

Matter of Migliozi

2023 NY Slip Op 31413(U)

April 10, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2016-92/C

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

April 10, 2023

ESTATE OF MARTIN J. MIGLIOZZI, Deceased
File No.: 2016-92/C

In this turnover proceeding, the estate's executor petitioned by order to show cause to recover the sum of \$1,116,379.07 from three respondents: (i) the Estate of Frank MiglioZZi ("Frank"), the decedent's post-deceased brother; (ii) Yorkville Enterprises LP ("Yorkville"), a limited partnership in which Frank was the general partner; and (iii) Stone Mountain Partners, Inc., ("SMP") a corporation controlled by Frank. The respondents failed to timely appear or respond to the petition. Based on the respondents' default the court issued an order, dated March 21, 2019 (the "Order"), granting the petitioner's application. The respondents timely moved pursuant to CPLR 2221 (e) for leave to renew or, alternatively under CPLR 5015 (a) (1) and (a) (4), to vacate the Order on the basis that they were never properly served with process. The petitioner opposes the motion.

At the outset, the court notes that it does not share the respondent's expansive view of CPLR 2221. Here, the challenge is to the respondent's failure to timely respond to a petition, which is a pleading and not a motion (see SCPA 302). The respondents' proper remedy is to seek vacatur of the default under CPLR 5015 (a), not request leave to renew (see *Kurth v Susskind*, 200 AD2d 572 [2d Dept 1994]). Accordingly, the court construes the instant motion as seeking to vacate a default under CPLR 5015 (a) (1) and (a) (4), and denies that branch of the application seeking leave to renew pursuant to CPLR 2221 (e).

Where a movant seeks to vacate a default on the dual grounds that (i) there

is a reasonable excuse for the default, under CPLR 5105 [a][1], and (ii) the court lacks personal jurisdiction over the defaulting party under CPLR 5101 [a][4], the court must first determine the latter claim because if personal jurisdiction was never obtained over the defaulting party, all subsequent proceedings would be rendered null and void (*Rattner v Fessler*, 202 AD3d 1011, 1015, [2nd Dept 2022]); *Cipriano v. Hank*, 197 A.D.2d 295, 297 [1st Dept. 1994].

CPLR 5015(a)(4) authorizes a court to vacate an order when it is obtained despite a "lack of jurisdiction to render the judgment or order" (CPLR 5015[a][4]). The proponent of a motion to vacate an order for want of jurisdiction must establish either that the court lacked personal jurisdiction over the defaulting party (*Toyota Motor Credit Corp. v Hardware Lam*, 93 AD3d 713, 713 [2d Dept 2012]; *Hossain v Fab Cab Corp.*, 57 AD3d 484, 485 [2d Dept 2008]), or that the court lacked the requisite subject matter jurisdiction to issue the order (*Lacks v Lacks*, 41 NY2d 71, 77 [1976]; *HSBC Bank USA, N.A. v Ashley*, 104 AD3d 975, 976 [2d Dept 2013]).

The burden of establishing personal jurisdiction and proper service rests with the petitioner (*Frankel v Schilling*, 149 AD2d 657, 659 [2d Dept 1989]; *Torres v Corpus*, 131 AD2d 463, 464 [2d Dept 1987]). Generally, an affidavit of service is prima facie evidence of proper service (*Caba v Rai*, 63 AD3d 578, 582-583 [1st Dept 2009]; *NYCTL 1998-1 Trust Bank of NY v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). Accordingly, an affidavit evidencing proper service upon the defendant is sufficient to support a finding of personal jurisdiction (*Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]). Personal jurisdiction will be upheld without a traverse hearing if the only

evidence submitted in opposition is a bare or conclusory denial of service (see *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 984 [2d Dept 2009]). If the denial of service is sufficiently factually specific, then the court must hold a traverse hearing before deciding whether it has personal jurisdiction over the defendant (*Frankel v Schilling*, 149 AD2d 657, 659[2d Dept 1989]; *Powell v Powell*, 114 AD2d 443, 444 [2d Dept 1985]).

At a traverse hearing, the petitioner bears the burden of establishing service upon the defendant (*Chaudry Const. Corp. v James G. Kalpakis & Assoc.*, 60 A.D.3d 544, 545 [1st Dept 2009]; *Schorr v Persaud*, 51 AD3d 519, 519-520 [1st Dept 2008]). Moreover, at the hearing where the trial court can resolve issues of credibility, such resolution is accorded great deference, and absent a determination that it is against the weight of the evidence, cannot be disturbed on appeal (*McCray v Petrini*, 212 AD2d 676, 676 [2d Dept 1995]; *Avakian v De Los Santos*, 183 AD2d 687, 688 [2d Dept 1992]).

Vacatur of an order or judgment pursuant to CPLR 5015(a)(1) on grounds that it was obtained upon default requires the moving party to demonstrate both a reasonable excuse for the default and the legal merit of the claim or defense asserted (*M-Dean Realty Corp., v General Security Insurance Company*, 6 AD3d 169, 171[1st Dept 2004]; *Goldman v Cotter*, 10 AD3d 289, 291[1st Dept 2004]). On a motion to vacate a default, a movant is only required to "demonstrate the existence of a possibly meritorious defense [or cause of action and it is] . . . not necessary for [the movant] to establish its defense [or cause of action] as a matter of law but merely to set forth facts sufficient to make out a prima facie showing" (*Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691, 692 [1st Dept 1983]; *Quis v Bolden*, 298 AD2d 375, 375 [2d Dept 2002]).

Whether the excuse proffered and the merits asserted are legally sufficient rests within the sound discretion of the court (see *Hunter v Enquirer/Star*, 210 AD2d 32,33 [1st Dept 1994]). When a party fails to establish a reasonable excuse for the default, the court need not determine whether the party has established the merits of the claim or defense (*Bardwil v Bardwil*, 208 AD3d 1087, 1088 [1st Dept 2022]; *Lutz v Goldstone*, 31 AD3d 449, 450 [2d Dept 2006]).

In their moving papers, the respondents contend that service should not have been made on Frank, but instead on the attorneys who represented him in a prior contested probate proceeding (our File Number 2016-92). This argument is unavailing, as each proceeding in the Surrogate's Court is separate, and the appearance of Frank's counsel in the prior probate contest does not constitute an appearance in this turnover proceeding (see *Matter of O'Brien*, 11/20/78 NYLJ 14, col. 6 [Surr Ct Bronx County]; SCPA 2402). Nevertheless, the court finds that Frank's sworn statement in support of the respondents' motion contains sufficient allegations and non-conclusory denials of service raising issues that can only be resolved at a traverse hearing. Accordingly, the respondents have demonstrated their entitlement to a traverse hearing to determine whether the court ever obtained personal jurisdiction over them (see *Wells Fargo Bank, Nat. Ass'n v Ferrato*, 150 A.D.3d 546, 547 [1st Dept 2017]).


If traverse is sustained, the Order must be vacated because the court lacks personal jurisdiction over the respondents. If, however, the court finds after conducting the traverse hearing that service was properly effectuated on the respondents, the issue will then become whether the court should grant respondents' motion to vacate the default

under CPLR 5101 [a][1].

The only reason offered by the respondents for their nonappearance in this proceeding is that they were never properly served with process. Therefore, the court alternatively finds that if the petitioner prevails at the traverse hearing, the respondents have no justifiable excuse for their default. Consequently, notwithstanding any potentially meritorious defenses that the petitioners may allege in their papers, the court would deny the respondents' motion.

Based on the foregoing, the court orders a traverse hearing to determine whether the respondents are entitled to vacatur of the Order because the court lacked jurisdiction over them when it was issued. The traverse hearing is hereby referred to court attorney-referee John J. Hughes, Esq., to hear and report. The parties' counsel are directed to appear at a conference via Teams with Mr. Hughes on May 2, 2023 at 1 p.m. to schedule the date and time for the hearing, which will be held in person in Room 406 of the Bronx County Courthouse, 851 Grand Concourse, Bronx, New York, on or before June 30, 2023. The collection of any alleged estate assets from the respondents and/or their financial accounts by the petitioner is stayed pending the outcome of the hearing.

This decision constitutes the order of the court. Counsel for the respondents is directed to serve notice of its entry upon the petitioner's counsel within five days from the date hereof.


HON. NELIDA MALAVE-GONZALEZ,
SURROGATE