

Marshall v ATN Care Franchising, LLC

2024 NY Slip Op 31659(U)

May 7, 2024

Supreme Court, New York County

Docket Number: Index No. 654958/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36
Justice
 -----X
 DAVID P. MARSHALL, INDEX NO. 654958/2021
Plaintiff, MOTION SEQ. NO. 005
 - v - **DECISION + ORDER ON
MOTION**
 ATN CARE FRANCHISING, LLC d/b/a GO TELECARE,
Defendant.

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 005) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for VACATE.

Plaintiff commenced this action against defendant by summons and motion for summary judgment in lieu of complaint seeking recognition of a money judgment entered in plaintiff's favor against defendant in the Sixth Judicial District for the State of Michigan. On February 3, 2023, this court entered a judgment on defendant's default in appearing in this action (the "Judgment"). Defendant now moves pursuant to CPLR 5015(a) to vacate the Judgment. Plaintiff opposes the motion and cross-moves, *inter alia*, to compel defendant's president, Dipak Nandi (Nandi), to comply with a subpoena *duces tecum* and information subpoena, and for a conditional contempt order against Nandi. For the reasons that follow, defendant's motion is denied, and plaintiff's cross-motion is granted in part.

Defendant, a limited liability company, asserts that it should be relieved from the Judgment because it was never served with the summons and motion for summary judgment in lieu of complaint in this action. In support, Nandi submits an affidavit wherein he states: "neither I nor anyone connected with the Defendant was aware that Plaintiff got judgment against the Defendant in this matter. The Defendant was never served with any papers nor given any notice that Plaintiff was seeking a judgment in this matter" (*Nandi affidavit* at ¶ 5, NYSCEF Doc. No. 81). Defendant contends that since it was never served with the summons and motion, the court lacked jurisdiction over it and therefore the Judgment should be vacated pursuant to CPLR 5015(a)(4). For the same reason, defendant contends that its default is excusable under CPLR 5015(a)(1).

CPLR 5015 authorizes "[t]he court which rendered a judgment or order" to "relieve a party from it upon such terms as may be just" on, among other grounds, "excusable default" (CPLR 5015[a][1]) and "lack of jurisdiction to render the judgment or order" (CPLR 5015[a][4]). In order to vacate a default pursuant to CPLR 5015(a)(1), a defendant is required to demonstrate a reasonable excuse for the default and a meritorious defense (see *Matter of Medallion Fin. Corp. v Rucker*, 223 AD3d 497, 498 [1st Dept 2024]). "A determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court" (*Hunter v Enquirer/Star, Inc.*, 210 AD2d 32, 33 [1st Dept 1994]).

However, “[w]hen the motion is based exclusively on lack of jurisdiction, the governing paragraph of CPLR 5015(a) is 4, not 1, and involves no discretion, and requires no affidavit of merits” (Siegel & Connors, NY Prac § 427, n2 at 828 [6th ed 2018]). Thus, “[w]here, as here, a defendant seeks vacatur of a default under both CPLR 5015(a)(1) (excusable default) and (4) (lack of jurisdiction), the court should determine whether or not it has personal jurisdiction over the defendant before reaching the 5015(a)(1) ground” (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 522 [1st Dept 2016]).

“The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff” (*Matter of Rockman v Nassau County Sheriff’s Dept.*, 224 AD3d 758, 759 [2d Dept 2024] [internal quotation marks and citation omitted]). “An affidavit of service constitutes prima facie evidence of proper service and the mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service” (*Jones v Grooms*, 209 AD3d 584, 584 [1st Dept 2022] [internal quotation marks and citation omitted]).

Service of process upon a limited liability company may be made pursuant to article three of the Limited Liability Company Law (*see* CPLR 311-a). Limited Liability Company Law § 303(a)(1) provides that service of process on the secretary of state as agent of a domestic limited liability company may be made by

“[p]ersonally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee.”

Service of process is “complete when the secretary of state is so served” (Limited Liability Company Law § 303[a][1]).

Here, the process server’s affidavit indicates that defendant was served pursuant to Limited Liability Company Law § 303(a)(1) by delivery of duplicate copies of the summons and notice of motion for summary judgment in lieu of complaint (with supporting papers) to the Secretary of State and payment of the requisite statutory fee (NYSCEF Doc. No. 52, *Affidavit of Service*). Nandi’s affidavit is insufficient to rebut the presumption of proper service as it amounts to a mere denial of receipt. As such, defendant is not entitled to relief under CPLR 5015(a)(4).

Similarly, Nandi’s mere denial of receipt without more is insufficient to demonstrate a reasonable excuse for default under CPLR 5015(a)(1) (*see Matter of Medallion Fin. Corp. v Rucker*, 223 AD3d at 498; *Andrews v Wartburg Receiver, LLC*, 203 AD3d 1000, 1001 [2d Dept 2022]; *60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511, 512-513 [1st Dept 2013]). “[A]bsent a reasonable excuse, vacatur is not appropriate [under CPLR 5015(a)(1)] regardless of whether defendant has a meritorious defense” (*Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-77 [1st Dept 2016]).

The court notes that CPLR 317 sets forth another basis for vacating a default judgment based upon improper service. Under CPLR 317, a defendant who has been “served with a summons other than by personal delivery” and has not appeared to defend “may be allowed to defend the action” upon a finding of the court that the defendant “did not personally receive notice of the summons in time to defend and has a meritorious defense” (CPLR 317). While defendant does not mention CPLR 317 in its motion papers, this court may consider whether application of the statute would warrant the relief requested (*see Peacock v Kalikow*, 239 AD2d 188, 189 [1st Dept 1997]).

That said, defendant is not entitled to relief under CPLR 317. There is case law from the Second Department holding that the mere denial of receipt of the summons and complaint is insufficient to establish lack of actual notice for the purpose of CPLR 317 (*see Garrick v Charles*, 222 AD3d 724, 727 [2d Dept 2023]; *Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012]). And, regardless of whether defendant lacked actual notice, it did not set forth a meritorious defense. “[T]o demonstrate a meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts” that does more “than merely make conclusory allegations or vague assertions” (*Peacock v Kalikow*, 239 AD2d at 190 [internal quotation marks and citations omitted]). Defendant has not satisfied this requirement.

Lastly, defendant contends in support of its motion that it is entitled to vacatur based on “fraud, misrepresentation, or other misconduct” pursuant to CPLR 5015(a)(3). In this regard, Nandi attests that plaintiff’s counsel knows both defendant and defendant’s counsel as they have all been involved in an unrelated “highly contentious litigation for the past five years” and “not once did [plaintiff’s counsel] ever mention seeking a judgment against Defendant” (Nandi Affidavit at ¶ 7, NYSCEF Doc. No. 81). This is insufficient to show that plaintiff procured the Judgment through “fraud, misrepresentation, or other misconduct” inasmuch as plaintiff’s counsel was under no obligation to mention the instant action to defendant or to defendant’s counsel in the context of an unrelated litigation. Thus, defendant’s motion is denied.

On May 20, 2023, plaintiff served Nandi with a subpoena *duces tecum* and an information subpoena, with restraining notice and questionnaire, pursuant to CPLR 5224 and CPLR 5222(b) (NYSCEF Doc. Nos. 95-96). Nandi has not responded. Plaintiff now cross-moves for an order compelling Nandi’s compliance with the subpoena *duces tecum* and the information subpoena and questionnaire within twenty (20) days after service of an order compelling his response. Plaintiff also seeks a conditional order of contempt against Nandi should he fail to respond to the subpoenas within twenty (20) days.

In opposition to the cross-motion, defendant does not argue that the subpoenas are overly broad or irrelevant, or that the requested information is unavailable. Rather, defendant contends that this court may not entertain a motion to hold Nandi in contempt without first issuing an order to compel compliance with the subpoenas. Defendant also argues that the subpoenas are facially defective because they reflect the wrong index number and that they are, in any event, a nullity because the court never obtained jurisdiction over defendant and the Judgment was obtained through fraud, misrepresentation, or other misconduct.

The latter argument is addressed to the merits of defendant’s motion to vacate the Judgment based on lack of proper service and fraud. For the reasons already discussed, the defendant’s motion has been denied. As to the subpoenas reflecting the incorrect index number, the subpoenas list the index number as 645958/21 as opposed to 654958/2021. It is apparent that the numbers 4 and 5 were transposed through a clerical error which may be disregarded in accordance with CPLR 2001. As such, the cross-motion is granted to the extent that Nandi shall comply with the subpoenas within thirty (30) days of the date of this decision and order. In the event Nandi fails to comply within such time period, plaintiff may renew its motion to compel and seek additional sanctions including an order of contempt. Accordingly, it is

ORDERED that defendant’s motion pursuant to CPLR 5015(a) to vacate the default judgment against it is denied; and it is further

ORDERED that plaintiff’s cross-motion is granted to the extent that defendant’s president, Dipak Nandi, is ordered to comply with the subpoena duces tecum and information subpoena, dated March 29, 2023, within thirty (30) days of the date of this decision and order; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that if Nandi fails to comply within such time period, plaintiff may renew its motion to compel and seek additional sanctions, including an order of contempt.

This constitutes a decision and order of the court.

May 7, 2024


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE