

Zywolewska v Markiewicz

2021 NY Slip Op 32115(U)

October 25, 2021

Supreme Court, New York County

Docket Number: Index No. 154900/2020

Judge: Louis L. Nock

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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. LOUIS NOCK PART 38M

Justice

-----X

Wieslawa Zywolewska,

Plaintiff,

- v -

Franciszek Markiewicz, Andrzej Markiewicz, and Nina
Markiewicz,

Defendants.

-----X

INDEX NO. 154900/2020

MOTION DATE 07/30/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, plaintiff's motion for entry of a default judgment is denied, and the cross-motion to dismiss is granted in part, in accord with the following memorandum decision.

Background

On July 28, 2020, Plaintiff Wieslawa Zywolewska ("Plaintiff") commenced this action against defendants Franciszek Markiewicz ("Franciszek"), Andrzej Markiewicz ("Andrzej"), and Nina Markiewicz ("Nina"), for alleged wage and hour violations under the New York Labor Law (NYSCEF Doc No. 1, complaint). On July 28, 2020, Plaintiff filed affidavits of service that indicate each defendant was served by substitute service on July 21, 2020 at 5:11 p.m. at 60-42 Flushing Ave., Maspeth, New York 11378-3222 (NYSCEF Doc Nos. 2-5). The affidavit states that the individual served "REFUSED NAME" and is described as a female individual, aged 51-65, 5 ft 4 in - 5 ft 8 in, weighing 131-160 lbs (*id.*). The Maspeth, New York address is indicated

as each individual's "dwelling house (usual place of abode)" (*id.*). None of the defendants thereafter answered the complaint or otherwise appeared in the action.

On July 30, 2021, Plaintiff filed the instant motion for entry of a default judgment against all defendants. Defendants Andrzej and Nina oppose and cross-move to dismiss the action against all defendants due to Plaintiffs' failure to move for entry of a default judgment within one year, for lack of personal jurisdiction due to lack of service, and because defendant Franciszek Markiewicz is deceased and was so prior to the commencement of the action. No opposition to the cross-motion has been filed.

Discussion

A plaintiff that seeks entry of a default judgment must demonstrate proof of service of the summons and complaint upon the defendant, proof of the default, and proof of the facts constituting its claims (CPLR 3215). A motion for default must be filed within one year of the default or "the court shall not enter judgment but shall dismiss the complaint as abandoned" (CPLR 3215 [c]). In this case, the defendants were each purportedly served by substitute service on July 21, 2020 and corresponding affidavits of service were filed on July 28, 2020 (NYSCEF Doc Nos. 2-5). Where a party is served by substitute service, service "shall be complete ten days" after the corresponding affidavits of service are filed (CPLR 308 [2]). The defendant must then appear in the action within 30 days after service is complete (CPLR 320 [a]). Therefore, the purported default took place forty days after the affidavits of service were filed, on September 6, 2020, and Plaintiff's motion for a default judgment was timely filed on July 30, 2021. Nevertheless, the motion for entry of a default judgment fails on other grounds.

With respect to defendant Franciszek Markiewicz, defendants have demonstrated, by affidavits of Andrzej and Nina, that Franciszek Markiewicz died on December 26, 2016. As

such, this action is a nullity as to that defendant because “one cannot commence an action against a deceased person” (*Maldonado v Law Off. of Mary A. Bjork*, 64 AD3d 425, 426 [1st Dept 2009]) [“Since one cannot commence an action against a deceased person, this action was a nullity from its inception”]; *see Marte v Graber*, 58 AD3d 1, 2-3 [1st Dept 2008]; *see also Matter of Foreclosure of Tax Liens [Goldman]*, 165 AD3d 1112, 1117 [2d Dept 2018]; *Rivera v Bruchim*, 103 AD3d 700, 700 [2d Dept 2013]). Consequently, this court lacks jurisdiction to entertain both the action against Franciszek Markiewicz and the motion for leave to enter a default judgment against him or even to extend the time to serve a representative of his estate, because Franciszek Markiewicz was deceased even prior to the commencement of the action (*see Maldonado v Law Off. of Mary A. Bjork*, 64 AD3d at 426). Rather, the plaintiff was required to have commenced the action against the executor of the decedent’s estate in a timely fashion (*see Krysa v Estate of Qyra*, 136 AD3d at 760; *Rivera v Bruchim*, 103 AD3d at 700). Therefore, the motion is dismissed as against Franciszek Markiewicz.

The remaining defendants, Andrzej Markiewicz and Nina Markiewicz,¹ have submitted personal affidavits in which they attest, in relevant part, that they live in Kelly Corners, New York; that the Maspeth, New York, address cited in the affidavits of service is their second home; and that the residence has been otherwise unoccupied except for when they stay there from time to time (*see*, NYSCEF Doc No. 25 ¶¶ 3-5; NYSCEF Doc No. 31 ¶¶ 3-7). They further attest that they were not at the residence at the time of purported service and “[n]either was there anyone else at the Maspeth residence in or around the home to accept service” (NYSCEF Doc No. 25 ¶ 9; NYSCEF Doc No. 31 ¶ 9). They further attest that “[o]n the date of the alleged service . . . there was no one else living or staying at the Maspeth residence . . . there was no

¹ Defendants Andrzej Markiewicz and Nina Markiewicz are married to each other. Franciszek Markiewicz is Andrzej’s father (*see*, NYSCEF Doc. No. 25 ¶¶ 3-5).

guest, cleaning person, or tenant present at the Maspeth residence” (NYSCEF Doc No. 25 ¶ 7; NYSCEF Doc No. 31 ¶ 7). This is sufficient to raise a question of fact regarding the sufficiency of service upon Andrzej and Nina.

A process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to the CPLR and raises a presumption of proper service (*see Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591, 591 [1st Dept 2020]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required (*see Hinds v 2461 Realty Corp.*, 169 AD2d 629 [1st Dept 1991]). Where defendant swears to specific facts to rebut the statements in the process server’s affidavit, a traverse hearing is warranted (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept. 2004]). Here, in light of the affidavits of Andrzej and Nina, a traverse hearing is directed.

Accordingly, it is hereby

ORDERED that this matter having come on before this court on motion of the plaintiff for entry of a default judgment, and, pursuant to CPLR 4212, the court having on its own motion determined that the appointment of a referee to hear and report is appropriate, it is now hereby

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court on the issue of whether the court has acquired personal jurisdiction over defendants Andrzej Markiewicz and Nina Markiewicz, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendant shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff’s papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that the motion for entry of a default judgment is denied without prejudice to renew pending the outcome of the hearing.

Louis L. Nock

<u>10/25/2021</u>			<u>LOUIS NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE