SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

----------X

NEW GLOBALTEX CO., LTD.,

Plaintiff,

- v -

ZHE LIN (a/k/a JESSICA LIN), individually and as a successor in interest to PIONEER INTERNATIONAL TRADING INC., and IMPERIAL INTERNATIONAL TRADING INC.

Defendant.

----------X

INDEX NO. 152361/2013

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 61
were read on this motion to/for VACATE - JUDGMENT.

This action is based on a breach of an oral agreement allegedly entered into between plaintiff New Globaltex Co., Ltd. (New Globaltex) and defendant Zhe Lin for the sale of clothing. (Complaint, ¶¶ 7-9, 14 [NYSCEF Doc. No. 1].) Plaintiff sues defendant individually and as successor in interest to two corporations, Pioneer International Trading Inc. (Pioneer) and Imperial International Trading Inc. (Imperial), which plaintiff alleges were wholly owned and controlled by defendant Lin and were dissolved after the delivery of goods to defendant. (Id., ¶ 2.) As set forth in the affidavit of service, plaintiff served the summons and complaint by substitute service in April 2013. (Aff. Of Service [NYSCEF Doc. No. 3].) Plaintiff sought judgment by default, which the court (Bransten, J.) granted by decision on the record on May 21, 2014. (Decision and Order [NYSCEF Doc. No. 11].) Notice of entry was served on June 5, 2014, but judgment was not entered until April 3, 2018. Defendant moved by order to show cause, returnable on July 2, 2018, to vacate the default judgment pursuant to CPLR 5015. (Order to Show Cause [NYSCEF Doc. No. 39].) In a subsequent decision on the record on July 12,

2018, the court (Bransten, J.) dismissed the complaint as abandoned and denied defendant's motion to vacate the default judgment as moot, due to the delay between the date the court had granted judgment and the date plaintiff sought entry of judgment. (Decision and Order [NYSCEF Doc. No. 49].) By decision and order entered on June 6, 2019, the Appellate Division reversed and remanded for consideration of the merits of defendant's motion. (Remittitur [NYSCEF Doc. No. 55].)

Defendant moved to vacate the default judgment on the ground that she was never "served with or received the Summons with Notice, or the Judgment of this action." (Lin Aff. In Supp., ¶ 2 [NYSCEF Doc. No. 37].) The affidavit of service of the summons and complaint attests that service was made by delivery on April 13, 2013 to a person of suitable age and discretion, a "relative," at 143-36 37th Ave., Apt. 4A, Flushing, NY 11354 (the Flushing address or Flushing apartment at which service was made), and by mailing to this address on April 15, 2013. In support of the motion, defendant submitted an affidavit in which she stated that she did not live at that address as of the date of service. (Lin Aff. In Supp., ¶ 4.) She provided bank account statements for the period from February through May 2013, and EZ Pass statements for the period from March through April 7, 2013, listing her address as 47-17 47th Street, Apt. 2R, Woodside, NY 11377 (the Woodside address). (Id., Exh. C [NYSCEF Doc. No. 35].)

By order dated November 4, 2020 (NYSCEF Doc. No. 61), this court held that defendant's proof of her address at the time of service was sufficient to require a traverse hearing, but that plaintiff would have the ultimate burden of proving that service was proper at the Flushing address. The court also held that it would take testimony on defendant's alternative claim that, even if service was proper, she had an excuse for not appearing and a meritorious defense. The hearing was held on December 17 and 21, 2020.[1]

[1] The hearing was held remotely due to the Covid-19 pandemic.

Based on the credible evidence at the hearing, the court now holds that defendant was properly served and that defendant fails to demonstrate excusable default or other grounds for vacatur of the default judgment.

CPLR 308 (b) authorizes service "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business. . . ." It is well settled that the terms "dwelling place" and "usual place of abode" mean the actual dwelling place or usual place of abode and "may not be equated with the 'last known residence' of a defendant" for purposes of the delivery of papers when substitute service is made pursuant to CPLR 308(2). (Cuomo v Cuomo, 144 AD2d 331, 332 [2d Dept 1988]; see also Feinstein v Bergner, 48 NY2d 234, 240 [1979].) Further, a person "can have more than one residence" for the purpose of service. (See Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C308:3 [d] [2015]; see generally Antone v General Motors Corp., Buick Motor Div., 64 NY2d 20, 28 [1984].)

At the hearing, plaintiff established that service was made by substitute service at defendant's Flushing address. In particular, plaintiff produced the process server, Lattanina Drucker, who gave credible testimony as to her practices in making service and producing records of service. In addition, plaintiff produced Joel Graber, president of United Process Service, Inc., a process serving agency that distributed the work to the process server in this case. He gave credible testimony as to the practices of his company in keeping the records of service. This testimony laid a sufficient foundation for the introduction of the process server's affidavit of service as a business record.

Plaintiff also established that service was made at the proper address, as the Flushing address was an actual place of residence or usual place of abode of defendant at the time service was made. Plaintiff produced deeds from both before and after the date of service which show that defendant listed the Flushing address as her address. In particular, a deed dated December 14, 2009 lists defendant as the buyer of the Flushing apartment at which service was made. (2009 Deed, Pl.'s Exh. 6.) Interestingly, in this deed both the seller and defendant as buyer list the apartment that is the subject of the sale as their address. A deed dated October 31, 2012 shows the transfer of the Flushing apartment from defendant to Ya Yan Ruan. (2012 Deed, Pl.'s Exh. 7.) At the hearing, defendant acknowledged that Ya Yan Ruan is her mother. Plaintiff also produced a deed dated January 18, 2014 for a property on Rose Avenue in Queens in which the grantor was Ya Yan Ruan and the grantee was defendant. (2014 Deed, Pl.'s Exh. 5.) In this deed, both Ms. Ruan and defendant gave their address as the Flushing apartment. Thus, notwithstanding defendant's 2012 sale of the Flushing apartment to Ms. Ruan, she continued to use the Flushing apartment as her address in an official document. Moreover, defendant produced a deed dated July 15, 2013 in which Ms. Ruan as seller sold the Flushing apartment. (Def.'s Ex. C.) Notwithstanding this sale, Ms. Ruan, like defendant, continued to use the Flushing apartment as her address, as evidenced by the 2014 deed discussed above.

At the hearing, defendant testified that at the time of service she resided at the Woodside address. She failed to give a viable explanation for her continued use of the Flushing apartment as her address after her 2012 sale of the apartment. Defendant testified that the 2014 deed was prepared by the real estate lawyer and that she did not know that the Flushing address was listed. The deed, however, bears her signature. As a sophisticated business person (the former president of the two dissolved corporations at issue in this action), she cannot claim that she did not know,

or understand, the contents of a document that she signed. (See Touloumis v Chalem, 156 AD2d 230, 232 [1st Dept 1989].)

Moreover, defendant's testimony that she did not reside at the Flushing address at the time of service was entirely conclusory. The documentary evidence she produced was also insufficient to counter plaintiff's showing that she continued to reside at the Flushing address. In support of her claim that she lived at the Woodside, not the Flushing, address in April 2013 when service was made, she again submitted the bank statements and EZ Pass statements, which she had submitted in support of the motion to vacate, showing the Woodside address. (Def.'s Exhs. A, B.) She failed, however, to submit documents, such as a driver's license or tax returns, which would have been highly probative of her address and which she could have been expected to have in her possession.[2] Nor did she counter plaintiff's showing that she continued to reside at the Flushing address. Put another way, she did not make any showing that even if she actually resided at the Woodside address, she did not also actually reside at the Flushing address. In sum, while plaintiff had the ultimate burden of proof that service was made at the proper address, defendant failed to counter plaintiff's showing that she was served at a proper address. (See Citi Mortgage Inc. v Scott, 157 AD3d 507, 507 [1st Dept 2018].)

The court accordingly holds that it acquired personal jurisdiction over defendant and turns to the issue of whether grounds exist for vacatur of the judgment. In the closing argument at the hearing, defendant for the first time contended that the default judgment was not properly issued because the complaint had been verified by an attorney without personal knowledge of the facts, and plaintiff had not submitted an affidavit of merit on personal knowledge in support of the motion for the default judgment. This contention, even if properly raised, is without merit.

[2] At the hearing, plaintiff's counsel asked her to produce her driver's license. She left the virtual stand and returned a moment later, saying that she had changed her wallet that morning and did not have the driver's license with her.

As the Court of Appeals has held, failure to supply proof of facts constituting the claim, as required by CPLR 3215 (f), is not a jurisdictional defect. (Manhattan Telecom. Corp. v H & A Locksmith, Inc., 21 NY3d 200, 203 [2013].) In other words, "a court that does not comply with this rule has merely committed an error—it has not usurped a power it does not have. . . . It does not justify treating the judgment as a nullity." (Id., at 203-204.) On remand, the Appellate Division held that the defect "went, at most, only to a procedural element of plaintiff's right to enter a default judgment" and refused to grant the defendant's motion to vacate on that basis. (Manhattan Telecom. Corp. v H & A Locksmith, Inc., 109 AD3d 699, 700 [1st Dept 2013].)

The court accordingly considers the ground actually advanced by defendant on the motion to vacate and at the hearing—namely, that she had an excuse for not appearing and therefore a basis for vacatur of the default judgment, pursuant to CPLR 5015 (a) (1). Under this provision, "[a] party seeking to vacate a default must demonstrate both a reasonable excuse and the existence of a meritorious defense. . . ." (Mutual Marine Office, Inc. v Joy Const. Corp., 39 AD3d 417, 419 [1st Dept 2007]; see Benson Park Assoc., LLC v Herman, 73 AD3d 464, 465 [1st Dept 2010].)

The court is unpersuaded that defendant had a viable excuse for not appearing. The only excuse for not appearing that defendant advances is that she was not served and that she did not have notice of the action until the judgment was entered and her bank account reflected a zero balance. (Lin Aff. In Supp., ¶¶ 2-3.) The court has, however, rejected the claim that she was not served. Moreover, as discussed above, the affidavit of substitute service attested to service on a "relative." As also discussed above, defendant's mother, Ms. Ruan, continued, even after her transfer of the Flushing property by the 2013 deed, to use the Flushing address, as evidenced by the 2014 deed. Yet, defendant did not have her mother testify or give any explanation for her failure to do so. Indeed, defendant did not respond in any way to the process server's averment

in the affidavit of service that a relative of defendant was served. The court therefore holds that defendant fails to meet her burden of demonstrating an excuse for her default.

The court further holds that defendant fails to meet her burden of demonstrating a potentially meritorious defense to this action. Defendant testified that she did not personally sign any contract with plaintiff and that neither of the now dissolved corporations signed a contract. Although defendant did not deny that there was an oral agreement for the purchase of goods, her testimony as to the terms of the agreement, including the parties that would be liable, was again wholly conclusory and unsupported by any documentation. She also testified that upon the dissolution of the corporations, she did not receive any assets and that she is accordingly not liable as a former officer. This testimony as well was wholly conclusory. Defendant did not produce any documentation regarding the dissolution of the corporations or the disposition of its assets, if any, upon dissolution. In addition, she testified that the goods delivered by plaintiff did not comply with the specifications, but gave no details as to the respects in which the goods were non-conforming. While she claimed that the corporations paid for the conforming goods, she produced no documentation of the payments or details as to what payments were made. Under these circumstances, the court cannot find that defendant demonstrated a meritorious defense to the action.

It is accordingly hereby ORDERED that the motion of defendant Zhe Lin to vacate a default judgment entered against her on April 3, 2018 is denied in its entirety with prejudice.

This constitutes the decision and order of the court.

12/23/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE