

160 E. 28th & 134 Ninth LLC v Suits & Skirts1 LLC

2022 NY Slip Op 31395(U)

April 27, 2022

Supreme Court, New York County

Docket Number: Index No. 155703/2020

Judge: David B. Cohen

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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. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 155703/2020

160 EAST 28TH & 134 NINTH LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

SUITS AND SKIRTS1 LLC D/B/A SUITS AND SKIRTS
CLEANERS, MATTHEW FANIA, ABC CORP., JOHN DOE,
and JANE DOE,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 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 DEFAULT JUDGMENT.

In this ejectment action commenced by 160 East 28th & 134 Ninth LLC (“plaintiff”), Suits and Skirts 1 LLC (“SS”) and Matthew Fania (“Fania”) (collectively “defendants”) move for an order: (i) vacating the default judgment entered against Fania pursuant to CPLR 5015(a)(4) and, upon vacating the default, dismissing the complaint against him pursuant to CPLR 3211(a)(8) or, in the alternative, vacating the default judgment against Fania pursuant to CPLR 5015(a)(1) and CPLR 317 and permitting him to file an answer; and (ii) vacating the default judgment entered against SS pursuant to CPLR 5015(a)(1) and CPLR 317 and permitting said defendant to file an answer.

I. Factual and Procedural Background

Plaintiff, as landlord, entered into a lease with SS, as tenant, for the building located at 160 East 28th Street a/k/a 158 East 28th Street, New York, New York 10016 (“the premises”) for a term commencing on April 5, 2013 and expiring on March 31, 2023. Doc. 29. At or about the time the lease was executed, Fania, a member of the plaintiff, executed a “good guy guaranty” pursuant to which he unconditionally guaranteed all of SS’ obligations pursuant to the lease. Doc. 29. In or

about March 2020, SS defaulted on its rent obligations pursuant to the lease and, pursuant to the guaranty, Fania became liable to plaintiff for fulfilling SS' obligations under the lease.

At or about the time SS surrendered possession of the premises in July 2020 (Doc. 26 at par. 19), plaintiff commenced the captioned action by filing a summons and complaint verified by its principal Mitchell Rothken. Doc. 1. In the complaint, plaintiff alleged that it was owed unpaid rent from SS and Fania and that it was entitled to a judgment of ejectment against SS. Doc. 1. On September 21, 2020, plaintiff served SS, a limited liability company, via the Secretary of State pursuant to Limited Liability Company Law ("LLCL") § 303. Doc. 40. Plaintiff also attempted to effectuate process on SS by serving it in the manner in which it registered with the New York Department of State. Specifically, SS designated Fania, with an address at the premises, to accept service for SS. Doc. 41.

After efforts by plaintiff's process server to serve Fania at the premises failed, plaintiff's counsel conducted an internet search to ascertain whether Fania had another business address. A Google search revealed that SS had a location at 120 East 34th Street, New York, New York 10016 ("the 34th Street address") and a search of Fania's LinkedIn profile revealed that he was "Founder and Managing Partner" of SS. Docs. 43-44. Fania's LinkedIn profile directed plaintiff's counsel to a LinkedIn profile page for SS listing an address at the premises as well as at the 34th Street address. Doc. 45. SS' LinkedIn profile page also contained a website for its business which listed the 34th Street address as one of its locations. Doc. 46. Additionally, each of the internet searches relating to SS revealed the identical bowtie logo. Since Fania, SS' agent for service, held out the 34th Street address as his place of business, plaintiff's counsel instructed its process server to attempt service on him at that location.

On August 18, 2020, plaintiff's process server effectuated service on Fania by serving Salma Bojorque, a cashier and person of suitable age and discretion, who was employed at the 34th Street address. Docs. 27, 42. The process server also mailed a copy of the summons and complaint to Fania at the premises, his "last known place of business within the state", as well as to 76 Saratoga Drive, West Windsor, New Jersey ("the West Windsor address"). Doc. 42. On October 1, 2020, an additional copy of the summons and complaint was mailed, pursuant to CPLR 3215(g)(3), to SS at the premises and to Fania at the premises and the West Windsor address. Doc. 47.

In November 2020, after SS and Fania failed to answer or otherwise appear, plaintiff moved for a default judgment against them. Docs. 6-17. By decision and order entered January 29, 2021, this Court granted the branch of plaintiff's application seeking unpaid rent and granted a default judgment against defendants in the amount of \$83,212.31, plus interest, costs, and disbursements. Doc. 20. On April 30, 2021, the County Clerk entered judgment in favor of plaintiff and against said defendants in the total amount of \$86,890.03. Doc. 24.

II. The Parties' Contentions

Fania now moves, pursuant to CPLR 5015(a)(4), to vacate the default against him and, upon such vacatur of the default, to dismiss the complaint against him pursuant to CPLR 3211(a)(8). Docs. 25-36. SS moves to vacate the default against it pursuant to CPLR 5015(a)(1) and CPLR 317 and, upon such vacatur, for permission to answer the complaint. Docs. 25-36. Defendants argue that they were not properly served with process. Specifically, Fania asserts that service on Bojorque at the 34th Street address was improper since it was not his actual place of business and that the mailing to the West Windsor address was improper since it was not his last known residence. Fania further maintains that he is protected by New York City Administrative Code § 22-1005, also known as "the Guaranty Law", which restricted the obligations of certain guarantors

during the Covid-19 pandemic. Doc. 36. Fania and SS also argue that they were prevented from fulfilling their obligations under the lease by the common-law doctrines of frustration of purpose and impossibility since they did not have enough patrons to pay their rent during the pandemic. Doc. 36.

In opposition, plaintiff argues that the default should not be vacated since defendants were properly served and, in any event, do not have meritorious defenses herein. Doc. 38.

In reply, Fania reiterates his argument that he is entitled to the benefits of the Guaranty Law, which was enacted to shield certain guarantors from liability due to the Covid-19 pandemic. Doc. 51. Fania further asserts that, since he sufficiently rebuts the process server's affidavit, a traverse hearing is required to determine whether he was properly served. Doc. 51.

III. Legal Conclusions

A. Motion to Vacate Default Against SS

CPLR 5015(a)(1) allows a party to move to vacate a default if it is excusable and there is a meritorious claim or defense (*See, Gray v B.R. Trucking Co.*, 59 NY2d 649 [1983]).

LLCL § 303 clearly allowed plaintiff to serve SS via the Secretary of State, which it establishes it did on September 21, 2020. Doc. 4. Indeed, defendants even concede that SS was served via the Secretary of State (Doc. 26 at par. 35), and SS fails to rebut the presumption of such proper service (*see* LLCL § 303; *Thas v Dayrich Trading, Inc.*, 78 AD3d 1163, 1164 [2d Dept 2010]; *Coyle v Mayer Realty Corp.*, 54 AD3d 713, 713 [2d Dept 2008]). Although SS maintains that said service was improper because the address of its agent for service (its member Fania) on file with the Secretary of State was incorrect, it was SS' responsibility to update the address (*Cedeno v Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 [1st Dept 1994] ["it is a corporation's obligation to keep on file with the Secretary of State the current address of

an agent to receive service of process...and failure to meet that obligation will not constitute reasonable excuse to vacate a default judgment..." [citations omitted]). Since SS' excuse that it was not served with process is not reasonable, that part of the motion brought under CPLR 5015 (a) (1) must be denied (*see Residential Bd. of Mgrs. of 99 Jane St. Condominium v Rockrose Dev. Corp.*, 17 AD3d 194, 194 [1st Dept 2005]).

SS' motion to vacate its default pursuant to CPLR 5015(a)(1) must also be denied because its proffered defenses, the common-law doctrines of frustration of purpose and impossibility, are not meritorious (*See Fives 160th, LLC v Zhao*, ___ AD3d ___, 2022 NY App Div LEXIS 2225, 2022 WL 1038072, 2022 NY Slip Op 02339 [1st Dept April 7, 2022] [Covid-19 pandemic held not to excuse a party's lease obligations on the grounds of frustration of purpose or impossibility], *citing 558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 562 [1st Dept 2021], *appeal dismissed 37 NY3d 1040 [2021] [same]*).

Nor is SS entitled to vacate its default pursuant to CPLR 317, which provides that:

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal. This section does not apply to an action for divorce, annulment or partition.

SS fails to establish that it did not receive notice of plaintiff's claim in time to defend this action but, even if it had made such a showing, it would not be entitled to relief under this statute given the conclusion, discussed above, that it does not have a meritorious defense.

B. Motion To Vacate Default Against Fania

Fania moves, pursuant to CPLR 5015(a)(4), to vacate the default against him and, upon such vacatur of the default, to dismiss the complaint against him pursuant to CPLR 3211(a)(8). Docs. 25-36. CPLR 5015(a)(4) allows an order or judgment to be vacated based on a court's "lack of jurisdiction to render the judgment or order."

As noted previously, SS registered Fania with the Secretary of State as its agent for service and listed Fania's address as the premises. Doc. 41. When plaintiff was unable to serve Fania at the premises, it determined that SS had other locations, including at the 34th Street address. It then served Fania at the 34th Street address by delivering the summons and complaint to Bojorque, a cashier and person of suitable age and discretion employed at that location (Docs. 27, 42). The process server also mailed a copy of the summons and complaint to Fania at the premises, which he described as Fania's "last known place of business within the state", as well as to the West Windsor address. Doc. 42.

CPLR 308(2) provides, in pertinent part, that service of process upon a "natural person" may be made:

by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other . . .

Although Bojorque submits an affidavit in support of defendants' motion in which she states, inter alia, that she did not have authority to accept legal papers on Fania's behalf, she admits that she worked at the 34th Street address on the day the summons and complaint intended

for Fania was delivered to her. Doc. 27. Bojorque does not deny that she was a person of suitable age and discretion or that her appearance matched the process server's description of the individual served (*see, Edan v Johnson, 117 AD3d at 529, citing Indymac Fed. Bank FSB v Quattrochi, 99 AD3d 763, 764-765 [2d Dept 2012]*). Thus, at first blush, it appears as if service was properly made on Fania by delivering the summons and complaint to Bojorque.

Bojorque further represents, however, that Fania “rarely visited” the 34th Street address in 2020 and “regularly worked” at a location in Hackensack, New Jersey. Doc. 27 at par. 8. Fania states in his affidavit that he was “rarely” at the 34th Street location and that his “actual place of business” was in Hackensack, although he acknowledges that the business operated at the 34th Street address “is a branded and managed [SS] cleaners” [sic]. Doc. 26. Since an address qualifies as a person's actual place of business for purposes of CPLR 308 (2) only if the person is “physically present with regularity” at the address and is “shown to regularly transact business at that location” (*1136 Realty, LLC v 213 Union St. Realty Corp., 130 AD3d 590, 591 [2d Dept 2015]* [internal quotation marks omitted]), the issue of whether Fania was served at his actual place of business would thus appear to be an issue to be resolved at a traverse hearing. However, for the reasons set forth immediately below, such a hearing is not necessary.

Assuming, *arguendo*, that Fania was properly served when the summons and complaint was delivered to Bojorque at the 34th Street address, plaintiff was still required, pursuant to CPLR 308(2), to mail the summons to Fania’s “actual place of business”, in an envelope marked “personal and confidential”, or to his “last known residence”. Here, the process server mailed the summons and complaint to the premises which, he represented, was Fania’s “last known place of business within the state”. Importantly, the process server’s affidavit of service did not state that the premises were Fania’s “actual place of business”. Doc. 42. Even assuming that the

process served had stated in the affidavit of service that he had mailed the summons and complaint to Fania's actual place of business, the mailing to that location was not marked "personal and confidential" and thus failed to comply with CPLR 308(2). Additionally, although the process server mailed the summons and complaint to the West Windsor address, there is no indication in the affidavit of service that the said address was Fania's last known residence.¹ Since plaintiff failed to comply with the specific mailing requirements set forth in CPLR 308(2), Fania was not properly served and, thus, the default judgment against him must be vacated pursuant to CPLR 5015(a)(4) and, upon vacatur of the default judgment against him, the complaint must be dismissed against him pursuant to CPLR 3211(a)(8).

The parties' remaining contentions are either without merit or need not be addressed given the conclusions set forth above.

Accordingly, it is hereby:

ORDERED that the branch of the motion by defendant Suits and Skirts 1 LLC seeking to vacate the default judgment entered against it on January 29, 2021 (Doc. 20) and the money judgment entered against it on January 29, 2021 (Doc. 24) it pursuant to CPLR 5015(a)(1) and CPLR 317 is denied; and it is further

ORDERED that the branch of the motion by defendant Matthew Fania seeking to vacate the default judgment entered against him on January 29, 2021 (Doc. 20) and the money judgment entered against him on April 30, 2021 (Doc. 24) pursuant to CPLR 5015(a)(4) and, upon vacating the said default judgment and money judgment, dismissing the complaint against him

¹ Fania represents in his affidavit that the West Windsor address was the former address of his parents and that he lived in Englewood, New Jersey during 2020. Doc. 26 at pars. 33-34. Although he does not specifically raise the issue of the improper mailing to the premises, he has thus, at the very least, raised the issue of improper mailing.

pursuant to CPLR 3211(a)(8), is granted, and the Clerk is directed to enter judgment accordingly in favor of defendant Matthew Fania ; and it is further

ORDERED that the caption of this action shall hereinafter read as follows:

160 EAST 28th & 134 NINTH LLC,

Plaintiff,

V

SUITS AND SKIRTS1 LLC d/b/a SUITS AND SKIRTS CLEANERS, ABC CORP., JOHN DOE, JANE DOE,

Defendants.

and it is further

ORDERED that counsel for the defendants shall serve a copy of this order, with notice of entry, upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change to the caption; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office 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/suptctmanh)).

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DAVID B. COHEN, J.S.C.

4/27/2022

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE