

Premier Digital Equip. Servs., Inc. v Starbus, LLC

2020 NY Slip Op 31324(U)

April 27, 2020

Supreme Court, Kings County

Docket Number: 509966/2017

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 27th day of April 2020.

P R E S E N T:

Honorable Reginald A. Boddie, JSC

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PREMIER DIGITAL EQUIPMENT SERVICES, INC.,

Plaintiff(s),

against

STARBUS, LLC,

Defendant(s).

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DECISION AND ORDER

Papers

Notice of Motion & Annexed Affirmation/Affidavit in Support
Affirmation in Opposition

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Upon the foregoing cited papers, the decision on defendant Starbus’s motion seeking to vacate the default judgment, pursuant to CPLR 5015, is as follows:

Plaintiff, Premier Digital Equipment Services, Inc., commenced this lawsuit to recover \$25,194.62 for studio rental time from March 11, 2017, to April 23, 2017. Plaintiff alleged there was originally due \$25,449.55, of which \$254.93 was paid, leaving the balance of \$25,194.62. Plaintiff alleged an invoice was delivered and mailed to the defendant, Starbus, LLC (Starbus) setting forth the amounts owed, which was retained without objection.

Trevor Smith (Smith), also known as Busta Rhymes, a recording artist and managing member of Starbus, states he is the person for whom the services were provided. He alleges he was overbilled for the time, leading him to terminate the use of plaintiff’s services. He produced invoices for January 3 and 4, 2017, as proof of such. However, the relevant period at issue here is

March 11, 2017, to April 23, 2017. Further, the summons and complaint are silent as to any reference to the name of the person using the studio.

The summons and complaint were served in duplicate on the Secretary of State on May 31, 2017, for service on defendant Starbus in accordance with Section 306 of the Business Corporation Law. After no answer was received, a default judgment was entered on July 31, 2017, in the amount of \$26,102.99, inclusive of costs, fees and interest. Subsequently, in January 2018, plaintiff moved to compel Nigro, Karlin, Segal & Feldstien (Nigro), alleged accountants of Starbus, to answer an information subpoena, which was granted by order of the late Justice Johnnie Lee Baynes, dated March 8, 2018. Plaintiff also petitioned the court for an order of contempt for Nigro's alleged failure to comply with the subpoena. Justice Baynes adjourned that matter for a future hearing, which was not concluded.

On September 21, 2018, Smith moved by order to show cause to vacate the default judgment. Smith alleged he had just learned of the judgment two weeks prior as a result of collection efforts by the plaintiff and a subpoena served on his former management company, Nigro. However, counsel for plaintiff avers that the subpoena was served in October 2017. It is undisputed that Smith was never personally served since he was not named in the complaint.

CPLR 5015 (a) (1) and (a) (4) provides, in relevant part,

The court which renders a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; . . . , or . . .
4. lack of jurisdiction to render the judgment or order; . . .

Courts have previously noted when a defendant seeking to vacate a default judgment raises both a jurisdictional objection, pursuant to CPLR 5015 (a) (4), and seeks a discretionary vacatur, pursuant to CPLR 5015 (a) (1), “the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5025 (a) (1) (*HSBC Bank USA v Miller*, 121 AD3d 1044 [2d Dept 2014]).

Here, Smith does not contend the summons and complaint were not served on Starbus or that the address at which Starbus was served was incorrect. Rather, Smith contends the complaint was not personally served before resorting to service through the Secretary of State. However, the parties do not dispute that the summons and complaint were properly served in duplicate and to the correct address in compliance with the BCL through the Secretary of State. Therefore, movant has not raised an issue as to the propriety of service pursuant to BCL 306.

Moreover, movant acknowledges he is an officer of Starbus and the subject invoice was enlisted to Starbus. The subject invoices were addressed to Starbus, allegedly mailed to Starbus, maintained by Starbus without objection and not fully paid, thus rendering the alleged account stated (*see American Express Centurion Bank v Williams*, 24 AD3d 577 [2d Dept 2005]). Therefore, service of the summons and complaint on Starbus was proper. Accordingly, the request to vacate the judgment pursuant to CPLR 5015 (a) (4) is denied.

The court turns next to the request for relief under CPLR 5015 (a) (1). Parties seeking relief from a judgment pursuant to CPLR 5015 (a) (1) must demonstrate reasonable excuse for the default and a meritorious cause of action or defense (CPLR 5015 [a] [1]; *Thomas v Avalon Gardens Rehabilitation & Health Care Ctr.*, 107 AD3d 694 [2d Dept 2013]). The determination of whether an excuse is reasonable is committed to the sound discretion of the court (*Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 752 [2d Dept 2014]). However, mere denial of the receipt of the

summons and complaint, as here, is insufficient to rebut proper service through an affirmation/affidavit of service evidencing service upon the Secretary of State, particularly where defendant does not contend the address on file is incorrect (*Jian Hua Tan v AB Capstone Dev., LLC*, 163 AD3d 937 [2d Dept 2018]).

Smith contends he has an excusable default and a meritorious defense because he used the services, was not personally served, was not aware of the collection proceedings until the subpoena was served on Nigro, and he was overbilled. Even assuming Smith first learned of this matter when the subpoena was served on Nigro, that subpoena was served in or around January 2018, as represented by the e-filed documents and related subpoena enforcement proceedings that took place before Justice Baynes. The judgment was entered on July 31, 2017. Furthermore, Smith does not dispute that he is an officer of Starbus and should have known of these events. Despite these circumstances, he did not move for relief until September 2018, after his bank account was levied. His delayed response is inexcusable (*Eretz Funding v Shalosh Assoc.*, 266 AD2d 184, 185 [2d Dept 1999]; *Roussodimou v Zafiriadis*, 238 AD2d 568 [2d Dept 1997]; *Kent v Fearless Realty*, 174 AD2d 499, 500 [1st Dept 1991]).

Smith also submits that he has a meritorious defense because he was fraudulently billed through a subsequent company. However, the invoices presented as proof of such are for February 2017, and the invoice service dates which are the subject of this lawsuit are March 11 through April 23, 2017. Further, the subsequent bills for the studio time in March and April 2017, undercut his argument that he terminated the use of plaintiff's services in February 2017, after the alleged

overbilling. Therefore, Smith has failed to proffer a meritorious defense and the court is unable to find any merit as to the purported defense to the current amounts sought. Accordingly, the motion to vacate the default judgment is denied.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court