

Slice Bus. Mktg., Inc. v Kipp
2021 NY Slip Op 32393(U)
November 17, 2021
Supreme Court, New York County
Docket Number: Index No. 656543/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART 53

Justice

-----X

SLICE BUSINESS MARKETING, INC.,

Plaintiff,

- v -

MARVIN KIPP, GIOVANI BAPTISTE, MICHAEL STYLES,
DEAN BECKWITH, ERIC WALTON, DERRICK WATKINS,
SELECT MERCHANT SERVICE, INC.

Defendant.

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INDEX NO. 656543/2019MOTION DATE MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for

JUDGMENT - DEFAULT

Slice Business Marketing, Inc.'s (**Slice**) motion for a default judgment is granted without opposition solely as against Marvin Kipp, Michael Styles, Dean Beckwith, Eric Walton, and Derrick Watkins, pursuant to CPLR 3215. Slice properly served these defendants and provided the additional mailing, affidavit of non-military service, and an affidavit of merit for the alleged default. The motion for a default judgment is denied solely as against Giovanni Jean-Baptiste.¹

“The affidavit of the process server constitutes prima facie evidence of proper service and the mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper” (*Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]). However, a “sworn non-conclusory denial of service by a defendant is sufficient to

¹ Mr. Jean-Baptiste was incorrectly named in the complaint as Giovanni Baptiste

dispute the veracity or content of the affidavit, requiring a traverse hearing” (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]).

“To obtain relief from a default judgment, a party is required to demonstrate both a reasonable excuse for the default and a meritorious claim or defense to the action” (*Bobet v Rockefeller Center, North, Inc.*, 78 AD3d 475, 475 [1st Dept 2010]). A court may exercise discretion in finding a reasonable excuse and a meritorious defense, particularly in light of “the strong policy favoring adjudication on the merits” (*National Union Fire Ins. Co. of Pittsburgh, PA v Diamond*, 39 AD3d 360, 361 [1st Dept 2007]) and where there is “no indication of a pattern of dilatory behavior or evidence that the default was willful, and there was no claim of prejudice” (*Bobet v Rockefeller Center, North, Inc.*, 78 AD3d at 474).

For completeness, in opposition to the motion for a default judgment, Mr. Jean-Baptiste submitted an affidavit in which he states that he did not live at 1 Tuscany Drive, Jackson, New Jersey on November 15, 2019, when Slice proports to have served him (Aff. of Giovanni Jean-Baptiste; NYSCEF Doc. No. 89, ¶ 3). In his affidavit, Mr. Jean-Baptiste claims that he lived with his father a 455 Bainbridge Street, Brooklyn, New York (*id.*, ¶ 5) and that the 1 Tuscany Drive address is the residence of his mother, her husband, and her mother (*id.*, ¶ 2). As a result, Mr. Jean-Baptiste claims that he did not receive the summons and complaint until January 2021 (*id.*, ¶ 10). Mr. Jean-Baptiste’s mother, Ana Davis, also submitted an affidavit that Mr. Jean-Baptiste did not live at the 1 Tuscany Drive address on November 15, 2019 (Aff. of Ana Davis; NYSCEF Doc. No. 90, ¶ 3). Ms. Davis also testified that the process server left documents on her steps, did not ask if Mr. Jean-Baptiste lived or worked at the address, and that the affidavit

saying that she responded affirmatively that Mr. Jean-Baptiste lived there was not accurate (*id.*, ¶¶ 5-9). Additionally, on the record (11.17.21), he accepted service of process and indicated that he would file a responsive pleading within 20 days of today's date with the understanding that should he fail to do so, Slice was given leave to have the court enter judgment against him.

In response, Slice submitted a copy of Mr. Jean-Baptiste's drivers license (NYSCEF Doc. No. 93), his employment agreement with Slice (NYSCEF Doc. No. 94), an employee's withholding allowance certificate (NYSCEF Doc. No. 95), an employment eligibility verification form (NYSCEF Doc. No. 96), and an emergency contact form (NYSCEF Doc. No. 97), all of which list his address as the 1 Tuscany Drive address. These documents are all dated between November 13, 2017 and February 28, 2019, beginning two years before Mr. Jean-Baptiste was allegedly served and ending nearly nine months before that time.

Mr. Jean-Baptiste's and Ms. Davis's affidavits are sufficiently non-conclusory because he provided the address where he lived at the time of service and in any event accepted service of process on the record. Thus, based on the strong public policy of deciding cases on the merits, Mr. Jean-Baptiste must file within 20 days from this order a responsive pleading. Should he fail to file an answer within 20 days, Slice shall be authorized to submit judgment to Part 53.

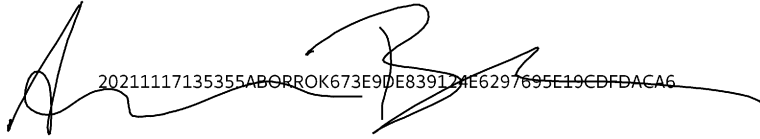
It is accordingly hereby ORDERED that Slice Business Marketing, Inc.'s motion for a default judgment is granted solely as against Marvin Kipp, Michael Styles, Dean Beckwith, Eric Walton, and Derrick Watkins; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Slice Business Marketing, Inc. and against Marvin Kipp, Michael Styles, Dean Beckwith, Eric Walton, and Derrick Watkins; and it is further

ORDERED that Slice Business Marketing, Inc.'s motion for a default judgment as against Giovanni Jean-Baptiste is denied; and it is further

ORDERED that Giovanni Jean-Baptiste shall file a responsive pleading within 20 days of the date of this order, and, if he fails to do so, he shall be in default and Slice Business Marketing, Inc. shall be authorized to enter judgment against him; and it is further

ORDERED that the issue of damages owed to Slice Business Marketing, Inc. by the defaulting parties will be referred to a Judicial Hearing Officer ("JHO") or Special Referee for an inquest at the time of trial.

<u>11/17/2021</u> DATE	 20211117135355ABORROK673E9DE839124E6297695E19CDFDACA6 ANDREW BORROK, JSC			
CHECK ONE:	☒	CASE DISPOSED	☐	NON-FINAL DISPOSITION
	☐	GRANTED	☐ DENIED	☒ GRANTED IN PART
APPLICATION:	☐	SETTLE ORDER		☐ OTHER
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT
			☒	REFERENCE