

Main St. Merchant Servs. Inc. v A. Rubio Delivery Corp.

2022 NY Slip Op 31976(U)

June 23, 2022

Supreme Court, Kings County

Docket Number: Index No. 512368/2021

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of June, 2022.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

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MAIN STREET MERCHANT SERVICES INC.

Index No. 512368/2021

Plaintiff,

-against-

A. RUBIO DELIVERY CORP., JESUS MARIA 25 DELIVERY, CORP AND ANTONIO G RUBIO,

DECISION AND ORDER

Motion Sequence #2

Defendants.
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	59-70,
Opposing Affidavits (Affirmations).....	72-82,
Reply Affidavits (Affirmations)	
Memorandum of Law	83

After a review of the papers and oral argument, the Court finds as follows:

The Plaintiff, Main Street Merchant Services, Inc. (hereinafter the "Plaintiff") has initiated this action as against Defendants A. Rubio Delivery Corp., Jesus Maria 25 Delivery Corp. and Antonio G. Rubio (hereinafter referred collectively as the "Defendants"). The Complaint raises causes of action for breach of contract, personal guarantee, and unjust enrichment. On July 2, 2021, a Judgment for the sum of \$15,810.80 was issued by the Kings' County Clerk, Nancy J. Sunshine in favor of the Plaintiff and against the Defendants.

Defendant Jesus Maria 25 Delivery Corp. (hereinafter "Jesus Maria") now moves (motion sequence #2) for an Order to be issued to "(1) Quash Service of Process (2) Vacate Default Final

Judgment (3) Dissolve Writ of Attachment” as against Jesus Maria. Jesus Maria argues that its motion should be granted as it was not a party to the Agreement between the Plaintiff and Defendant A. Rubio Delivery Corp. and that it was not properly served with the pleadings. In support of this application, Jesus Maria relies primarily on the affidavits of Antonio Rubio and Nelson Rodriguez. Mr. Rubio generally states that “since January 7th, 2020” he has had no connection to Jesus Maria and had no authority to obligate Jesus Maria by contract or otherwise. Mr. Rodriguez states that he is the Registered Agent and President of Jesus Maria. In Mr. Rodriguez’s affidavit he states that he was never served with the Summons and Complaint and that his underlying defense to the complaint is that Jesus Maria “has [n]ever engaged in any business dealings with Main Street Merchant Services, Inc.”

The Plaintiff opposes the motion. The Plaintiff contends that the Defendants, including Jesus Maria, entered into an agreement (hereinafter the “Agreement”) with the Plaintiff “to purchase all rights to Company Defendants’ future receivables having an agreed upon value of \$14,990.” (See Complaint, Paragraph 4). The Plaintiff further contends that it remitted the purchase price for the future receivables to the Defendants and had agreed to have one bank account approved by the parties from which the Plaintiff was authorized to make withdrawals until \$14,990.00 was fully paid. The Plaintiff alleges that the Defendants made payments totaling \$4,996.70, leaving a balance of \$9,993.30 and incurred other charges. As to service of process, the Plaintiff argues that pursuant to Section 43 of the Agreement, the Defendants waived personal service and consented to service of process by certified mail, return receipt requested at the address set forth in the Agreement. Section 43 of the Agreement states, in pertinent part:

ADDITIONALLY, MERCHANT AND GUARANTOR AGREE THAT ANY SUMMONS AND/OR COMPLAINT OR OTHER PROCESS TO COMMENCE ANY LITIGATION BY MSM WILL BE DEEMED PROPERLY SERVED IF MAILED BY CERTIFIED MAIL TO THE

ADDRESS(ES) LISTED ON PAGE 1 OF THIS AGREEMENT AND SERVICE OF SUCH PROCESS SHALL BE DEEMED COMPLETE UPON SUCH MAILING IRRESPECTIVE OF WHETHER SUCH MAILING IS ACTUALLY RECEIVED BY MERCHANT AND/OR GUARANTOR.

A motion pursuant to CPLR 5015 must be made within one year of service of the order on the moving party (see CPLR 5015 (a)(1)).

A party seeking to vacate an order entered upon his or her failure to [appear] is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion (see *Bhuiyan v. New York City Health & Hosps. Corp.*, 120 AD3d 1284, 993 N.Y.S.2d 62 [2d Dept 2014]). The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion (see *Lyubomirsky v. Lubov Arulin, PLLC*, 125 AD3d 614, 3 N.Y.S.3d 377 [2d Dept 2015]). In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits.

Hamilton v. New York Hospital Queens, 183 AD3d 621, 622, 123 N.Y.S.3d 172, 173-174 [2d Dept 2020]. The Court finds that Jesus Maria's motion is timely and that its proffered excuse is reasonable under the circumstances.

"To establish the existence of a potentially meritorious defense, defendants needed only to make a *prima facie* showing of legal merit, as the quantum of proof needed to prevail on a CPLR 5015(a)(1) motion is less than that required when opposing a summary judgment motion." *Lai v. Montes*, 182 AD3d 646, 649, 121 N.Y.S.3d 431, 435 [2d Dept 2020] quoting *Luderowski v. Sexton*, 152 AD3d 918, 920, 59 N.Y.S.3d 505, 507 [3d Dept 2017]. The Court also finds that Jesus Maria has a potentially meritorious defense. Jesus Maria relies primarily on Rubio's affidavit. Rubio is the owner of Defendant A. Rubio Delivery Corp. and signed the Agreement with Plaintiff. In his affidavit, Rubio states "[s]ince January 7th, 2020, I have not been affiliated with, employed by, nor an owner or officer of the corporation, JESUS MARIA 25 DELIVERY, CORP. I have absolutely no authority to enter into any contractual agreements or apply for any loans, personal or corporate,

on behalf of JESUS MARIA 25 DELIVERY, CORP., nor on behalf of the owners or officers of the corporation. I admit that I submitted an application to MAIN STREET MERCHANT SERVICES, INC. on or about March 22, 2021 without the knowledge of or authority of JESUS MARIA 25 DELIVERY, CORP., its owners or officers of the corporation.” (See Sworn Affidavit of Antonio G. Rubio, NYSCEF Document 72, Paragraphs 3 to 5). Additionally, Plaintiff relies on Articles of Incorporation for Jesus Maria 25 Delivery, Corp. to show that Rubio has an interest in the company. The Court notes that this document is not certified and the address listed is not the service address. Therefore, there is a question as to whether Mr. Rubio had the authority to sign an agreement on behalf of Jesus Maria. Accordingly, the Court finds that Defendant Jesus Maria has provided a meritorious defense and the default judgment as against Jesus Maria is vacated.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Jesus Maria’s motion (motion sequence #2) is granted, the money judgment dated July 2, 2021 is hereby vacated, all stays, restraints, and attachments in relation to this proceeding are lifted, and the Defendant’s time to Answer is extended for the period of 45 days from service of a copy of this Decision and Order with notice of entry. Defendant Jesus Maria may settle an Order to include the release of held funds.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.