

Goldman Sachs Bank USA v Wagschal

2023 NY Slip Op 31263(U)

April 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 520659/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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GOLDMAN SACHS BANK USA,

Plaintiffs, Decision and order

- against -

Index No. 520659/2022

ZALMEN WAGSCHAL and B&H MANAGEMENT US LLC,
Defendants,
-----x
PRESENT: HON. LEON RUCHELSMAN

April 17, 2023

Motion Seq. #2

The defendant Zalmen Wagschal has moved seeking to vacate an order dated October 7, 2022 granted on default. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

This lawsuit was commenced by the filing of a summons and a motion for summary judgement in lieu of a complaint. The lawsuit concerns defendant's failure to pay back loans furnished by the plaintiff. On August 1, 2022 the defendant was served pursuant to CPLR §308(4) by affixing the summons to door of the defendant's residence. The court entered an order granting the plaintiff's motion on October 13, 2022. The defendant now moves seeking to vacate the order on the grounds he was never adequately served with process and was never afforded adequate time in which to oppose the motion. The plaintiff counters the defendant cannot present either a reasonable excuse or any meritorious defense and the motion must be denied.

Conclusions of Law

It is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious defense (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]). In this case the reasonable excuse presented is essentially that the summons and motion seeing summary judgement required the defendant to respond before the time afforded pursuant to the CPLR. Thus, service was effectuated ten days after it was served, namely on August 11, 2022. Further, pursuant to CPLR §320(a) the defendant then had thirty days in which to appear. More importantly, the court did not enter the judgement until October 13, 2022. Thus, the defendant was afforded sufficient time in which to appear or answer or request more time and failed to do so.

However, the defendant argues that service pursuant to CPLR §308(4) was defective since some of the times for attempted service was improper. It is well settled that pursuant to CPLR §308(4) the plaintiff must exercise due diligence to demonstrate that personal service or service upon someone of suitable age and discretion could not be made. Thus, one attempt at personal service is insufficient (see, Markoff v. South Nassau Community Hospital, 91 AD2d 1064, 458 NYS2d 672 [2d Dept., 1983]). Likewise, service at the same times of the day is equally

insufficient. Moreover, in Serrano v. Staropoli, 94 AD3d 1083, 943 NYS2d 201 [2d Dept., 2012], the court held that due diligence included trying to ascertain the business address of the party to effectuate service there. Therefore, where the affidavit from the process server fails to indicate efforts to locate defendant's business address for personal service there then service is improper (see, also, County of Nassau v. Letosky, 34 AD3d 414, 824 NYS2d 153 [2d Dept., 2006], Earle v. Valente, 302 AD2d 353, 754 NYS2d 364 [2d Dept., 2003], Annis v. Long, 298 Ad2d 340, 751 NYS2d 370 [2d Dept., 2002]). These requirements are not merely technical rules but emerges from an understanding that the purpose of serving process is to try and ensure that process is received.

In this case, the affidavit of service lists numerous times when personal service upon the defendant was attempted. One of the attempts was on a Saturday. There is insufficient evidence such service violated General Business Law §13 since that statute requires malice which has been defined as knowledge the defendant observes and recognizes the Sabbath (see, Hirsch v. Zvi, 184 Misc2d 946, 712 NYS2d 238 [Civil Court of the City of New York, 2000]). In any event, such service was surely improper and cannot constitute a valid attempt to support the requisite attempts necessary to resort to service pursuant to CPLR §308(4). Thus, according to the affidavit of the process server there were

two additional attempts at service, Thursday July 28, 2022 at 8:00 AM and Monday August 1, 2022 at 9:50 AM (see, Affidavit of Process Server [NYSCEF Doc. No. 21]). However, those attempts were both in the morning hours and insufficiently attempted to serve process when the defendant was home. Moreover, there is no indication at all that service was attempted at the defendant's place of business. This is significant since the first promissory note, the mortgage and guaranty, the building loan note, the building loan mortgage and guaranty all dated September 25, 2019 all list the business address of the defendant as 4403 15th Avenue in Kings County (see, NYSCEF Doc. Nos. 4,5,6,7,8,9). Further, the first forbearance agreement and guaranty both dated September 10, 2020 list a business address as 4403 15th Avenue in Kings County (see, NYSCEF Doc. Nos. 10,11). Moreover, the second forbearance agreement dated June 15, 2021 also lists the business address as 4403 15th Avenue in Kings County (see, NYSCEF Doc. No. 14). Thus, the plaintiff was familiar with the business address of the defendant and was required to attempt service at that location before resorting to alternative service.

Therefore, concerning the defendant Zalmen Wagschal the plaintiff failed to engage in due diligence. Consequently, there was no service upon the defendant, therefore, there was never jurisdiction conferred upon him and consequently the motion seeking to vacate the default is granted. Further, the court has


no jurisdiction over this defendant and the case cannot proceed.

However, the plaintiff shall be afforded 120 days from receipt of this order to effectuate and file proper service and proof of service (Murphy v. Hoppenstein, 279 AD2d 410, 720 NYS2d 62 [1st Dept., 2001]).

So ordered.

ENTER:

DATED: April 17, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC