

Terzulli v CitiMortgage, Inc.
2024 NY Slip Op 35641(U)
June 5, 2024
Supreme Court, Bronx County
Docket Number: Index No. 33147/2020E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26-----X
Vito Terzulli,

Index No.: 33147/2020E

Plaintiff,

DECISION/ORDER

-against-

CitiMortgage, Inc. Alexander G. Ortega, Cheng Hei
Cheung and Core Realty Family, Safeguard Properties
Management, LLC, Safeguard Properties, Inc., and
Safeguard Properties, LLC,Defendant.
-----XRecitation, as required by CPLR §2219(a), of the papers considered in the review of the order to
show cause as indicated below:

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits.....	1
Affirmation in Opposition & Exhibits.....	2
Affirmation in Reply.....	3

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The defendant, Cheng Hei Cheung, moves for an order vacating the decision and order of the Hon. Ruben Franco which granted the plaintiffs motion for default judgment. The defendant moves to vacate pursuant to CPLR § 5015(a)(4) for lack of personal jurisdiction and CPLR §§ 317 and 5015(a)(1) based on a reasonable excuse for defaulting and a meritorious defense to the plaintiffs causes of action. The defendant further moves to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) and § 3211(a)(8) and 306-b. The plaintiff, Vito Terzulli and co-defendant, CitiMortgage, Inc. oppose the motion.

The defendant argues that the Court should vacate the default judgment pursuant to CPLR § 5015(a)(4) because there is no personal jurisdiction over the defendant. In support of this argument, the defendant points to improper service. The defendant maintains that service was improper and that the plaintiff's attempt to serve the defendant failed to satisfy the due

diligence requirements for conspicuous service. The defendant further argues pursuant to CPLR § 317 and CPLR § 5015(a)(1) that he has both a reasonable excuse and meritorious defense.

Pursuant to § CPLR 5015(a)(4) a court that rendered a judgment or order may vacate that judgment or order where the court never obtained personal jurisdiction. The affidavit of service demonstrates that the summons and complaint was affixed to the door on November 9, 2020 at 12:30 p.m. at 1691 Grove Street, 1Fl, Brooklyn, New York, 11385. CPLR § 308(4) states that where service cannot be made with due diligence, the summons may be affixed to the door of dwelling of the individual to be served. Cheung correctly argues that the complaint must be dismissed against him because the plaintiff failed to properly serve him in accordance with the requirements of service pursuant to CPLR § 308(4). The process server did not establish due diligence in attempting to effectuate personal service. "The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*Gurevitch v. Goodman*, 269 AD2d 355). "A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the 'due diligence' requirement before resort to nail and mail service" (*Estate of Waterman v. Jones*, 46 AD3d 63,66). Due diligence can be satisfied with a few visits on different occasions and at different times to the defendants residence when the defendant can be reasonably expected to be found at the location (*Id.*).

Through the affidavit of service, the defendant demonstrated that service was attempted on November 6, 2020 at 11:30 a.m.; November 7, 2020 at 8:00 a.m.; and November 9, 2020 at 12:30 p.m. The evidence does not demonstrate that the attempts were made during times that working individuals can be expected to be home. The attempts were at around the same time

during weekdays and one attempt on a Saturday. Moreover, due diligence was not met since the process server did not attempt to ascertain the defendants place of employment (see *Wood v. Balick*, 197 AD2d 438; *Marballie v. Lefrak*, 201 AD2d 707; *Hanover New England v. MacDougall*, 202 AD2d 724). The defendant demonstrates that there was no due diligence in attempts to serve the defendant. Additionally, a defendant is not obligated to demonstrate a reasonable excuse for the default and a potentially meritorious defense if there is a lack of jurisdiction (*Avis Rent a Car Sys., LLC v. Scaramellino*, 161 AD3d 572). The defendant has established that he was never properly served and the branch of the motion to vacate the default judgment against him pursuant to CPLR § 5015(a)(4) is granted.

Pursuant to CPLR § 3211(a)(8), a party may move for judgment dismissing one or more of the causes of action asserted against him on the ground that the court does not have jurisdiction over the defendant. Additionally, the defendant's motion to dismiss the complaint against him for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) is also granted.

CitiMortgage, Inc.'s opposition is based on CPLR § 3211(a)(1) and 3211(a)(7). However, the Court will not address this branch of the motion as the complaint against defendant has been dismissed pursuant to CPLR § 5015(a)(4) and CPLR § 3211(a)(8) for lack of personal jurisdiction. Additionally, in opposition, the plaintiff argues that the motion is untimely and that the defendant was required to move within one year after service of the copy of the judgment or order pursuant to CPLR § 5015(a)(1). However, there is no limitation on the time in which a movant must apply for relief from a judgment or order pursuant to CPLR § 5015(a)(4) (West's McKinney's Forms Civil practice Law and Rules § 8:88 [Feb 2024 Update]).

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the defendants motion to vacate the default judgment and dismiss the complaint against Cheng Hei Cheung is granted and it is further,

ORDERED AND ADJUDGED, that the defendant shall serve a copy of this decision and order upon all parties within twenty (20) days of notice of entry.

This constitutes the Decision and Order of the court.

Dated: June 5, 2024



Hon. Paul L. Alpert, J.S.C.