

Valdes v Iacovangelo

2024 NY Slip Op 30776(U)

March 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 500500/2023

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of March, 2024.

PRESENT:

HON. INGRID JOSEPH,

Justice.

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GUILLERMO VALDES, MD,

Plaintiff,

Index No. 500500/2023

-against-

ANDREW IACOVANGELO,

Defendant.

-----X

DECISION & ORDER

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavit/Memorandum/Exhibits.....	<u>11 – 22</u>
Memorandum in Opposition/Exhibits.....	<u>24 – 30</u>
Reply Affidavit/Reply Memorandum.....	<u>32 – 33</u>

This action arises out of medical services that were provided by Plaintiff Guillermo Valdes, MD (“Plaintiff”) to Defendant Andrew Iacovangelo’s (“Defendant”) minor son from approximately November 8, 2019 through January 21, 2022. Plaintiff alleges that Defendant has failed to remit payment for these services and seeks \$42,200, the past-due sum. Plaintiff filed his complaint on or about January 6, 2023. Plaintiff also filed an affidavit of service on February 10, 2023. According to the affidavit of service, Kathryn Doe, a person of suitable age and discretion, was served on January 31, 2023 at Defendant’s dwelling. The process server also avers that service by mailing was completed on February 1, 2023. Thereafter, Plaintiff moved for a default judgment, which was entered on May 11, 2023.

Defendant now moves for an order: (i) pursuant to CPLR 5015 (a) (1), (a) (3), and (a) (4), vacating the judgment entered by the County Clerk on May 11, 2023; (ii) pursuant to CPLR 3211

(a) (8), dismissing the action for lack of personal jurisdiction; and (iii) permitting Defendant to file and serve an answer to the complaint. Plaintiff opposes the motion.

In support of his motion, Defendant contends that he has an excusable default because he was not properly served. Defendant argues that he does not know a “Kathryn Doe” and no female residing at the address indicated on the affidavit of service fits the physical description. Defendant further argues that he never received the Summons and Complaint that was served on Kathryn Doe. Thus, according to Defendant, Plaintiff failed to personally serve him. Moreover, Defendant asserts that he has a meritorious defense because he did not agree to pay for Plaintiff’s medical services. Instead, Defendant claims that the New York City Department of Education was responsible for payment. Accordingly, Defendant alleges that he has been misrepresented as a defendant in this case.

In opposition, Plaintiff argues that Defendant was properly served, and Defendant has no meritorious defense to the action. With respect to service, Plaintiff asserts that Defendant’s wife Fiona *Catherine* Iacovangelo was living at the same address. Plaintiff argues that Defendant has not explained what another woman named Catherine was doing at his home, accepting service of the Summons and Complaint and who had knowledge of Defendant’s lack of military service. Even if there was another woman accepting service, Plaintiff claims that service was still properly made and Defendant has not denied receiving mailed service. With respect to the lack of meritorious defense, Plaintiff contends that Defendant is directly liable for payment of the services rendered. Plaintiff avers that the Department of Education had only agreed to pay the costs of treatment for up to one year. According to Plaintiff, Defendant continued to request services after he was informed that his insurance would not cover treatment and he would remain liable.

In his reply, Defendant argues that he has made a sworn denial of service rebutting the presumption of proper service. Though Plaintiff alleges that Kathryn Doe is Fiona Catherine Iacovangelo, Defendant claims that Plaintiff has not asserted any additional factors or submitted any evidence to establish jurisdiction or to contest Defendant’s sworn denial. Defendant also submitted an affidavit of Fiona Iacovangelo, in which she states that she was never served with the Summons and Complaint and never spoke to a process server. Since Defendant was not properly served, Defendant argues that he does not have to establish a meritorious defense. Nonetheless, Defendant maintains that the Department of Education was responsible for issuing payment.

A defendant moving to vacate a default in failing to answer the complaint must demonstrate a reasonable excuse for the default and the existence of a potentially meritorious defense (CPLR 5015 [a] [1]; *Deutsche Bank Natl. Trust Co. v Geslani*, 222 AD3d 835, 837 [2d Dept 2023]). Under CPLR 5015 (a) (3), the defendant must demonstrate fraud, misrepresentation, or other misconduct on the part of the plaintiff (CPLR 5015 [a] [3]; *Finance v Abundant Life Church, U.P.C., Inc.*, 122 AD3d 918, 919 [2d Dept 2014]). To obtain vacatur under CPLR 5015 (a) (4), the “defendant must overcome the presumption raised by the process server’s affidavit of service” (*Machovec v Svoboda*, 120 AD3d 772, 773 [2d Dept 2014]). Unlike CPLR 5015 (a) (1), a defendant moving under CPLR 5015 (a) (3) or (a) (4) does not have to establish an excusable default or meritorious defense (*Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983]; *Dime Sav. Bank of Williamsburg v 146 Ross Realty, LLC*, 106 AD3d 863, 864 [2d Dept 2013]). Where, as here, a defendant moves to vacate a default on jurisdictional grounds, the Court is required to resolve that question before determining whether to grant vacatur under other grounds (*JPMorgan Chase Bank, N.A. v Grinkorn*, 172 AD3d 1183, 1185 [2d Dept 2019]). Therefore, the Court will first address Defendant’s claim of entitlement to vacatur under CPLR 5015 (a) (4).

It is well-settled that an affidavit of service constitutes prima facie evidence of proper service and gives rise to a presumption of proper service (*Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). “While bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server’s affidavit and necessitates an evidentiary hearing” (*Wachovia Bank, N.A. v Greenberg*, 138 AD3d 984, 985 [2d Dept 2016] [internal citations omitted]). Here, the process server’s affidavit of service constitutes prima facie evidence of proper service on Defendant under CPLR 308 (2) (*Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719, 719 [2d Dept 2014]).

An affidavit that merely denies knowledge of the person named in the affidavit of service is insufficient (*Washington Mut. Bank v Huggins*, 140 AD3d 858, 859 [2d Dept 2016]). Instead, the affidavit must rebut the process server’s sworn allegation that a person fitting the physical description of the named person was present at the residence at the time and accepted service on a defendant’s behalf (*id.*). Therefore, Defendant’s statement that he did not know a “Kathryn Doe” is insufficient. Moreover, whether a female was *living* at the address that fit the description is irrelevant since “[t]his does not mean that the female relative described in the affidavit of service

was not present at the defendant's home to accept service as a person of suitable age and discretion" (*Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007]). In fact, in the opposition, Plaintiff's counsel insinuates that Defendant's wife may be "Kathryn Doe." Though Defendant's affidavit is conclusory and insufficient on its own, he did submit an affidavit of his wife denying receipt of the summons and complaint (*see id.*). Accordingly, the Court finds that Defendant has rebutted the affidavit of service and an evidentiary hearing is necessary to determine the issue of whether Defendant was properly served.

Accordingly, it is hereby

ORDERED, that this matter is referred to a Judicial Hearing Officer or Special Referee who shall conduct a traverse hearing and hear and determine the issue of whether Defendant was properly served with the Summons and Complaint; and it is further

ORDERED, that a decision on Defendant's motion (Mot. Seq. No. 1) is held in abeyance until the issue of service is determined.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**