

Bowery Poetry Club, Inc. v Lemoine

2022 NY Slip Op 30965(U)

March 23, 2022

Supreme Court, New York County

Docket Number: Index No. 651043/2012

Judge: Sabrina Kraus

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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. SABRINA KRAUS **PART** **57TR**

Justice

-----X

BOWERY POETRY CLUB, INC.,

Plaintiff,

- v -

RAY LEMOINE, MICHAEL HERMAN

Defendant.

-----X

INDEX NO. 651043/2012

MOTION DATE 3/21/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff commenced this action pursuant to a summons and complaint filed on April 2, 2012. Plaintiff was the lessee of the ground floor and cellar of 308 Bowery, New York, New York, 10012 (Subject Premises) pursuant to a lease agreement dated December 1, 2009 between plaintiff and 308-310 Bowery, LLC.

On or about December 10, 2010, plaintiff subleased a portion of the Subject Premises to Harrisons Bowery (HB) for a term for January 1, 2011 through February 29, 2016. Defendants in this action were the guarantors for said sublease.

Plaintiff alleges HB fell behind in the payment of rent and additional rent. Plaintiff further alleges that it entered into a surrender agreement with HB terminating the sublease and waiving the payments due on condition that HB vacated the Subject Premises on or before August 22, 2011. Plaintiff alleges that HB failed to vacate by said date, and they commenced a holdover proceeding to take back possession of the Subject Premises Under Index No. L&T

85292/11. Plaintiff alleges they obtained a judgment of possession in that proceeding in addition to a money judgment in the amount of \$74,171.54 for rent and additional rent due. Plaintiff alleges a warrant of eviction issued on February 2, 2012 and was subsequently executed by a City Marshal.

Defendants failed to answer or appear in this action and on August 27, 2012, plaintiff moved for a default judgment. The motion was granted by the Court (Freed, J) pursuant to a decision and order dated November 19, 2012, which granted the default and set the matter down for an inquest on damages. On January 16, 2013, the court awarded plaintiff a judgment in the amount of \$88,902.00. Plaintiff served and filed notice of entry of said judgment on February 4, 2013.

In March 2021, plaintiff served Michael Herman's (Herman) bank with an information and restraint subpoena. On March 17, 2021, an attorney reached out to plaintiff's counsel on behalf of Herman as regards the account. Based on discussions between counsel it was agreed that any funds in the account in excess of the \$152,678.86 needed to satisfy the judgment could be released.¹

THE PENDING MOTION

On February 22, 2022, Herman appeared herein by counsel and submitted an order to show cause seeking to vacate the default judgment. The order to show cause was signed by the court and returnable on March 21, 2022. Plaintiff filed opposition and after oral argument, the court reserved decision.

For the reasons stated below, the motion is granted to the extent of vacating the default judgment as against Herman and granting Herman leave to serve and file an answer.

¹ At oral argument counsel stated that in fact the bank, in error released all the funds being held.

DISCUSSION

The Motion Pursuant to CPLR 5015(a)(1) is Untimely But Movant Does Provide An Excusable Default

Herman moves by order to show cause pursuant to CPLR §5015 and seeks an order:

- (i) opening and vacating Michael Herman’s default judgment upon the grounds of lack of personal jurisdiction and excusable default;
- (ii) lifting all restraints and executions against Michael Herman;
- (iii) staying all judgment enforcement action against Michael Herman pending the determination of this application;
- (iv) granting leave for defendant Michael Herman to serve and file a reply to respond to plaintiff’s affidavit of service, which plaintiff is required to produce with its responsive papers pursuant to CPLR § 3211(e);
- (v) directing restitution for all monies paid toward the judgment thus far by Michael Herman through garnishment, plus interest and fees; and
- (vi) for such other and further relief as may be just, proper, and equitable.

The order to show cause does not specify which provision of 5015 relief is sought pursuant to. The order to show cause neither seeks dismissal of the action, nor does it seek leave to serve and file a proposed answer. No proposed answer is annexed to the moving papers. As the motion speaks to excusable default and meritorious defenses, but does not seek dismissal, the court presumes it was intended to be a motion pursuant to CPLR §5015(a)(1).

“A motion to vacate a default judgment pursuant to CPLR §5015(a)(1) on the ground of excusable default must be made within one year after service upon the moving party of a copy of the judgment, with notice of its entry (*see* CPLR 5015[a][1]).” *Barnett v. Diamond Fin. Co., Inc.*, 202 A.D.3d 651 (N.Y. App. Div. 2022).

Motions under CPLR 5015 are only subject to a time limitation when brought under subdivision (a)(1) of the statute, where the ground for vacating is that the default is excusable.

The computation of the one-year deadline is objective, as the entry date of an order and judgment is fixed and documented. While the statute commences the one year motion period from the “entry” of the order or judgment, the language has been properly and practically interpreted as running from the “service” of the order or judgment with notice of entry (*Hayes v Village of Middleburgh*, 140 A.D.3d 1359, 34 N.Y.S.3d 659 [3d Dep’t. 2016]).

In the case at bar Notice of Entry was served and filed in February 2013. Pursuant to CPLR 5015(a)(1), the motion is not timely.

When the motion is presented beyond the one-year statutory deadline, defendant must demonstrate a reasonable excuse for the tardiness (*Ibukun Ogunbekun v Strong Memorial Hospital*, 181 A.D.3d at 1189; *Carter v Daimler Trust*, 177 A.D.3d 541, 110 N.Y.S.3d 841 [1st Dep’t. 2019]). Thus, motions pursuant to CPLR §5015(a)(1) filed beyond the one-year statutory deadline must address two separate layers of reasonable excuse---the first to excuse the moving party's failure to bring the motion within one year, and if reached, the second to excuse defendant’s initial default in failing to appear, answer, or oppose the underlying complaint.

In this case, the motion does not acknowledge that it is untimely thus no explicit explanation is given for the delay. The motion papers taken as a whole however do challenge service and provide that as a basis for excusable default which could also be applicable to the delay in moving.

There is no explanation however at all as to why Herman waited nearly one year after admittedly learning of the judgment to move to vacate the judgment. Nor do the moving papers seek relief pursuant to CPLR §317, but if the motion were deemed to be pursuant to CPLR §317 it would be timely.

Herman has Waived the Right to Seek Dismissal Pursuant to CPLR §5015(a)(4)

As noted above there is a discussion about the deficiencies of service but no request for dismissal based on lack of personal jurisdiction pursuant to CPLR §5015(a)(4). There is no mention of lack of personal jurisdiction in the relief sought in the order itself.²

Because the moving papers do not seek dismissal based on lack of personal jurisdiction, nor do they reference CPLR §5015(a)(4) the court finds that Herman has waived the issue of lack of personal jurisdiction. (*See eg Caba v Rai* 63 AD3d 578 holding that where movant did not seek relief under CPLR 5015(a)(4) nor dismissal of the action based on lack of personal jurisdiction allegations regarding deficiencies in service only deemed applicable to excusable default; *Darbeau v 136 W. 3rd St. , LLC* 144 AD3d 420).³

In the Interests of Justice the Default Is Vacated

The statutory list provided in CPLR §5015 is not necessarily exhaustive and despite the absence of a catch-all paragraph, a court may vacate its own orders or judgments for sufficient reason and in the interests of substantial justice (*Woodson v Mendon Leasing Corp.*, 100 N.Y.2d 62, 760 N.Y.S.2d 727 [2003]; *J.P. Morgan Chase Bank, National Association v Dev*, 176 A.D.3d 691 [2d Dep't. 2019]; *40 BP, LLC v Katatikarn*, 147 A.D.3d 710 [2d Dep't. 2017]).

The court finds that such action is warranted in the case at bar. Given the admitted deficiencies in service of the original pleadings, the allegations of Herman that he has meritorious defenses to the claim herein, and the preference of courts to have cases determined

² The affirmation in support does reference a lack of personal jurisdiction as to Lucie Jonaissant in its concluding request for relief, but the court believes this reference to an individual not a party to this action was inadvertently included in the motion papers.

³ Moreover, this waiver was acknowledged by movant's counsel at oral argument.

on the merits, the court finds that the judgment as against Herman should be vacated and Herman should be given an opportunity to defend on the merits.

The defenses asserted by Herman include that the tenant vacated possession in advance of the date provided in the surrender agreement, and an allegation that the judgment in the summary proceeding was vacated on that basis. Herman also alleges breach of the sublease by plaintiff which may affect the amount due.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Herman's motion to vacate its default herein is granted, and the judgment is vacated as to Herman, on condition that Herman serve and file an answer to the complaint herein, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that all liens and executions of said judgment as to Herman are vacated; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference in on June 6, 2022, at 10:00 AM; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/23/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: