

Cherkassky v Goykman
2023 NY Slip Op 30426(U)
February 6, 2023
Supreme Court, Kings County
Docket Number: Index No. 503640/2012
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGA

Index No: 503640/2012
Motion Date: 12-12-22
MSNs: 2, 3

-----X
IGOR CHERKASSKY,

Plaintiff,

-against-

DECISION/ORDER

INNA GOYKMAN, DR. INNA GOYKMAN DDS, PC,
and NAHUM AMIR,

Defendants
-----X

Upon the following papers, listed on NYSCEF as document numbers 27-54 were read on these motions:

In Motion Sequence # 2, the plaintiff INNA CHERKASSKY, moves for an Order (1) compelling a response to an Information Subpoena; and for (2) such further and additional relief as the court deems just and appropriate. In Motion Sequence # 3, defendant cross-moves for an order (a) pursuant to CPLR §5015(a)(4), vacating the default judgment as against Defendant Inna Goykman because this Court lacks personal jurisdiction over said defendant in this action; (b) pursuant to CPLR §3211(a)(8) dismissing this action as against defendant Inna Goykman because this Court lacks personal jurisdiction over the Defendant in this action; and (c) granting such other and further relief as this Honorable Court deems just and proper.

The court will first address the cross-motion. The affidavit of service reflecting service of the summons and complaint on defendant Inna Goykman reflects that she was served pursuant to CPLR 308(2), which provides:

Personal service upon a natural person shall be made by any of the following methods:

- (2). 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

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effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; **service shall be complete ten days after such filing**; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; ...

When service is made pursuant CPLR 308(2), service is not complete until ten days after the filing of an affidavit of service. At the time plaintiff moved to enter a default judgment against Inna Goykman, she was not in default since the affidavit of service was not on file with the Court. Indeed, the time in which she had to answer the complaint or otherwise appear in the action, had not even begun to run. The motion was therefore premature (see *First Fed. Sav. & Loan Ass'n of Charleston v. Tezzi*, 164 A.D.3d 758, 759, 84 N.Y.S.3d 239, 241).

When plaintiff moved to enter the default judgment, plaintiff also moved for leave to file the affidavit of service *nunc pro tunc*. The “failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004” (*Khan v. Hernandez*, 122 A.D.3d 802, 803, 996 N.Y.S.2d 667; see *Buist v. Bromley Co., LLC*, 151 A.D.3d 682, 683, 55 N.Y.S.3d 443; *Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d at 750, 983 N.Y.S.2d 587). Even if this court's order granting plaintiff's motion for a default judgement is properly construed as granting that branch of the motion to file the affidavit reflecting service of the summons and complaint on defendant Inna Goykmani *nunc pro tunc*, the Court erred in granting the plaintiff a default judgment against Inna Goykmani since “[t]he court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order (see *Khan v. Hernandez*, 122 A.D.3d at 803, 996 N.Y.S.2d 667; *Discover Bank v. Eschwege*, 71 A.D.3d at 1414, 897 N.Y.S.2d 333), “nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur” (*Discover Bank v. Eschwege*, 71 A.D.3d at 1414, 897 N.Y.S.2d 333 [internal quotation marks omitted]; see *Bank of New York v. Schwab*, 97 A.D.2d 450, 467 N.Y.S.2d 415). The default judgment as against defendant INNA GOYKMAN must therefore be vacated and the Court sua sponte grants defendant INNA

GOYKMAN an additional 30 days to appear and answer after service upon her of a copy of the decision and order (see CPLR 320[a]; *Buist v. Bromley Co., LLC*, 151 A.D.3d at 683, 55 N.Y.S.3d 443; *Khan v. Hernandez*, 122 A.D.3d at 803, 996 N.Y.S.2d 667; *Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d at 750, 983 N.Y.S.2d 587; *Discover Bank v. Eschwege*, 71 A.D.3d at 1414, 897 N.Y.S.2d 333).

The plaintiff has not provided any basis to vacate the defendant judgment as against DR. INNA GOYKMAN DDS, PC. Plaintiff served defendant DR. INNA GOYKMAN DDS, PC with the summons and complaint pursuant to Bus. Corp. Law § 306 by servicing the Secretary of State. Bus. Corp. Law § 306 provides “[s]ervice of process on such corporation shall be complete when the secretary of state is so served.” The time in which defendant DR. INNA GOYKMAN DDS, PC had to answer the complaint thus began to run when the Secretary of State was served with the summons and complaint, not when the affidavit of service was filed.

Accordingly, it is hereby

ORDERED that the default judgment as against defendant INNA GOYKMAN is vacated and the Court *sua sponte* grants defendant INNA GOYKMAN an additional 30 days to appear and answer after service upon her of a copy of the decision and order; it is further

ORDERED that defendant’s motion to dismiss the action as against defendant INNA GOYKMAN is **DENIED**; it is further

ORDERED that the action insofar as asserted against defendant INNA GOYKMAN is severed; and it is further

ORDERED that defendant DR. INNA GOYKMAN DDS, PC shall respond to the Information Subpoena with Restraining Notice with 30 days of service of this order.

This constitutes the decision and order of the Court.

Dated: February 6, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

KINGS COUNTY CLERK
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