

Newco Capital Group VI LLC v MD Power Inc.

2023 NY Slip Op 34829(U)

October 26, 2023

Supreme Court, Ontario County

Docket Number: Index No. 134808-2022

Judge: Daniel J. Doyle

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONTARIO

NEWCO CAPITAL GROUP VI LLC,
Plaintiff,

Decision and Order

-vs-

Index No. 134808-2022

MD POWER INC. D/B/A MD POWER; MD POWER
INC.; INFINITUM INC.; DISPOZIBUM CO.
and MIRJANA RACIC,
Defendants.

Appearances:

Ariel Bouskila, Esq., Berkovitch & Bouskila, PLLC, for the Plaintiff
Michael S. Leinoff, Esq., Lebedin Kofman, LLP, for the Defendants

Daniel J. Doyle, J.

Newco Capital Group VI LLC (hereinafter “plaintiff”) initiated this action by the filing of a Summons and Complaint in December of 2022 alleging that the defendants breached a sale of a receivables agreement (hereinafter “agreement”) and seeking resultant damages against the corporate defendants and the personal guarantor.

Defendants MD Power Inc. d/b/a MD Power; MD Power Inc.; Ininitum Inc.; Dispozibum Co. and Mirjana Racic (hereinafter “defendants”) move pursuant to CPLR Rule 5015 and § 317 to vacate the default judgment and dismiss the action.

For the reasons set forth below, the motion to vacate the default judgment is GRANTED and the complaint is dismissed.

Relevant Facts

On October 28, 2022, the plaintiff and the defendants executed a Revenue Purchase Agreement (hereinafter “agreement”) for the sale of future receivables. The agreement contained the following provision:

4.5 Binding Effect; Governing Law, Venue and Jurisdiction.

* * *

[The parties] hereby agree that the mailing of any Summons and Complaint in any proceeding commenced by [plaintiff] by certified or registered mail, return receipt requested **to the Mailing Address listed on this Agreement**, or via email to the Email Address listed on this Agreement, or any other process required by any such court will constitute valid and lawful service of process against them without the necessity for service by any other means provided by statute or rule of court, but without invalidating service performed in accordance with such other provisions.¹

The agreement contained two addresses for the defendants. The first was for MD Power, and the address was listed in the agreement as:

Physical Address		
975 N MAIN ST #104		
City	State	Zip
ROCKFORD	IL	61103

¹ See Revenue Purchase Agreement (NYSCEF Docket # 2) at page 5 [emphasis added].

The second address was for the person guarantor, defendant Mirjana Racic.

That address was listed in the agreement as:

Mailing Address		
2268 LANDMEIER RD STE F ELK		
City	State	Zip
GROVE VILLAGE	IL	60007-2634

Plaintiff initiated suit alleging breach of the agreement. Plaintiff filed an affidavit of service stating that the Summons and Complaint was served “via Certified Mail with return receipt requested to the Defendants” at the addresses in the agreement. Attached to the affidavit were copies of the United States Postal Service certified mail receipt indicating the address to which it was mailed. The receipt for the personal guarantor stated the following address:²



Thereafter, plaintiff filed for a default judgment against all of the defendants and that judgment was entered by the county clerk on January 20, 2023.

² The receipts for each named defendant had the same address.

Defendants now move by way of an Order to Show Cause to vacate the default judgment, arguing: (1) that service was defective as the principle of the company defendants, and person guarantor, Mirjana Racic no longer lived at the address to which process was served; (2) according to the USPS's records, the summons and complaint were never served; (3) excusable default and a meritorious defense to the action. The defendants submit the lease agreement for defendant Racic showing that Racic entered into a lease for an apartment in Des Plaines, Illinois for a rental period between December 23, 2021 and February 10, 2023. The defendants also submit the records from the USPS which indicate that none of plaintiff's mailings were successfully delivered.

Plaintiff, in opposition to the requested relief, did not allege that it received the "return receipt" indicating that the defendants did receive the mailing. Nor did plaintiff allege that service was attempted at the email address provided by the defendants in the agreement.

Defendants are Entitled to Vacatur of the Default Judgment

Defendants' factual allegations, evidentiary submissions establishing that the plaintiff served (by mail) process at the incorrect address, evidence process was not delivered by the USPS, coupled with the plaintiff's failure to assert that it received conformation of receipt by defendants of the mailed summons and complaints,

compels the inference that the defendants did not receive the summons and complaint.

Parties are free to contractually waive the statutory rules regarding service of process. (*See Alfred E. Mann Living Tr. v. ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140 [1st Dept. 2010]: “. . . parties to a contract are free to contractually waive service of process (*see e.g. Comprehensive Merchandising Catalogs, Inc. v Madison Sales Corp.*, 521 F2d 1210, 1212 [7th Cir 1975]; *National Equip. Rental v DecWood Corp.*, 51 Misc 2d 999 [App Term 1966]; *see generally* 86 NY Jur 2d, Process and Papers § 7). By definition, such waivers render inapplicable the statutes that normally direct and limit the acceptable means of serving process on a defendant.”) Had the plaintiff mailed process using the valid address of the defendants as listed in the agreement by way of certified mail, return receipt requested that would have satisfied the contractual provision in the agreement and thus established jurisdiction of the court.

However, plaintiff did not do so.

*The Mailing Standards of the United States Postal Service, Domestic Mail Manual*³ – constituting part of the regulations of the Postal Service (*see* 39 CFR 211.2) – define “registered mail” and “certified mail”. Both types of mail allow the mailer to

³ The Court takes judicial notice of the policies and procedures outlined in this manual.

receive a “return receipt” which “provides a mailer with evidence of delivery (to whom the mail was delivered and date of delivery), and information about the recipient’s actual delivery address.” (See *The Mailing Standards of the United States Postal Service, Domestic Mail Manual* at 503.2.1.1, 503.3.1.1, and 503.6.1.1.)

Plaintiff argues that “[t]he Agreement provided that service of a complaint in an action arising from this Agreement would be proper on the Defendants if done via certified mail” but that is not what the agreement contemplated. Instead, plaintiff could serve the defendants by certified mail, provided plaintiff also requested a return receipt, and provided the mailing was to the address in the agreement. The only fair reading of the terms of the agreement is that: (1) process was to be mailed to the address listed in the agreement; and (2) the additional requirement of the return receipt was to establish that the defendants actually received the mailed summons and complaint. The plaintiff’s failure to allege or show that the return receipt was provided by the Postal Service establishing actual receipt by the defendants, coupled with the mailing having the incorrect address and the defendants’ denial they received the mailing, compels the inference that the mailing was not received by the defendants.

The agreement required that the plaintiff, to effectuate service, mail the summons and complaint by either registered mail or certified mail to the “Mailing Address listed on this Agreement” and required that there be a “return receipt

requested”. Here, the plaintiff mailed process to the incorrect address. The address in the agreement and the address to which the plaintiff mailed process do not match.

Additionally, the defendants have established that the mailings were never delivered. The defendant submitted the tracking receipts from the certified mailings. Each tracking number provides confirmation - through the USPS website - that the mailings made by the plaintiff were never delivered. The Court takes judicial notice of these records. (*See Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 [2nd Dept. 2009]: “Even material derived from official government websites may be the subject of judicial notice (*see Munaron v. Munaron*, 21 Misc.3d 295, 862 N.Y.S.2d 796 [Sup. Ct. Westchester County 2008]; *Parrino v. Russo*, 19 Misc.3d 1127(A), 2008 WL 1915133 [Civ. Ct. Kings County 2008]; *Nairne v. Perkins*, 14 Misc.3d 1237(A), 2007 WL 656301 [Civ. Ct. Kings County 2007]; *Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.*, 12 Misc.3d 1176 (A), 2006 WL 1815210 [Buffalo City Ct. 2006]).”)

Since the plaintiff failed to abide by the agreement’s terms regarding service of process, and the defendants have established actual non-service, the Court does not have jurisdiction. The default judgment is vacated and the complaint is dismissed. (CPLR Rule 5015[1][4]; *Green 333 Corp. v. RNL Life Sci., Inc.*, 191 AD3d 506 [1st Dept. 2021].)

Pursuant to CPLR Rule 3211(d) the plaintiff shall provide to the defendants restitution for any payments paid by the defendants toward the judgment, with interest computed from the date each payment was made.

Based upon the foregoing, and the papers submitted herein,⁴ it is hereby

ORDERED that the defendants' motion to vacate the default judgment is GRANTED; and it is further

ORDERED that the default judgment as to all defendants is vacated; and it is further

ORDERED that the complaint is dismissed, without prejudice; and it is further

ORDERED that the plaintiff shall provide within ten (10) days of entry of this Order restitution to the defendants for all payments made by the defendants towards the judgment herein with statutory interest from the date of each payment.

Dated: October 26, 2023

Hon. Daniel J. Doyle
Supreme Court Justice

⁴ Order to Show Cause (NYSCEF Docket # 13); Affirmation in Support (NYSCEF Docket # 14); Memorandum of Law in Support (NYSCEF Docket # 15); Affidavit in Support with exhibits (NYSCEF Docket # 16-24); Affirmation in Opposition (NYSCEF Docket # 29); Memorandum of Law in Opposition (NYSCEF Docket # 30); Memorandum of Law in Reply (NYSCEF Docket # 32).