

Arequipa v Inga
2022 NY Slip Op 35182(U)
December 14, 2022
Supreme Court, Queens County
Docket Number: Index No. 714124/2021
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

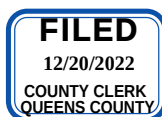
EDISON AREQUIPA,

Plaintiff,

-against-

SECUNDO INGA and MARIA F. INGA,

Defendants.



IAS Part - 42

Index No.: 714124/2021

Motion Date: 3/3/22

Motion Cal. No. 4

Motion Seq. No. 3

The following electronically filed documents read on this motion by Edison Arequipa (“Edison” or “defendants”) for an order: 1) pursuant to CPLR § 2221 (d) for leave to reargue the defendants' prior motion to vacate the default judgment against them on the ground the Court overlooked the plaintiff's opposition papers, and upon such reargument, denying the defendants' motion to vacate the default judgment and allow the default judgment to stand, or in the alternative; 2) pursuant to CPLR § 5015 (1) vacating the plaintiffs default in opposing the defendants' prior motion to vacate the default judgment against them, despite the fact opposition papers were properly served and e-filed with the Court pursuant to the rules of the Supreme Court, Queens County, which resulted in the granting of the defendants' motion to vacate the default judgment against them, and upon such vacatur, deciding the defendants' motion upon consideration of all papers and denying the defendants' prior motion to vacate the default judgment in its entirety; and 3) granting such other and further relief this Court may deem just, meet and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 19 - 24
Affirmation in Opposition-Exhibits.....	EF 26 - 28
Reply Affirmation Exhibits-Service.....	EF 29 - 31

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries the plaintiff sustained at Ilusion Bar. In particular, the plaintiff alleges that on June 26, 2016, he was maliciously, viciously and violently assaulted while he was lawfully at Ilusion Bar, which is located at 105-07 Northern Boulevard, Corona, New York ("subject premises"). According to the complaint, Segundo Inga ("Segundo") and Maria Inga ("Maria") (collectively, the "defendants") owned the subject premises. As a result, on November 28, 2017, the plaintiff commenced the instant action. Thereafter, on December 7, 2017, the plaintiff's process server, Anthony Shultz, ("Mr. Shultz") allegedly served the defendants with the summons and complaint, pursuant CPLR § 308 (2), by delivering the same to Carlos Santos at the subject premises. Thereafter, on December 19, 2017, Mr. Schultz allegedly returned to the subject premises at 6:33 p.m. and served Defendants by delivering the summons and complaint to "Joshelyn, Torrez" who is identified as the defendants' daughter. Afterwards, on February 13, 2019, the Honorable Allan Weiss rendered a default judgment against the defendants in the sum of \$500,000.00. In response, on June 23, 2022, the defendants moved to vacate the default judgment based upon lack of personal jurisdiction, pursuant to CPLR § 3211(a)(8), among other things. Unbeknownst to the court, the defendants' motion was granted without considering the plaintiff's opposition papers, which was due to a computer glitch (i.e., the parties' conversion to the e-filing system). As a result, the latter seeks to reargue the court's September 7, 2021 decision/order. As such, the court must revisit the defendants' initial motion to vacate the default judgment, pursuant to CPLR § 3215.

It is well settled law that when a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR § 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR § 5015(a)(1)" (*Falvo v. Cerra*, 127 AD3d 19 [2d Dept 2015]; *HSBC Bank USA, N.A. v. Miller*, 121 AD3d 1044 [2d Dept 2014]; *Canelas v. Flores*, 112 AD3d 871 [2d Dept 2013]; *JP Morgan Chase Bank, N.A. v. Grinkorn*, 172 AD3d 1183 [2d Dept 2019]; *Deutsche Bank Nat'l Tr. Co. v. Saketos*, 158 AD3d 610 [2d Dept 2018]). A defendant moving to vacate a judgment entered upon his or her default in appearing or answering the complaint on the ground of lack of personal jurisdiction "is not required to demonstrate a reasonable excuse for the default and a potentially meritorious defense" (*Itshaik v. Singh*, 165 AD3d 902 [2d Dept 2018]; *Falvo v. Cerra*, 127 AD3d 19 [2d Dept 2015]). "[T]he failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent

proceedings are thereby rendered null and void” (*Krisilas v. Mount Sinai Hosp.*, 63 AD3d 887 [2d Dept 2009] [internal quotation marks omitted]).

Furthermore, in order to effectuate service pursuant to CPLR § 308, the summons must be served “by delivering the summons within the state to the person to be served.” Furthermore, the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service. (*Frankel v. Schilling*, 149 AD2d 657 [2d Dept 1989]; *Deutsche Bank Natl Co. v. Stolzberg*, 165 AD3d 624 [2d Dept 2018]; *Wells Fargo Bank, N.A. v. Heaven*, 176 AD3d 761 [2d Dept 2019]). A process server’s sworn affidavit of service ordinarily constitutes *prima facie* evidence of proper service. However, when a motion is made and there is an affidavit from the defendant that denies delivery of the summons, the process server’s affidavit of service is rebutted and the plaintiff then has the burden of proving jurisdiction by a preponderance of the evidence at a traverse hearing. (see *Wells Fargo Bank, N.A. v. Chaplin*, 65 AD3d 588 [2d Dept 2009] citing *Bankers Trust Co. of Cal. v. Tsoukas*, 303 AD2d 343 [2d Dept 2003]; *Bank of Am. Nat. Trust & Sav Assn. v. Herrick*, 233 AD2d 351 [2d Dept 1996].)

It must be remembered that “[a]lthough bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing. (*U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154 [2d Dept 2016]). Consequently, “a mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server’s affidavit.” (*Washington Mut. Bank v. Huggins*, 140 AD3d 858 [2d Dept 2016]). Here, defendants argue that they were never served either with the summons and complaint; and they do not know the persons, who the plaintiff allegedly served: Mr. Inga avers that he does not have a co-worker named Carlos Sanots; and Ms. Inga avers that she does not have a daughter named Joshelyn Torrez. Under the circumstances, a traverse hearing is warranted. (*Frankel v. Schilling*, 149 AD2d 657 [2d Dept 1989]; *Finnegan v. Trimarco*, 173 AD3d 691 [2d Dept 2019]; *Wells Fargo Bank, N.A. v. Guerrero*, 189 AD3d 1669 [2d Dept 2020]).

Accordingly, it is hereby

ORDERED that plaintiff’s motion to reargue, pursuant to CPLR § 2221, is granted to the extent that the court shall decide the defendants’ motion to vacate the default judgment upon consideration of all papers; and it is further,

ORDERED that this matter is set down for a traverse hearing, and for final disposition of the motions, at the Supreme Court, Queens County, 25-10 Court Square, Long Island City, New York 11101, Part 42, courtroom 208, on Wednesday, April 5, 2023 at 11:00 a.m.; and it is further,

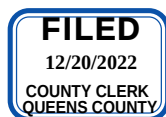
ORDERED, that plaintiff is directed to produce his process server, Anthony Shultz, on Wednesday, April 5, 2023 at 11:00 a.m. at the traverse hearing with his logbook on penalty of dismissal; and it is further,

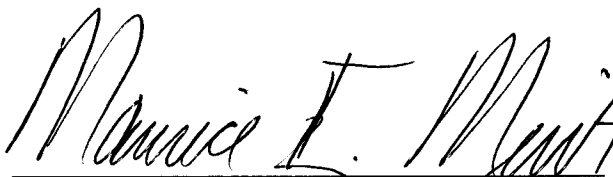
ORDERED that this action is stayed pending the outcome of the traverse hearing; and it is further,

ORDERED that defendants shall serve a copy of this decision and order with notice of entry upon the plaintiff, via NYSCEF and certified mail, on or before January 5, 2023.

This constitutes the decision and order of this court.

Dated: December 14, 2022
Long Island City, New York




MAURICE E. MUIR, J.S.C.