

**Tri-State Surgical Supply & Equip. Ltd. v Eden
Springs Healthcare Ctr. LLC**

2020 NY Slip Op 32466(U)

July 24, 2020

Supreme Court, Kings County

Docket Number: 522007/18

Judge: Leon Ruchelsman

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
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

-----x

TRI-STATE SURGICAL SUPPLY & EQUIPMENT LTD,
Plaintiff, Decision and order

- against - Index No. 522007/18

EDEN SPRINGS HEALTHCARE CENTER LLC, EDEN
SPRINGS NURSING & REHABILITATION WEST LLC,
EDEN SPRINGS PHARMACY LLC, EDEN SPRINGS
ASSISTED LIVING EAST LLC, EDEN MEDICAL
SUPPLY GROUP LLC, GREEN MOUNTAIN NURSING
HOME LLC, GREEN MOUNTAIN NURSING AND
REHABILITATION CENTER LLC, BRROKSIDE
HEALTHCARE & REHABILITATION CENTER LLC
and MAYER SPILMAN,

Defendants, July 24, 2020

-----x

PRESENT: HON. LEON RUCHELSMAN

The defendant Mayer Spilman has moved seeking to vacate a default entered against him. The plaintiff has opposed the motion and papers were submitted by both parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

This lawsuit concerns money due to the plaintiff based upon the alleged failure of defendant to pay outstanding invoices. A summons and complaint was filed and the defendants failed to answer and a default was granted. This motion seeking to vacate the default has now been filed by Spilman. He argues that he was never validly served with process and even if he was, he has a reasonable excuse and a meritorious defense. The plaintiff opposes the motion arguing the defendant has no basis in which to oppose the default.

Conclusions of Law

A default judgement may be vacated when the party demonstrates a reasonable excuse for the failure to appear and a meritorious defense (AIU Insurance Company v. Fernandez, 281 AD2d 542, 721 NYS2d 840 [2d Dept., 2001]).

First, the defendant argues that service was never effectuated since it was served in violation of General Business Law §13. That statute requires malice which has been defined as knowledge the defendant observes and recognizes the Sabbath (see, Hirsch v. Zvi, 184 Misc2d 946, 712 NYS2d 238 [Civil Court of the City of New York, 2000]). The plaintiff has submitted an affidavit which states that "I do not know whether Spilman is a Sabbath observer nor was I ever told Spilman is a Sabbath observer" (see, Affidavit of George Hoffman, ¶12). Spilman asserts that his religious affiliation was "well known" to the plaintiffs (see, Affirmation of Mayer Spilman, ¶¶10,11). Thus, regardless of the precise time of service and whether the time of service was during the Sabbath there is a more fundamental factual question that must first be resolved, namely whether there could even be a violation of General Business Law §13. The factual dispute of that crucial information necessitates a hearing.

Further, and in any event, the defendant Spilman argues he was never served with process. Turning to the issue of service,

the Civil Practice Law and Rules provide that a summons and complaint may be served upon the actual defendant or a person of suitable age and discretion at the usual place of abode of the person to be served (CPLR §308(1)(2)). It is true that generally a process server's affidavit provides prima facie evidence of proper service (Household Finance Realty Corp., of New York v. Brown, 13 AD3d 340, 785 NYS2d 742 [2d Dept., 2004]). To contend that service was improper, the defendant must swear to specific facts rebutting the statements contained in the process server's affidavit (see, US Bank N.A. v. Arias, 85 AD3d 1014, 927 NYS2d 362 [2d Dept., 2011]). Minor discrepancies in the appearance of the person served is insufficient to raise an issue of fact (Simmons First National bank v. Mandracchia, 248 AD2d 375, 669 NYS2d 646 [2d Dept., 1998]). Likewise, conclusory denials are insufficient to entitle a defendant to a hearing concerning service (Deutsche Bank National Trust Company v. Hussain, 78 AD32d 989, 912 NYS2d 595 [2d Dept., 2010]).

A defendant is generally required to issue a sworn denial concerning service (Ballancio v. Santorelli, 267 AD2d 189, 699 NYS2d 312 [2d Dept., 1999]). However, merely issuing a denial the defendant was not home when service was conducted and failing to substantiate that claim is insufficient to rebut the presumption of proper service (see, Green Point Savings Bank v. Clark, 253 AD2d 514, 679 NYS2d 874 [2d Dept., 1998], NYCTL 1997-1

v. Nillas, 288 AD2d 279, 732 NYS2d 872 [2d Dept., 2001]). Thus, substantiated claims which specifically rebut the allegations of the process server are sufficient to raise questions of fact whether service was proper (Kowlessar v. Darkwah, 172 AD3d 837, 101 NYS3d 154 [2d Dept., 2019]). In this case, according to the process server there was service upon Mr. Spilman's wife at the premises located at 2405 65th Street in Kings County pursuant to CPLR §308(2). The defendant has sufficiently raised specific allegations contesting service. The defendant has submitted an affidavit wherein he asserts neither he nor his wife were home at the time of the alleged service and has provided alternate locations for himself and his wife. Further, the defendant's wife Dalia Spilman has specifically denied that she was present at the time of service and has provided the location of her whereabouts at the alleged time of service. Thus, questions of fact have sufficiently been raised and they must be resolved at a hearing (Fuentes v. Espinal, 153 AD3 500, 60 NYS3d 81 [2d Dept., 2017]).

Turning to the meritorious defense, the entire basis for such personal liability as to the defendant is an email Spilman sent dated November 14, 2017 which stated that he was aware the corporation Eden Medical Supply had an outstanding balance, he was working to reduce that balance and that he "personally guarantee the open invoices will get paid" (see, Email from Mayer Spilman to Eli Fishman, dated November 14, 2017 sent at 3:16 PM).

In HSBC Bank USA, N.A. v. Laniado, 72 AD3d 645, 897 NYS2d 514 [2d Dept 2010] the court held that a prima facie showing sufficient to establish the existence of a personal guarantee is made by submitting proof of the underlying credit agreement, the personal guaranty of the company's obligations under that agreement, and the company's failure to make payment in accordance with the terms of the credit agreement. In this case there has been no evidence presented which demonstrates a personal guarantee pursuant to any agreement. The email noted is ambiguous since it is unclear whether that guarantee was stated in his personal capacity or as a representative of the corporate entity. Moreover, the email was written long after the original agreements were executed raising further ambiguity whether such personal guarantees were intended.

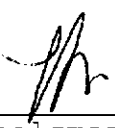
Therefore, the motion seeking to vacate the default is granted to the extent the parties shall appear for a hearing to determine whether service was proper.

The date and location of that hearing will await further availability of the court and in-court operations dealing with the COVID-19 pandemic.

So ordered.

ENTER:

DATED: July 24, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC