Wells Fargo Vendor Fin. Servs., LLC v Elslawy
2020 NY Slip Op 33484(U)
October 22, 2020
Supreme Court, Kings County
Docket Number: 524393/17
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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WELLS FARGO VENDOR FINANCIAL SERVICES, LLC.,
Plaintiff, Decision and order

- against - Index No. 524393/17

MOHAMED ELSLAWY, INDIVIDUAL,
MOHAMED ELSLAWY, d/b/a BIG SASCO
TOOL & EQUIPMENT RENTAL CORP,
a/k/a BIG SASCO TOOLS RENTAL CORP,
MOHAMED ELSLAWY d/b/a AMERICAN TOOL
& EQUIPMENT RENTAL CORP,
MASOOD BHUTTA d/b/a BIG SASCO TOOL
EQUIPMENT RENTAL CORP,
a/k/a BIG SASCO TOOLS RENTAL CORP,
TAHIR BHUTTA d/b/a BIG SASCO TOOL
& EQUIPMENT RENTAL CORP,
a/k/a BIG SASCO TOOLS RENTAL CORP,
Defendants, October 22, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendants Tahir Bhutta and Masood Bhutta have moved seeking to vacate a default judgement entered against them. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on April 15, 2019 judgement was entered against the defendants in the amount of $708,751.80. Further, the court granted an order granting plaintiff possession of equipment that was the subject of an equipment finance agreement. To date neither of the orders have been satisfactorily complied with by the defendants and thus the

plaintiff seeks the appointment of a receiver. The defendants primary objection was the request is premature.

Conclusions of Law

It is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious defense (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]).

First, the defendants argue they were never served with process so the court never maintained jurisdiction over them. 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 and that defendant is entitled to a hearing on the matter, the defendant must allege facts to support the contention (Mortgage Electronic Registration Systems, Inc., v. Schotter, 50 AD3d 983, 857 NYS2d 592 [2d Dept., 2008, Hannover Insurance Company v. Cannon Express Corp., 1 AD3d 358, 766 NYS2d 853 [2d Dept., 2003]). 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]). Thus a sworn denial by defendant that the location of the service was no longer his usual place of abode raises an issue whether service was proper (Johnson v. Motyl, 202 AD2d 477, 609 NYS2d 34 [2d Dept., 1994]). In this case, there was service upon the defendant Masood Bhutta pursuant to CPLR §308(1). The defendant has not raised anything other than conclusory allegations concerning service. In fact, Masood has not alleged any basis upon which to object to service at all. The defendant Tahir Bhutta was served pursuant to CPLR §308(2) by serving a person of suitable age and discretion, namely Nouman Bhutta. The defendant has not submitted any sworn denial from Nouman Bhutta contesting service at all. Rather, counsel has noted, in conclusory fashion, that Nouman did not reside at that location. However, without a specific sworn denial of such facts service was proper.

Concerning the reasonable excuse for failing to appear and contest the allegations presented the defendants argue the complaint and all subsequent papers listed both Masood Bhutta and Tahir Bhutta in an incorrect and confusing manner. Thus, the

caption of the complaint stated the names of the defendants as "TAHIR BHUTTA DBA BIG SASCO TOOL & EQUIPMENT CORP AKA BIG SASCO TOOLS RENTAL CORP., MASOOD BHUTTA DBA BIG SASCO TOOL & EQUIPMENT CORP AKA BIG SASCO TOOLS RENTAL CORP." (see, Complaint). The defendants argue that the appellation 'DBA' after their names meant and continues to mean they were not served in their individual capacities.

In U.S. ex rel. First National Bank v. Robinson, 7 F.Supp 853 [Western District of Louisiana 1934] the court held that where a defendant was served and the complaint recited his name with the "appendage" that such person was 'doing business as' a corporation, then such service was proper (see, also, Carpenters' District Council of Greater St. Louis v. Herring Concrete Inc., 2008 WL 1913973 [Eastern District of Missouri, 2008]). Thus, 'doing business as' is not a distinct corporate entity separate from the individual herself (Bauer v. Pounds, 762 A2d 499, 61 Conn. App. 29 [Appellate Court of Connecticut 2000]). The lack of a more developed body of case does not undermine the truism that serving an individual who is also doing business as a certain corporation is valid service. It merely highlights the pervasive understanding of this obvious reality. In another related the court noted that a simple misnomer is not a defect in service. The court cited to Long Island Minimally Invasive Surgery P.C. v. Outsource Marketing Solutions, 33 Misc3d 1228(A),

939 NYS2d 741 [Supreme Court Nassau County 1011]) which held that "mistakes or irregularities not affecting a substantial right of a party are not fatal. Mistakes relating to the name of a party involving a misnomer or misdescription of the legal status of a party fall within the category of irregularities which are subject to correction by amendment particularly where the other party is not prejudiced, and was aware from the outset that a misdescription was involved" (id). Thus, the service of the summons and complaint and all ensuing documents were all proper.

Therefore, the defendants have failed to assert any reasonable excuse for failing to appear.

Further, a motion to vacate will prove unsuccessful if the party does not allege a defense at all (Halali v. Gabbay, 223 AD2d 623, 636 NYS2d 838 [2d Dept., 1996]). The defense need not entitle the party to judgement as a matter of law, rather it must simply raise the possibility that the case can be adequately defended (Parker v. City of New York, 272 AD2d 310, 707 NYS2d 199 [2d Dept., 2000]). Thus, where a defense cannot be asserted at all, for example where the defendant was already convicted of felony charges regarding the events which now comprise the civil action, then vacating the default would be improper (Boorman v. Deutsch, 152 AD2d 48, 547 NYS2d 18 [1st Dept., 1989]).

In the instant case, the defendants has raised the defense that they never contracted to rent the equipment, never signed

any guaranty and thus cannot be responsible for the debt incurred. However, the judgement in this case is based upon the activities the defendants committed in their individual capacities. These activities include holding a meeting of the board of directors, taking control of the assets and retrieving equipment from the job site. These allegations are not refuted or challenged and have nothing to do with whether the defendants contracted or signed any guaranty.

Concerning the interest of justice standard to vacate the default, the defendants argue that "in this case Plaintiff never amended complaint and movant defendants have been severally prejudiced by their mistaken belief that the corporation was responsible and not them personally" (Affirmation in Support Point III, ¶10). However, that argument fails to explain why the complaint lists their names as well. According to the defendants they mistakenly thought the complaint was only directed at the corporation, nevertheless, the complaint clearly listed both Tahir Bhutta and Masood Bhutta. Notwithstanding the 'doing business as' appendage which the defendants argue created "confusion" they have failed to address the fact their names were undoubtedly present on the face of the complaint.

Thus, while the interest of justice would permit vacating a default in certain circumstances, in this case the defendants

have been duly served, have failed to present any reasonable excuse for not participating in the lawsuit and have failed to present any meritorious defense. Consequently, the motion seeking to vacate the default judgements entered is denied.

So ordered.

ENTER:

DATED: October 22, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC