

LVNV Funding LLC v Nunez

2023 NY Slip Op 30032(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 151172/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

was scheduled for December 15, 2022 (Order to Show Cause, NYSCEF Doc. No. 21). The court now evaluates both motions jointly.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff submits an affidavit of service stating the papers were served on defendant personally at his residence, 284 Mulberry Street Apt. 3, New York, NY 10012, and describes him as a white male with grey hair, 60-70 years old, 5ft4in – 5ft 8in, and weighing around 151-180lbs (NYSCEF Doc. No. 2). Defendant admits that 248 Mulberry Street Apt. 3 is his residence, but he states he is Latino with brown skin, has black and gray hair, and weighs approximately 125lbs in direct contradiction to the service affidavit’s description (NYSCEF Doc. No. 20 ¶ 16). Defendant states that he lives alone and was never served the papers and only learned of the action once he received papers in the mail related to the motion for a default judgment (NYSCEF Doc. No. 20 ¶ 6, 16). Defendant denies being served any time prior to receiving the motion for default judgment papers.

“While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing” (*NYCTL 1998-1 Tr. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). The conflicting affidavits submitted by the parties raise a question of fact whether defendant was actually served, and the court cannot proceed to the further merits of the motions absent a traverse hearing determination regarding whether personal jurisdiction over the defendant was obtained.

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss is granted to the extent that this matter is hereby referred for assignment to a JHO or Special Referee for a traverse hearing, TO HEAR AND REPORT, regarding whether the defendant was properly served with process in this action; and it is further

ORDERED that plaintiff’s motion for default judgment is denied without prejudice to renew; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that the remainder of defendant’s motion to dismiss is hereby held in abeyance pending the determination on the issue of process.

Louis L. Nock

1/4/2023

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE