

**Garrick v Charles**

2021 NY Slip Op 34062(U)

October 5, 2021

Supreme Court, Queens County

Docket Number: Index No. 706633/19

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN  
Justice

IA PART 27

BEULAH GARRICK,

Index No. 706633/19

Plaintiff,

Motion

Date March 30, 2021

- against-

CHICALENA CHARLES, WAYNE MEADE,  
LEAH BLOOM and KODOSH HOLDINGS, LLC,

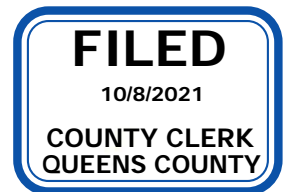
Motion

Cal. No. 5

Motion

Seq. No. 1

Defendants.



The following numbered papers read on this motion by the plaintiff for a default judgment, pursuant to CPLR 3215, against defendants; and pre-answer cross motion by defendants Leah Bloom and Kodosh Holdings LLC, seeking to either dismiss the action pursuant to CPLR 5015 (a) (4) and CPLR 3211 (a) (8), order a traverse hearing as to personal jurisdiction, or vacate their default in answering, pursuant to CPLR 317 and CPLR 5015(a) (1) or (a) (4) and grant them leave to file a late answer, pursuant to CPLR 3012 (d).

Papers  
Numbered<sup>1</sup>

Notice of Motion - Affirmation - Exhibits.....	EF 6-12, 39
Notice of Cross Motion- Affirmation - Exhibits.....	EF 16-26
Affirmation in Opposition to Cross Motion - Exhibits....	EF 28-38
Affirmation in Further Support of Cross Motion - Exhibits....	EF 40-44
Affirmation in Further Support of Motion - Exhibit.....	EF 45-46
Letter dated March 30, 2021 by defendants.....	EF 47

<sup>1</sup> The court will overlook the procedural violations of both parties, relating to defendant, Bloom’s cross motion and plaintiff’s “sur-reply,” which submitted the Kodosh Holdings LLC operating agreement as an exhibit, of which, in a letter to the court, Bloom’s counsel protests the procedural irregularity, not its validity.

Upon the foregoing papers the motion and cross motion are determined as follows:

This is an action for fraud, unjust enrichment and breach of contract wherein plaintiff alleges the following: she entered into a purchase of real property located at 147-12 South Road (also known as Tuskegee Airmen Way), in County of Queens, believing that she was purchasing a property free and clear of a mortgage but instead, she later learned it was subject to a mortgage, and the purchase was for only an undivided 50% interest rather than full ownership. Discovering the mortgage had gone unpaid, allegedly upon the advice of the defendant, Meade, she sought the assistance of defendant, Bloom. Bloom allegedly promised that in exchange for managing the property and saving it from foreclosure, a separate company (defendant, Kodosh Holdings LLC) be formed between plaintiff and Bloom into which plaintiff transferred full title to the subject property. Plaintiff contends that defendant, Bloom never intended to carry out her promised role, and instead intended to collect the rents for her own benefit and obtain partial ownership rights to the property. Plaintiff further contends that defendant, Bloom disregard the mortgage and expenses of the property and failed to make any distributions of monies received to plaintiff.

Plaintiff moves for a default judgment against defendants, pursuant to CPLR 3215.<sup>2</sup> Defendants, Bloom and Kodosh Holdings LLC cross-move either dismiss the action, order a traverse hearing as to personal jurisdiction, or vacate their default in answering, pursuant to CPLR 317 and CPLR 5015(a) (1) or (a) (4) and grant them leave to file a late answer, pursuant to CPLR 3012 (d).

To obtain a default judgment pursuant to CPLR 3215 (f), a plaintiff is required to make a sufficient showing, among other things, that service had been properly made and that sufficient facts enable the court to determine that viable causes of action exist. (*See Kwang Bok Yi v Open Karaoke Corp.*, 161 AD3d 969 [2d Dept 2018]; *Charmon v Pavy*, 153 AD3d 493 [2d Dept 2017].) At the outset, service upon defendant, Kodosh Holdings LLC and defendant, Charles are deemed proper service. The affidavit of service for defendant, Charles indicated personal service and the affidavit of service for defendant, Kodosh Holdings LLC demonstrated service upon the Secretary of State. Although service is deemed proper as to defendants, Charles and Kodosh Holdings LLC, however, plaintiff has failed to submit sufficient evidence to enable the court to determine, for the purposes of consideration of a default judgment, whether any alleged cause of action

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<sup>2</sup> The court notes that while plaintiff stated in her affidavit that some “understanding” was reached with defendants, Meade and Charles, no stipulation of settlement has been filed.

described in plaintiff's complaint constitutes a viable cause of action against defendants, Charles and Kodosh Holdings LLC. (*See Charmon*, 153 AD3d 493 [2d Dept 2017].) Further, the verified complaint and other submissions by plaintiff contain insufficient facts to satisfy the statutory requirements for entry of a default judgment as against defendant, Bloom (*See Kwang Bok Yi v Open Karaoke Corp.*, 161 AD3d 969 [2d Dept 2018]; *Roy v 81 E 98<sup>th</sup> KH Gym LLC*, 142 AD3d 985 [2d Dept 2016].)

Moreover, the process server's affidavit attesting to service upon defendant, Meade by "nail and mail," lacks the language necessary to conform to the requirements of the statute, in that it is conclusory, and did not properly identify the address served. (CPLR 308 [4]; *Wells Fargo Bank, N.A., v Heaven*, 176 AD3d 761 [2d Dept 2019].)

The affidavit of service for defendant, Bloom indicated substituted service on a person of suitable age and discretion at 2516 Avenue W, Brooklyn, New York as the "usual place of abode" of Bloom, pursuant to CPLR 308 (2). A process server's affidavit of service constitutes *prima facie* evidence of proper service (*See Pennymac Corp., v Barbosa*, 189 AD3d 863 [2d Dept 2020]; *Bethpage Federal Credit Union v Grant*, 178 AD3d 997 [2d Dept 2019].) In order to avoid the entry of a default judgment, a defendant who has failed to appear or answer the complaint, must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action. A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit. (*Id.*) The denial of service must be substantiated by specific detailed facts that contradict the affidavit of service. (*Washington Mut. Bank v Huggins*, 140 AD3d 858 [2d Dept 2016].)

In the case at bar, the mere denial of defendant, Bloom, purportedly supported by her driver's license, does not overcome the presumption of proper service. (*Id.*) Several factors contradict defendant, Bloom's assertions, including that 2516 Avenue W, was, in fact, stated by her to be her residence address at various times prior to and after service of process. The home at this address was owned by defendant, Bloom as shown by the deed to the property and was her stated residence in years prior to the date of service. Without explanation, this address was also used as her residence in bankruptcy court proceedings filed by defendant, Kodosh Holdings LLC, for which defendant Bloom, acting *pro se*, was the majority member in control of such filing. Even after a purported transfer of ownership to a third party, these bankruptcy records show 2516 Avenue W as her residence, and her submissions do not address these discrepancies. Further, the Kodosh Holdings LLC operating agreement itself, uses 2516 Ave W as defendant, Bloom's residence address. Under such circumstances, a mere denial and a copy of defendant, Bloom's driver's license, without more, are insufficient to rebut the presumption of

proper service. (*Washington*, 140 AD3d 858; cf. *Wells Fargo Bank, N.A., v Rinderman*, 190 AD3d 885 [2d Dept 2021]).

In order to vacate a default pursuant to CPLR 5015 (a) (1), the defaulting party must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action. (*See Eugene Di Lorenzo, Inc., v A.C. Dutton Lbr. Co.*, 67 NY2d 138 [1986].) Since the only excuse offered for failing to submit a timely answer in this matter is that defendant, Bloom did not receive service, or notice of the action in time to submit an answer, the court finds the default is not excusable, and need not address whether defendant, Bloom has a meritorious defense. (*See Dunn v Law Offices of Evans & Al-Shabazz, LLP*, 189 AD3d 776 [2d Dept 2020].)

Furthermore, CPLR 317 provides that a defaulting defendant, served other than by personal delivery, may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend the action and has a potentially meritorious defense. (*Dove v 143 Ach. St. Realty Corp.*, 172 AD3d 1315 [2d Dept 2019].) It is within the sound discretion of the court to determine whether the defendant received sufficient notice to appear or answer in a timely fashion. (*Id.*) Upon the evidence submitted herein, the court finds that defendant, Bloom received sufficient notice in time to defend the action. (*Id.*)

Accordingly, plaintiff's motion for a default judgment against defendants, is denied. The cross motion of defendants, Bloom and Kodosh Holdings LLC, is denied in its entirety.

Dated:

Oct. 5, 2021

  
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DARRELL L. GAVRIN, J.S.C.