

Gera v KA & B Props. Inc.

2021 NY Slip Op 33425(U)

February 25, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 621640/2019

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 621640/2019

CAL. No. _____

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE (# 003)7/13/2020,
8/4/2020 (# 004)

ADJ. DATE 11/24/2020

Mot. Seq. # 003 - MD

Mot. Seq. # 004 - MG

-----X

ANDRE GERA and GERA REALTY LTD.,

Plaintiffs,

- against -

KA & B PROPERTIES INC., ROBERT
O’CONNOR, KATIA N. O’CONNOR,
BREANA O’CONNOR, ALIDA CONSOLE
a.k.a. ALIDA LANG, individually and d/b/a KA
& B PROPERTIES AND FORECLOSURE
EXPERTS USA.

Defendants.

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Upon the following papers e-filed and read on this motion to enter default judgments : Notice of Motion and supporting papers by plaintiffs, dated June 12, 2020; Notice of Cross Motion and supporting papers by defendants, dated July 14, 2020; Answering Affidavits and supporting papers by plaintiffs, dated October 19, 2020 ; Replying Affidavits and supporting papers by defendants, dated November 12, 2020, November 16, 2020 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiffs’ motion for leave to enter default judgments against defendants KA & B Properties, Inc., Katia O’Connor, Breana O’Connor, Alida Console a/k/a Alida Lang and defendants’ cross motion for an order dismissing the complaint against them are consolidated for the purposes of this determination; and it is further

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ORDERED that plaintiffs' motion for leave to enter default judgments on the first, second and third causes of action against defendants KA & B Properties, Inc., Katia O'Connor, Breana O'Connor, Alida Console a/k/a Alida Lang, individually and d/b/a KA & B Properties and Foreclosure Experts USA is denied; and it is further

ORDERED that the cross motion by defendants Katia O'Connor, Breana O'Connor and Alida Console a/k/a Alida Lang d/b/a KA & B Properties and Foreclosure Experts USA for an order dismissing the complaint as against them is granted; and it is further

ORDERED that the branch of the cross motion by defendant KA & B Properties, Inc. excusing it from appearing in this action and extending its time to answer is granted, and such defendant shall serve and file a verified answer to plaintiffs' complaint within 30 days from receipt of a copy of the Notice of Entry; and it is further

ORDERED that the branch of the cross motion by Robert O'Connor for an order granting him leave to amend his answer is denied without prejudice to renew; and it is further

ORDERED that if this Order has not already been entered, defendant KA & B Properties, Inc. is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, defendant KA & B Properties, Inc. is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiffs commenced this action on October 30, 2019 to recover damages in the amount of \$127,900.00 on the first three causes of action which is the subject of their motion. By verified complaint, plaintiffs allege that they retained the services of defendants with respect to the purchase of a certain piece of real property known as and located at 10 West Cliff Drive, Mount Sinai, New York. Plaintiffs allege that defendants held themselves out as "foreclosure experts with regard to, among other things, negotiating mortgage modifications, forbearance agreements, the securing of refinancing for defaulted mortgages, and specialists in negotiating, obtaining and procuring of short sales of distressed real estate being foreclosed upon."

Plaintiffs allege that defendants maintain their place of business at 135 W. Main Street, Smithtown, New York, and that they instructed plaintiff to deposit the sum of \$120,000.00 with them to purchase the subject premises, and assured plaintiffs that the money would be held in escrow. Plaintiffs allege they also paid real estate taxes for the tax year 2016/2017 in the sum of \$7,900.00, and that defendants assured plaintiffs they would have a short sale and plaintiff could improve the premises while they were waiting. Plaintiffs allege that they spent substantial monies to improve the property, and that the property was sold in foreclosure to a third party. The complaint alleges that defendants used the monies deposited for their own personal benefit, that they refused to return the monies and were unjustly enriched.

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Plaintiffs now move for an order granting them leave to enter a default judgment against defendants KA & B Properties, Inc., Katia O'Connor, Breana O'Connor, Alida Console a/k/a Alida Lang in the amount of \$127,900.00 representing damages for the first three causes of action. In support of the motion, plaintiffs submit a copy of the summons and verified complaint, affidavits of service, an answer by defendant Robert O'Connor, an affidavit by Andre Gera, copies of checks issued by plaintiffs made payable to defendant "KA & B" and deposited to the account of KA & B Properties, Inc.

On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's default in answering or appearing (*Wilmington Savings Fund Society, FSB v Chishty*, 179 AD3d 1147, 114 NYS3d 701 [2d Dept 2020]; *Moran v BAC Field Services Corporation*, 164 AD3d 494, 83 NYS3d 111 [2d Dept 2018]; *BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]). CPLR § 3215 (f) requires that proof of the facts constituting the claim be established for the entry of a default judgment. To establish proof of the claim, an affidavit made by a party who has firsthand knowledge, alleging the facts of the claim, or a complaint verified by the party is necessary to demonstrate a viable cause of action (*Woodson v Mendon Leasing Corp.*, 100 NY2d 627, 760 NYS2d 727 [2003]; see also *L & Z Masonry Corp. v Mose*, 167 AD3d 728, 90 NYS3d 92 [2d Dept 2018]; *Gerhardt v Salacqua Contr. Co.*, 181 AD2d 719, 581 NYS2d 227 [2d Dept 1992]).

The affidavits of service of the summons and complaint indicate that defendants Katia O'Connor, Breana O'Connor and Alida Console a/k/a Alida Lang were served pursuant to CPLR 308 (2), by leaving a copy of the summons and complaint with a person of suitable age and discretion at their place of business on November 11, 2019, and the documents were mailed to such defendants on November 12, 2019 in accordance with the requirements set forth in the statute. The affidavits of service were filed with the Clerk of the Court on December 5, 2019, and, therefore, service was complete on or about December 15, 2019, and defendants should have answered or appeared on or before January 15, 2020. The affidavit of service for defendant KA & B Properties, Inc. indicates that it was served pursuant to BCL § 306, by leaving the documents with the Secretary of State in Albany on November 13, 2019, and the documents were filed on December 5, 2019. Plaintiffs' counsel avers that such defendants did not answer the complaint and have not appeared in this action.

The allegation set forth in plaintiffs' verified the complaint and in the affidavit of Andre Gera, are sufficient to demonstrate that plaintiffs have viable causes of action against defendants (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 627, 760 NYS2d 727; see also *L & Z Masonry Corp. v Mose*, 167 AD3d 728, 90 NYS3d 92; *Gerhardt v Salacqua Contr. Co.*, 181 AD2d 719, 581 NYS2d 227).

In opposition, defendants submit their own affidavits arguing that they were not properly served. Defendant Katia O'Connor states in her affidavit that she resides in the State of

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California and has lived there since 2011. She states that she is currently the sole shareholder of KA & B Properties, Inc. Katia states that KA & B Properties, Inc. was incorporated in 2013, and that at the time of incorporation, 25 shares of stock were issued to Breana O'Connor, 25 shares of stock were issued to Tyler O'Connor, and that she was issued 50 shares of stock. She states that in September 2016, Breana O'Connor and Tyler O'Connor transferred their shares of stock to her making her sole shareholder of KA & B Properties, Inc.

Katia states that she did not conduct any business with plaintiffs in her individual capacity and did not guaranty any transactions regarding KA & B Properties, Inc. She states that Robert O'Connor is the operations manager and chief executive officer who handles the day-to-day operations of KA & B, Properties, Inc., and she also states that she has never been actively involved in the business of KA & B Properties, Inc. She states that her only involvement with the company is to endorse and deposit checks which were sent to her by Robert O'Connor. Katia argues that the action should be dismissed as against her on the grounds that the Court lacks jurisdiction over her person and she also cross-moves for such relief. Alternatively, Katia requests a traverse hearing.

Defendant Breana O'Connor argues that she was not properly served, as she resides in the County of Westchester. She states that in or about September 2016, she transferred her twenty-five (25) shares of stock to her stepmother, Katia O'Connor, and that she was not involved in the transaction that is the subject of this lawsuit, that she never met plaintiffs and she does not maintain a business address at 135 West Main Street, Smithtown, New York. Breana argues that she was not properly served, and she also cross-moves for an order dismissing the complaint against her on the grounds that the court lacks jurisdiction over her person. Alternatively, Breana requests a traverse hearing.

An affidavit by Alida Console is submitted. Console states that she is currently married, and that she was formerly known as Alida Lang. Console states that she works part time for KA & B Properties, Inc. as a secretary, that she does not maintain a place of business in Suffolk County, that she does not maintain a place of business at 135 Main Street and is unfamiliar with the person described in the affidavit of service. Console argues that she was not properly served, and she also cross-moves for an order dismissing the complaint against her on the grounds that the court lacks jurisdiction over her person. Console alternatively seeks a traverse hearing. Console also argues that she is not a shareholder and has no equity interest in KA & B Properties, Inc., and that the only interaction she had with plaintiff Mr. Gera was to prepare a loan modification application at his request, and he paid her directly.

It is well settled that an affidavit of a process server that is facially sufficient constitutes a prima facie showing of proper service (*FV-1, Inc. v Reid*, 138 AD3d 922, 31 NYS3d 119 [2d Dept 2016]; *Genway Corp. v Elgut*, 177 AD2d 467, 575 NYS2d 899 [2d Dept 1991]). Only a sworn denial that sets forth specific facts challenging the allegations in the affidavit of service may refute the presumption (*see Deutsche Bank National Trust Company v Saketos*, 158 A.D.3d 610, 72 NYS3d 167 [2d Dept 2018]). Furthermore, whereas here, defendants allege that

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they reside at a different place than that of service, they must submit documentary evidence to support that claim (*see American Home Mtge. Acceptance, Inc. v Lubonty*, 136 NYS3d 130, 136 NYS3d 130 [2d Dept 2020]; *Bank of NY Mellon v Lawson*, 176 AD3d 1155, 111 NYS3d 337 [2d Dept 2019]). Here, the affidavits in opposition are insufficient to demonstrate that service was improper and that the court lacks jurisdiction over their persons.

Notwithstanding, plaintiffs' motion for leave to enter a default judgment against defendants Katia O'Connor, Breana O'Connor and Alida Console is denied. Each defendant has provided sufficient facts constituting a meritorious defense to plaintiffs' causes of action. As service was made pursuant to CPLR 308(2), and not by personal delivery, defendants' failure to appear need not be explained (*see* CPLR § 317). Furthermore, it is the favored policy in this State to determine cases on their merits (*see Moorer v County of Nassau*, 175 AD3d 1404, 108 NYS3d 164 [2d Dept 2019]; *Ahmad v Aniolowiski*, 28 AD3d 692, 814 NYS2d 666 [2d Dept 2006]).

With respect to defendant KA & B Properties, Inc., the affidavit of service is sufficient to establish that service of process was proper. The affidavit of service indicates that KA & B Properties, Inc. was served pursuant to BCL § 306, by leaving the documents with the Secretary of State in Albany, on November 13, 2019, and the documents were filed on December 5, 2019. Therefore, service was complete on November 13, 2019 and KA & B Properties, Inc. should have answered or appeared by counsel on or before January 13, 2020. Defendant, a corporation, must appear by counsel (CPLR § 321 [a]). As defendant did not retain counsel until July 14, 2020, it is in default. Plaintiffs have also submitted sufficient proof of facts constituting the claims through the verified complaint and affidavit by Andre Gera. However, whereas here, service is made pursuant to BCL § 306, proof of additional notice must be submitted to obtain a default judgment. Pursuant to CPLR § 3215 (g)(4)(i), "an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." Furthermore, the additional notice "shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. . ." (CPLR § 3215 [g][4][ii]).

Here, an affidavit that additional notice was given to KA & B Properties, Inc. is submitted. However, the statements in the affidavit are insufficient to constitute compliance with the requirements contained in CPLR § 3215 [g][4][ii]). Accordingly, plaintiffs' motion for an order granting leave to enter a default judgment against KA & B Properties, Inc. is denied.

Defendants Katia O'Connor, Breana O'Connor, Alida Console d/b/a, KA & B Properties and Foreclosure Experts, USA cross-move for an order dismissing the complaint against them on the grounds that the court lacks jurisdiction over their persons, or alternatively, for a traverse hearing, or for an order permitting them to serve an answer to the plaintiffs' complaint, pursuant to CPLR § 3012 (d). Defendant Robert O'Connor also cross-moves for an order dismissing the

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complaint against him on the ground that the court lacks jurisdiction over his person due to improper service. Alternatively, Robert O'Connor requests a traverse hearing, or leave to amend his answer. Defendants Robert O'Connor, Katia O'Connor, Breana O'Connor and Alida Console d/b/a Foreclosure Experts USA also seek dismissal of the complaint on the grounds that the complaint fails to state a cause of action against them in their individual capacity. In support of the motion, defendants submit an affirmation of counsel, affidavits by defendants Robert O'Connor, Katia O'Connor, Breana O'Connor and Alida Console.

Initially, the Court notes that the affidavits by defendants Katia O'Connor, Breana O'Connor and Alida Console were provided in plaintiffs' motion, and the Court addressed the jurisdictional arguments above. Accordingly, that branch of the motion for an order dismissing the complaint as against these defendants on the grounds that the Court lacks jurisdiction over their persons is denied.

With respect to defendant Robert O'Connor, he states in his affidavit that he was not served with a copy of the summons and complaint and seeks dismissal due to lack of personal jurisdiction. Robert O'Connor served an answer to plaintiffs' complaint on November 19, 2019 which does not contain the affirmative defense of lack of personal jurisdiction, and Robert O'Connor 621640/201 did not make this motion within the time prescribed by CPLR 3211 (e). Therefore, he waived such objection. Additionally, nowhere in his affidavit does he express any denial of having been served to rebut the presumption created by the process server's affidavit of service which states that Robert O'Connor was served on November 11, 2019, pursuant to CPLR § 308 (2).

Defendants Robert O'Connor, Katia O'Connor, Breana O'Connor Alida Console a/k/a Alida Lang and Foreclosure Experts USA also seek dismissal of the complaint on the ground that the complaint fails to state a cause of action against them in their individual capacity.

It is well settled that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*see Walkovszky v Carlton*, 18 NY2d 414, 417, 276 NYS2d 585 [1966]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009] *aff'd* 16 NY3d 775, 919 NYS2d 496 [2011]).

While an exception to this principle exists to prevent fraud, illegality or to achieve equity (*see Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]; *Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 972 NYS2d 84 [2d Dept 2013]; *Sigal v Brokaw*, 71 AD3d 865, 895 NYS2d 862 [2d Dept 2010]; *Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 1029 [2d Dept 2005]), known as the doctrine of piercing the corporate veil, the complaint fails to allege sufficient facts to implicate personal liability upon the individual defendants Katia O'Connor, Breana O'Connor and Alida Console. Accordingly, the cross motion by defendants Katia O'Connor, Breana O'Connor and Alida Console for an order dismissing the complaint as against them is granted.

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The branch of the cross motion for an order excusing KA & B Properties, Inc. from its default by failing to appear by counsel and permitting it to serve and file a verified answer to plaintiffs' complaint is granted pursuant to CPLR § 3012 (d).

The branch of the cross motion by Robert O'Connor for leave to amend his answer is denied without prejudice as the proposed amended answer is not submitted with the motion (CPLR 3025 [b]).

Anything not specifically granted herein is hereby denied.

This constitutes the Decision and Order of the Court.



LINDA KEVINS, JSC

Dated: 2/25/21

 FINAL DISPOSITION X NON-FINAL DISPOSITION