

Chen v Tapmasters Albany, LLC
2020 NY Slip Op 34142(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 654695/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 42EFM

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JOHN CHEN, and OAKRIDGE
HOLDINGS GROUP, LLC,

INDEX NO. 654695/2017

MOTION
SEQ. NO. 005

Plaintiffs,

DECISION + ORDER

- v -

TAPMASTERS ALBANY, LLC,
TAPMASTERS NY, LLC, TAPMASTERS
NEW BRUNSWICK, LLC, TAPMASTERS,
LLC, GEORGE STREET HOLDINGS,
LLC, WILLIE MINGO, and NIRAV
PATEL,

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for, *inter alia*, breach of contract and breach of personal guaranty agreements, plaintiff John Chen ("Chen"), was granted leave to enter a default judgment against defendants Tapmasters Albany, LLC ("Tapmasters"), Willie J. Mingo ("Mingo"), and Nirav Patel ("Patel"), jointly and severally, in the sum of \$505,286.40, by a decision and order dated March 27, 2018. A judgment awarding Chen that sum, plus statutory interest and costs, was entered on

June 25, 2019. By a decision and order dated January 14, 2020, the court directed that the Clerk enter an additional judgment in favor of Chen and against Tapmasters, Mingo, and Patel, jointly and severally, in the sum of \$10,323.00, as and for an award of attorneys' fees and costs. Judgment has not been entered on that sum.

Defendants Tapmasters and Mingo now move to vacate the default judgment entered against them on June 25, 2019, pursuant to CPLR 5015(a)(1), CPLR 5015(a)(4), and CPLR 317. Chen opposes the motion. For the following reasons, the motion is granted in part.

II. DISCUSSION

A. CPLR 5015(a)

CPLR 5015(a)(1) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person ... on the ground of ... excusable default if such motion is made within one year after the service of a copy of the judgment or order with written notice of its entry upon the moving party." To vacate a judgment entered on default under CPLR 5015(a)(1) the moving party must demonstrate both a reasonable excuse for the failure to appear and a potentially meritorious defense to the proceeding. See CPLR 5015(a); Matter of Bendeck v Zablah, 105 AD3d 457 (1st Dept. 2013); Youni Gems Corp. v Bassco Creations

Inc., 70 AD3d 454 (1st Dept. 2010). In order to establish a reasonable excuse, the movant must submit facts explaining the reason for its default, and it is "within the court's sound discretion to determine whether the excuse for the default is sufficient." Chevalier v 368 E.148th St. Assoc., LLC, 80 AD3d 411, 413 (1st Dept. 2011); see also Tandy Computer Leasing v Video X Home Library, 124 AD2d 530, 531 (1st Dept. 1986).

CPLR 5015(a)(4) permits a party to seek relief from a judgment or order on the ground that the court lacked jurisdiction to render it. There is no specified time limitation for the making of a motion pursuant to CPLR 5015(a)(4). Where a party challenges jurisdiction based on the propriety of service of process, the affidavit of a process server constitutes *prima facie* evidence of proper service. HSBC Bank USA v Whitter, 159 AD3d 942, 945 (2nd Dept. 2018); see Grinshpun v Borokhovich, 100 AD3d 551 (1st Dept. 2012). "To be entitled to vacatur of a default judgment under CPLR 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service." HSBC Bank USA v Whitter, supra at 945; see Gonzalez v City of New York, 106 AD3d 436 (1st Dept. 2013); Grinshpun v Borokhovich, supra. "[T]he mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper." Grinshpun v Borokhovich, supra at 552.

As a preliminary matter, this application is timely under CPLR 5015(a)(1). The plaintiffs served the defendants with a copy of the June 25, 2019, judgment and notice of entry on June 25, 2019. Although the movants did not move for relief until August 5, 2020, Governor Andrew Cuomo's Executive Order 202.8, issued on March 20, 2020, directed, *inter alia*, that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state," be tolled until April 19, 2020. Subsequently, Governor Cuomo issued a series of executive orders approximately every 30 days extending tolling through November 3, 2020. Accordingly, the movants' time to seek relief under CPLR 5015(a)(1) had not expired when they filed their notice of motion on August 5, 2020.

Where a defendant seeking to vacate a default raises both a jurisdictional objection under CPLR 5015(a)(4) and a factual objection under 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 5015(a)(1)." JP Morgan Chase Bank, N.A. v Grinkorn, 172 AD3d 1183, 1185 (2nd Dept. 2019); see Caba v Rai, 63 AD3d 578 (1st Dept. 2009). Therefore, the court turns first to the movants' jurisdictional challenge.

The plaintiffs submitted an affidavit stating that Mingo was served via "affix and mail" service pursuant to CPLR 308(4). CPLR 308(4) permits a plaintiff to use affix and mail service only where service cannot, with due diligence, be made by personal delivery or by the "deliver and mail" method, authorized by CPLR 308(1) and (2), respectively. "The due diligence requirement of CPLR 308(4) should be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received." Moran v Harting, 212 A.D.2d 517, 518 (2nd Dept. 1995); see also, e.g., Coley v Gonzalez, 170 AD3d 1107 (2nd Dept. 2019); McSorley v Spear, 50 AD3d 652 (2nd Dept. 2008). Whether the due diligence requirement has been met is to be determined on a case-by-case basis. See McSorley v Spear, supra; Farias v Simon, 73 AD3d 569 (1st Dept. 2010).

The plaintiffs' process server averred that he attempted to effect personal service on Mingo at his home address on three separate occasions over a two-week period: Wednesday, July 19, 2017, at 8:00 p.m., Tuesday, July 25, 2017, at 7:15 a.m., and Tuesday, August 1, 2017, at 2:30 p.m. On the first occasion, the process server encountered a "tenant" who "stated Mr. Mingo was away and will be back next week." On the second and third occasions, there was no answer at the address. After failing to personally serve Mingo on the third occasion, the process server

affixed the papers to the front door and mailed a copy of the papers to Mingo's home address. Mingo does not dispute that he actually resides at the address listed in the affidavit of the plaintiffs' process server. However, in an affidavit submitted in support of this application, he avers that he and his family were vacationing in North Carolina during the week of July 17, 2017, that he was in Washington, D.C., on business on August 1, 2017, and that he was at work at 2:30 p.m. on August 1, 2017. Upon returning home on August 1, 2017, Mingo denies seeing anything affixed to the door.

The three attempts made by the plaintiffs' process server to serve Mingo on non-consecutive weekdays, during three separate weeks, including attempts well-before and well-after business hours, satisfy the due diligence requirement for substitute service under CPLR 308(4). See Farias v Simon, supra; Merchants Bank of New York v Itzkoff, 1 AD3d 178 (1st Dept. 2003); Albert Wagner & Son, Inc. v Schreiber, 210 AD2d 143 (1st Dept. 1994); Lara v 1010 E Tremont Realty Corp., 205 AD2d 468 (1st Dept. 1994); Hochhauser v Bungeroth, 179 AD2d 431 (1st Dept. 1992). "Nor was it necessary that the process server, before resorting to nail-and-mail, attempt to serve [the movant] at [his] place of business." Farias v Simon, supra at 844.

Although Mingo submits an affidavit stating that he never received any papers, his conclusory denial of service is

insufficient to rebut the presumption of proper service, even by affix and mail, created by the process server's affidavit. Wells Fargo Bank, N.A. v Kissi, 146 AD3d 407, 407 (1st Dept. 2017; see also, e.g., Wells Fargo Bank, N.A. v Javier, 179 AD3d 482 (1st Dept. 2020); Wells Fargo Bank, N.A. v Njoku, 148 AD3d 438 (1st Dept. 2017); U.S. Bank National Association v Martinez, 139 AD3d 548 (1st Dept. 2016). The court concludes that the service effectuated on Mingo was sufficient to confer jurisdiction over him. Mingo's application for relief under CPLR 5015(a)(4) is denied.

Furthermore, Mingo is not entitled to a discretionary vacatur pursuant to CPLR 5015(a)(1) because he fails to set forth any reasonable excuse for his default. Instead, Mingo relies on the same conclusory denial of service he cited in contesting this court's exercise of jurisdiction. For the reasons the court has explained, that denial is insufficient to justify Mingo's three-year delay in appearing in this action.

As to the sufficiency of service on Tapmasters, the plaintiffs submitted an affidavit stating that service was effected on July 25, 2017, pursuant to CPLR 311-a when the process server left a copy of the papers with "Irish Perez / Authorized Employee" at an address in Hoboken, New Jersey. CPLR 311-a permits service on a limited liability corporation by, *inter alia*, personal delivery to (i) any member of the company

in the state, if management is vested in its members (ii) any manager of the company in the state, if management is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the company to receive process. Since service was made outside of the state only the latter of two methods are applicable here.

Mingo, the managing member of Tapmasters, avers that the address where service was purportedly made is the residential address of defendant Nirav Patel. He further states that neither Patel nor Irish Perez are authorized to accept service on behalf of Tapmasters, and that neither was Tapmaster's registered agent for service of process. Chen does not address any of these allegations in his opposition.

Given Mingo's sworn statement that Irish Perez was not authorized to accept service on behalf of Tapmasters, and was not even employed by Tapmasters at any time, the lack of any information in the process server's affidavit about Perez's actual title or role in Tapmasters, and Chen's failure to address these issues in any manner, the court concludes that Tapmasters was not properly served. Accordingly, judgment must be vacated, and the action dismissed, as against Tapmasters. In light of this dismissal, the court does not reach Tapmaster's

arguments in support of relief under CPLR 5015(a)(1) or CPLR 317.

B. CPLR 317

CPLR 317 provides that a defendant who is not served by personal delivery in an action may vacate his default as long as he demonstrates that he did not personally receive notice of the lawsuit in time to defend against the action and shows that he possesses a potentially meritorious defense. See Stillwell Cafe, Inc. v 1680 Eastchester Realty Corp., 145 AD3d 645 (1st Dept. 2016); Olivaria v Lin & Son Realty, Corp., 84 AD3d 423, 425 (1st Dept. 2011); see also Dalton v Noah Constr. & Bldrs., Inc., 136 AD3d 730 (2nd Dept. 2016). A defendant invoking CPLR 317 must move to vacate his default within one year of obtaining knowledge of entry of the judgment. See Olivaria v Lin & Son Realty, Corp., supra.

As discussed, the plaintiffs submitted an affidavit of service establishing that Mingo was properly served by affix and mail service, rather than personal service, pursuant to CPLR 308(4). Moreover, in light of Governor Cuomo's executive orders tolling the time limitations on filing motions such as this one beginning on March 20, 2020, Mingo's application pursuant to CPLR 317 is timely.

However, Mingo fails to demonstrate that he did not personally receive notice of the lawsuit in time to defend. The

affidavit of service created a presumption of proper service and Mingo's conclusory denial of service, as described above, does not overcome that presumption. See Cavalry Portfolio Services, LLC v Reisman, 55 AD3d 524 (2nd Dept. 2008).

C. Vacatur in the Interests of Justice

Notwithstanding the foregoing, the court retains discretion to vacate its own orders or judgments for sufficient reason and in the interests of substantial justice. Woodson v Mendon Leasing Corp., 100 NY2d 62 (2003). The movants have pointed out that although judgment was entered in the sum of \$505,286.40 as against Tapmasters, Mingo, and Patel, jointly and severally, the operative guaranty agreements limit Mingo's and Patel's personal liability to \$227,250.00. The guaranty agreements were considered by the court in granting leave to enter default judgment. The entry of judgment against Mingo and Patel in excess of the limitation in the agreement was not sought by the plaintiffs and was erroneous. In the interests of justice, the judgment against Mingo and Patel must be modified to reflect the terms of the guaranty agreements between the parties. See also CPLR 5109(a) and CPLR 2001.

III. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Tapmasters Albany, LLC, and Willie J. Mingo to vacate the default judgment entered against them on June 25, 2019, pursuant to CPLR 5015(a)(1), CPLR 5015(a)(4), and CPLR 317, and to dismiss this action, is granted to the extent that (1) the judgment entered on June 25, 2019, is vacated as against Tapmasters Albany, LLC, pursuant to CPLR 5015(a)(4), and the action is dismissed as against Tapmasters Albany, LLC for lack of jurisdiction, and (2) the judgment entered on June 25, 2019, is amended as against Willie J. Mingo to the extent that it is reduced to \$227,250.00, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk shall amend the judgment entered on June 25, 2019, as against Willie J. Mingo only, to the extent that the judgment against him is reduced to \$227,250.00, with interest at 9% per annum beginning on March 27, 2018, and the judgment is otherwise unmodified.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: December 10, 2020