

Martinez v Russell

2024 NY Slip Op 32920(U)

August 16, 2024

Supreme Court, New York County

Docket Number: Index No. 160759/2021

Judge: Richard G. Latin

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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. RICHARD G. LATIN **PART** **46M**

Justice

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LIZETTE MARTINEZ, LISA VAN ALLEN, KELLY ROGERS,
FAITH ROGERS, RODERICK GARTRELL, GEM PRATTS,

Plaintiff,

INDEX NO. 160759/2021

MOTION DATE 07/24/2024

MOTION SEQ. NO. 004

- v -

DONNELL RUSSELL, ROBERT SYLVESTER KELLY, RSK
ENTERPRISE, LLC, INDYBUILD CORP.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 117

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

As a preliminary matter, at conference prior to the oral argument on July 24, 2024, counsel for movant explained that she only represented and would be arguing on behalf of defendant Robert Sylvester Kelly and not RSK Enterprise, LLC. As a result, that portion of the motion as to RSK Enterprise, LLC is deemed abandoned and this decision will only address vacating the court order dated January 19, 2023 as to defendant Robert Sylvester Kelly.

Upon the foregoing documents, it is ordered that defendant Kelly’s motion pursuant to CPLR 5015 to vacate the default judgment order and judgment after inquest is denied.

Plaintiffs filed the summons and complaint in this action on December 1, 2021 and defendant Kelly was served on December 22, 2021. Plaintiffs then waited nearly a year before moving for a default judgment by motion, filed on December 13, 2022. By order dated January 19, 2023, this court granted default judgment against defendants Donnell Russell, Robert Sylvester Kelly, RSK Enterprise, LLC, and Indybuild Corp. The order further directed that an inquest would take place on March 10, 2023 and that a copy of the order granting default judgment with notice of entry, a note of issue/notice of inquest, and a statement of readiness be sent to the defendants. The inquest commenced as scheduled on March 10, 2023 and continued for four more long days,

ultimately concluding on April 19, 2023. Defendant Donnell Russell was the only defendant to appear and participate at the inquest hearings.

“It is well settled that in order to vacate its default pursuant to CPLR 5015 a defendant must demonstrate both a reasonable excuse for the failure to appear and a meritorious defense” (*Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454 [1st Dept 2010]). “[W]hat constitutes a reasonable excuse for a delay generally lies within the sound discretion of the motion court” (*Gecaj v Gjonaj Realty & Management Corp.*, 149 AD3d 600 [1st Dept 2017] quoting *Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510 [1st Dept 2010]). Where there is “persistent and willful inaction” an order finding a defendant in default should not be vacated even where the defendant has a meritorious defense (*Pires v Ortiz*, 18 AD3d 263 [1st Dept 2005]; *Youni Gems Corp.*, 70 AD3d at 455).

Defendant Kelly argues that he had a reasonable excuse for defaulting because he was never served with the complaint and had no notice of any subsequent proceedings. Defendant alleges that he was served at the MDC Brooklyn after he had already been transferred to the MCC in Chicago. Additionally, defendant asserts that even if he was served, he would have had no ability to read and comprehend the legal documents because he is functionally illiterate.

In support of these arguments, movant relies on an affidavit of defendant Kelly, submitted nearly a month after his reply papers were submitted. In the affidavit, he avers, among other things, that he had “no recollection of personally receiving any lawsuit concerning this matter” (NYSCEF #117). He knew he received paperwork for various legal matters but did “not recall getting paperwork specific to this matter” (*id.*). He further states that he “would not have been able to understand the lawsuit or distinguish it from the many other legal documents that [he] received” (*id.*). He additionally testified that he relied on his lawyers to explain things to him because he “cannot read or understand words beyond that of a grade schooler” (*id.*). Additionally, Kelly claims that before his conviction in New York he had lawyers who helped him handle civil matters, but after the trial he did not have the resources to pay civil lawyers and that his criminal trial team had withdrawn from his case (*id.*).

In opposition to the motion, plaintiffs submit the sheriff’s certificate of service demonstrating that defendant Kelly was served with the summons and complaint on December 22,

2021¹ (NYSCEF #2). It is undisputed that on December 22, 2021 Kelly's criminal defense team had not yet withdrawn from his case.²

Plaintiffs also submit proof of service that the note of issue, certificate of readiness, and a copy of the order granting a default judgment and setting the matter down for an inquest on March 10, 2023, with notice of entry, was sent to defendant Kelly by certified mail, return receipt requested, at the MCC Chicago on or about January 30, 2023 (NYSCEF #110).

It is well settled that the affidavit of a process server is prima facie evidence of proper service (*see Nazarian v Monaco Imports, Ltd.*, 255 AD2d 265 [1st Dept 1998]). The bare assertion that a defendant does not recollect or recall having been served is an insufficient basis for seeking to have a default vacated (*id.*). Here, the claim that defendant Kelly was not served with the pleadings and subsequent papers is belied by the affidavits of service submitted by plaintiffs. Inasmuch as there is proof that Kelly was served with the summons and complaint in December 2021, was served in MCC Chicago with the note of issue, certificate of readiness, and default order, with notice of entry, in January 2023, and had criminal representation at all relevant times such that he could have and/or would have given the legal documents to his attorneys if he could not understand them, defendant Kelly fails to demonstrate a reasonable excuse for his default and inaction until after the August 25, 2023 judgment was issued (*see Uram v Smith*, 138 AD3d 553 [1st Dept 2016]; *see also Pires v Ortiz*, 18 AD3d 263 [1st Dept 2005]). At a minimum, defendant Kelly should have appeared and sought vacatur during the 40 days between when he was served with a copy of the default judgment order with notice of entry and when the inquest began. In light of movant's failure to demonstrate a reasonable excuse for his default, the court need not determine whether defendant demonstrated a meritorious defense (*see New Globaltex Co., Ltd. v Zhe Lin*, 198 AD3d 573 [1st Dept 2021]; *Uram*, 138 AD3d at 554; *Gecaj*, 149 AD3d at 607).

Accordingly, defendant Robert Sylvester Kelly's motion pursuant to CPLR 5015 is denied; and it is further


¹ There is an additional sheriff's certificate of service of personal delivery on Kelly dated March 9, 2022, however, that service was purportedly effectuated on Kelly on behalf of defendant RSK Enterprise, LLC pursuant to CPLR § 311-a (NYSCEF #106).

² An article was published on PageSix.com on December 1, 2021, the day this action was commenced discussing this matter wherein Kelly's counsel state that Kelly has no connection to co-defendant Russell and that Kelly was not involved in any harassment or intimidation (Page Six, <https://pagesix.com/2021/12/01/r-kelly-manager-sued-for-allegedly-threatening-singers-abuse-accusers/> [last accessed Aug. 16, 2024]).

ORDERED that the portion of the motion as to defendant RSK Enterprise, LLC is denied without prejudice; and it is further

ORDERED that plaintiffs shall serve a copy of this order, with notice of entry, on defendants within 30 days of the upload of this order onto NYSCEF.

This constitutes the decision and order of the Court.

<u>8/16/2024</u> DATE	 RICHARD G. LATIN, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE