provided the court with an affidavit of service regarding defendant Mohamed and appears to concede that defendant Ahmed Mohamed was not served properly. Notably, these defendants do not move to vacate any default. Further, plaintiff does not move to file its affidavit of service of the Amended Summons with Notice *nunc pro tunc*.

This action was commenced by filing the Summons with Notice on March 8, 2018. The affidavit of service indicates that the Summons with Notice was served upon defendant BJ Organization of New York Inc. on June 20, 2018 and the affidavit was filed on July 6, 2018.

The Amended Summons with Notice was served by mail on Defendant BJ Organization of New York, Inc. (“BJ”) on June 29, 2018 (Plaintiff’s Reply Affirmation, Exhibit 4) pursuant to CPLR 2103 because service by mail is permissible once the court obtains jurisdiction over a party which was ostensibly accomplished by service of the original Summons with Notice (Affidavit of Service of original Summons with Notice, sworn to on July 6, 2018). The affidavit of service of the Amended Summons with Notice was filed on February 28, 2020, without a court order allowing the filing *nunc pro tunc*.

The Amended Summons with Notice supersedes the original Summons with Notice. “Generally, an amended complaint supersedes the original pleading, the

defendant's original answer has no effect, and a new responsive pleading is substituted for the original answer (*see Brooks Bros. v. Tiffany*, 117 A.D. 470, 102 N.Y.S. 626; *Rifkind v. Web IV Music*, 67 Misc.2d 26, 323 N.Y.S.2d 326; *cf. Volpe v. Manhattan Sav. Bank*, 276 A.D. 782, 92 N.Y.S.2d 797; *see also 3 Weinstein-Korn-Miller*, N.Y.Civ.Prac., par. 3025.12)" (*Stella v. Stella*, 92 A.D.2d 589, 459 N.Y.S.2d 478 [1983]). "The original complaint is no longer viable, inasmuch as the amended complaint 'takes the place of the original pleading' (internal citations omitted)" (*Golia v. Vieira*, 162 A.D.3d 863, 80 N.Y.S.3d 297 [App. Div. 2018]).

A motion for default judgment must be made within one year of default or the matter shall be dismissed as abandoned either by motion or *sua sponte* by the court. (*See* CPLR 3215[c]). The Amended Summons with Notice reflects the following:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED to appear in this action by serving a notice of appearance on plaintiff at the address set forth below, and to do so within 20 days after the service of this Summons (not counting the day of service itself), or within 30 days after service is complete if the summons is not delivered personally to you within the State of New York.

Because the Amended Summons with Notice was served by mail on June 29, 2018, the defendant would then have 30 days to answer plus five days for mailing under CPLR 2103 and would be in default for failing to answer, if service of the original Summons with Notice was proper, on August 3, 2018. The

plaintiff's motion for default judgment was served and filed on August 1, 2019 and is therefore timely. *See and Cf. Bank of New York v. Kushnir*, 150 A D 3d 946 (2d Dept. 2017).

The action was commenced by filing the original Summons with Notice on March 8, 2018. Service needed to be completed within 120 days under CPLR 306-b, or no later than July 6, 2018. It appears that the original Summons with Notice was served by personal service on June 20, 2018, which is within the 120-day period, and the affidavit of service was filed on July 6, 2018, which is within 20 days as required by CPLR 308(2). The Amended Summons with Notice, which generally supersedes the original Summons with Notice, was subsequently served by mail on June 29, 2018, still within the 120-day period, and timely (*see* CPLR 3025[a]), but the affidavit of service of the Amended Summons with Notice was not filed until February 28, 2020, approximately one and one-half years later. The defendant's time to answer a complaint does not begin to run until the affidavit of service of the pleading is filed with the clerk of the court. (*See JPMorgan Chase Bank, N.A. v Degennaro*, 163 AD3d 539, 540 [2d Dept 2018]) (*see* CPLR 308 [2]; 320 [a]; *Friedman v Ostreicher*, 22 AD3d 798, 803 NYS2d 703 [2005]). In other words, the defendant BJ Organization of New York Inc.'s time to answer does not begin until the affidavit of service is timely and properly filed. However, the failure to timely file the affidavit is not jurisdictional (*see, Metz v Roth*, 2010 NY

Slip Op 30190[U], [Sup Ct, NY County 2010]), "...the filing of proof of service 'pertains solely to the time within which the defendant must answer, and does not relate to the jurisdiction acquired by service of the summons' (*Lancaster v Kindor*, 98 AD2d 300, 306, 471 N.Y.S.2d 573 [1st Dept 1984], *affd*, 65 NY2d 804, 482 N.E.2d 923, 493 N.Y.S.2d 127 [1985])." But the court will not allow its filing *nunc pro tunc* without a motion requesting such a relief.

The defendant BJ Organization of New York Inc. denies receiving by mail the Amended Summons with Notice and denies receiving personal service of the Amended Summons with Notice. The bare denial of receipt of the Amended Summons with Notice by mail is insufficient to raise an issue of fact requiring a traverse hearing. The affidavit denying receipt of the original Summons with Notice is in inadmissible form because it contains only hearsay statements regarding the process server's affidavit.

See, NYCTL 2009-A Trust v Tsafatinos, 101 A.D.3d 1092, 1094, 956 N.Y.S.2d 571, 2012 N.Y. App. Div. LEXIS 8967, 2012 NY Slip Op 9037 (2d Dep't 2012),

'A process server's affidavit of service constitutes prima facie evidence of proper service' " (*Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 984, 912 NYS2d 96 [2010], quoting [1094] *Scarano v Scarano*, 63 AD3d 716, 716, 880 NYS2d 682 [2009]; *see Tikvah Enters., LLC v Neuman*, 80 AD3d 748, 749, 915 NYS2d 508 [2011]; *Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 904 NYS2d 668 [2010]).

‘Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing (*see Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135, 139, 502 NYS2d 479 [1986]), no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits’ (*Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d at 984-985 [internal quotation marks and some citations omitted]; *see Tikvah Enters., LLC v Neuman*, 80 AD3d at 749; *Associates First Capital Corp. v Wiggins*, 75 AD3d at 614; *Scarano v Scarano*, 63 AD3d at 716; *Simonds v Grobman*, 277 AD2d 369, 370, 716 NYS2d 692 [2000]).

The defendant Ahmed Mohamed indicates in his affidavit that the person located at the 9723 Glenwood Road, Brooklyn, NY 11236, where the Summons with Notice was purportedly served, Yasin Mohamed, is a shareholder of BJ Organization of New York, Inc., and that neither he, nor his son, received any Summons with Notice. The lack of an affidavit from Yasin Mohamed indicating his status as an officer or manager of the defendant corporation, or from his son, that is a "sworn, nonconclusory denial of service" (*Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135, 139, 502 N.Y.S.2d 479, 484 [2nd Dept 1986]) precludes the necessity for a traverse hearing.

Defendant corporation's cross-motion to dismiss under CPLR 3211 (3), (5), (7) will be considered because defendant's time to answer has not expired. The time to answer does not begin until the court orders its filing *nunc pro tunc*. (*See JPMorgan Chase Bank, N.A. v Degennaro*, 163 AD3d 539, 540 [2d Dept 2018])

(see CPLR 308 [2]; 320 [a]; *Friedman v Ostreicher*, 22 AD3d 798, 803 NYS2d 703 [2005]).

CPLR 3211 (a) (3), (5), and (7) reflects the following:

CPLR 3211 a) Motion to Dismiss Cause of Action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1....

2....

3. the party asserting the cause of action has not legal capacity to sue; or

4....

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6....

7. the pleading fails to state a cause of action...

The plaintiff does have legal capacity to sue under CPLR 3211 (a)(3).

Plaintiff changed his name from Ishola Bola Kolawole, a prior owner of record on the real property, which is the subject of this lawsuit, to Emmanuel Ishola. The defendant has failed to show as a matter of law that the action in Queens Supreme Court, which was consolidated with a Kings County action, and apparently involved a judgment for \$50,000.00 due to a personal guarantee, has any *res*

judicata or *collateral estoppel* effect regarding the current action where plaintiff claims that defendant executed on a judgment by transferring ownership into defendant corporation's name but not only satisfied that judgment but, among other claims, was unjustly enriched because the equity in the property exceeded \$600,000.00. Further, the statute of limitations may run from the recording of the deed (*Lackey v Romano*, 283 AD2d 463 [2d Dept 2001]) and not the transfer of ownership so as to preclude a finding as a matter of law, at this juncture, that the statute of limitations has expired. Lastly, the Amended Summons with Notice, along with the affidavit of merit, provides sufficient allegations to state a claim for unjust enrichment, among other grounds.

The defendant Sheriff of the City of New York has not appeared in this action, but his or her time to answer has also not run because the affidavit of service was not timely filed.

Based on the foregoing, it is

ORDERED, that Plaintiff's motion for default judgment against defendants BJ ORGANIZATION OF NEW YORK INC. and SHERIFF OF THE CITY OF NEW YORK, is DENIED; and it is further

ORDERED, that Defendants' cross-motion pursuant to CPLR 3215(c) to dismiss the action for plaintiff's failure to take proceedings for the entry of judgment within one year after defendants alleged default is DENIED; and it is

further

ORDERED, that Defendants' cross-motion pursuant to CPLR 306-b to dismiss the action for plaintiff's failure to serve the Summons with Notice or Amended Summons with Notice on BJ Organization of New York, Inc. within one hundred and twenty days after the filing of the Summons with Notice or Amended Summons with Notice is DENIED; and it is further

ORDERED, that Defendants' cross-motion to dismiss the complaint on the grounds that proper service was not made upon defendant BJ Organization of New York, Inc. is DENIED; and it is further

ORDERED, that Defendants' cross-motion to dismiss the complaint on the grounds that proper service was not made upon defendant AHMED MOHAMED is GRANTED and the complaint is dismissed as to this defendant and plaintiff's motion for default judgment against defendant AHMED MOHAMED is DENIED as academic; and it is further

ORDERED, that the defendants' motion to dismiss the action pursuant to CPLR 3211 (3), (5), and (7), or on any grounds, is DENIED.

A copy of this order must be served by plaintiff on all parties within twenty (20) days hereof or (20) days from receipt of an electronic copy from the court,

when e-filing is applicable, whichever is later, with notice of entry.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY
May 6, 2020


RICHARD J. MONTELIONE, A.J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20
Dated April 20, 2020.