

Roberts v Obando-Orozco

2020 NY Slip Op 32556(U)

August 4, 2020

Supreme Court, New York County

Docket Number: 151388/2018

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

JOHN ROBERTS,

Plaintiff,

- v -

CARLOS OBANDO-OROZCO, TOYOTA LEASING COMPANY, 776 SIXTH AVE PARKING CORP.

Defendant.

-----X

INDEX NO. 151388/2018
MOTION DATE 7/29/2020
MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 44, 45, 46, 47, 48, 49, 50, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT .

The following e-filed documents, listed by NYSCEF document number (Motion 005) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, and after oral arguments, it is ordered that plaintiff's motion (mot. seq. no. 004) to confirm the award of Judicial Hearing Officer Philip S. Straniere (hereinafter referred to as "JHO Straniere") dated March 18, 2019, and defendants Carlos Obando-Orozco and 776 Sixth Ave Parking Corp.'s motion (mot. seq. no. 005) to vacate such March 18, 2019 award as well as to vacate their default judgment, are decided herein.

Preliminarily, the Court notes that by Stipulation of Partial Discontinuance dated May 14, 2018, this action was discontinued as against defendant Toyota Leasing Company only. Thus, the only remaining defendants are the moving defendants. By Decision/Order dated August 13, 2018, the Court granted plaintiff's motion for a default judgment against defendants. Defendants now move to vacate the default, as well as JHO Straniere's report, on the grounds that defendants were never properly served. Plaintiff opposes and defendants reply.

The Court must first address defendants' motion to vacate the default judgment. A default judgment may be vacated pursuant to CPLR §5015(a)(4) for lack of jurisdiction. In this case, a default judgment was previously granted to plaintiff based upon the affidavit of service dated March 9, 2018 which states that service was effectuated on defendant 776 Sixth Ave Parking Corp. at 107 West 13th Street, 3rd Floor, New York, NY 10011 by serving Nicolas Eitenne, a manager. After review of all the papers, the Court notes that plaintiff's previous motion seeking a default judgment was only as to defendant 776 Sixth Ave Parking Corp., and no affidavit of service was proffered with regards to defendant Carlos Obando-Orozco. Thus, defendants' motion to vacate JHO Straniere's report dated March 18, 2019, as well as the default judgment, is granted as to defendant Carlos Obando-Orozco.

As to defendant 776 Sixth Ave Parking Corp., "a process server's affidavit of service constitutes prima facie proof of proper service. In order to rebut this prima facie showing..., a defendant is required to submit a sworn, nonconclusory, factually specific, denial of service." *Capital Equity Management, LLC v Weisz*, 50 Misc.3d 128(A) (2nd Dep't 2015)(internal citations omitted). Defendants proffer, *inter alia*, the affidavit of Mr. Eitenne, which states that he was never served, that he works only on the ground floor and never on the 3rd floor, and that he is not authorized to accept service of process. *See* Notice of Motion, Exh. D. Affidavit of Mr. Eitenne, dated August 19, 2019.

In opposition, plaintiff proffers, *inter alia*, the affidavit of Claude Brown, the process server who purportedly effectuated service. In response to Mr. Eitenne's affidavit, Mr. Brown now affirms in his affidavit that on the date of service, he spoke with Mr. Eitenne on the ground floor parking garage whereupon Mr. Eitenne allegedly advised him that he was authorized to accept service. Mr. Brown further affirms that he effectuated service by delivering the papers to

Mr. Eitenne on the ground floor, rather than the 3rd floor as he attested to in the affidavit of service. According to Mr. Brown's current affidavit, in the affidavit of service he only affirmed that service was effectuated on the 3rd floor as a cover letter from a paralegal employed by plaintiff's counsel lists the 3rd floor as the corporate offices of defendant 776 Sixth Ave Parking Corp.

Here, Mr. Eitenne's affidavit articulated specific facts sufficient to rebut the affidavit of service. In contrast, the conflicting statements sworn to by Mr. Brown in the affidavit of service and his current self-serving affidavit call into question the integrity of both such documents. Thus, defendants' motion is granted and the default judgment, as well as JHO Straniere's report dated March 18, 2019, are vacated as to defendant 776 Sixth Ave Parking Corp. As defendants' motion to vacate is granted, plaintiff's motion to confirm the report of JHO Straniere is hereby denied as moot.

Accordingly, it is

ORDERED that the defendants' motion to vacate their default judgment, as well as the report of JHO Straniere, is granted, and defendants Carlos Obando-Orozco and 776 Sixth Ave Parking Corp.'s default is hereby vacated; and it is further

ORDERED that JHO Straniere's report dated March 18, 2019 is vacated; and it is further

ORDERED that plaintiff's motion is denied as moot; and it is further

ORDERED that within 30 days plaintiff shall serve the summons and complaint upon both defendants by certified mail with return receipt requested to their last known address, as well as by regular mail to their attorney; and it is further

ORDERED that within 30 days from receipt of the summons and complaint, defendants shall serve an answer; and it is further

ORDERED that, within 30 days of entry, defendants shall serve upon plaintiff a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.



8/4/2020

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE