

Bank of Amer. N.A. v Garcia
2011 NY Slip Op 34255(U)
December 29, 2011
Supreme Court, Bronx County
Docket Number: 24290-06
Judge: Kibbie F. Payne
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 1**

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BANK OF AMERICA N.A.,

Plaintiff,

-against-

Index No. 24290-06
Decision/Order

JORGE GARCIA,

Defendant.

-----X

KIBBIE F. PAYNE, J.:

Defendant moves, pursuant to CPLR 5015 (a) (4), seeking vacatur the of the default judgment, arguing that issues of fact concerning service warrant a traverse hearing in this matter. Plaintiff opposes the application, arguing that defendant's surrender to wage garnishments and participation in settlement negotiations amounted to a waiver of his jurisdictional objection.

"The basic fact is that a waiver of an objection to personal jurisdiction occurs only if the defendant appears in the action without preserving the objection with either a motion or an answer" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:9). Plaintiff cites *Lomando v Duncan* (257 AD2d 649), claiming support for his position. In that case, the reviewing court found defendant's tender of \$10,000 in exchange for release of a lien on his real property "amounted to a partial settlement of the action which impliedly acknowledged the validity of the judgment."

The facts here are not analogous. The defendant made no voluntary attempt at satisfaction, nor did his delay in challenging the income execution confirm the judgment. (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5015:3 ["Laches can't confer on a court jurisdiction it doesn't have"]; State Higher Educ. Services Corp. v. Sparozic, 35 AD3d 1069, 1070 [on motion to vacate twelve-year-old judgment for child support, "defendant's argument that the judgment is a nullity because personal jurisdiction was never obtained over her must be entertained even at this late juncture"])). Moreover, participation in settlement negotiation is not considered formal appearance and does not subject a party to the court's jurisdiction (Crossland Sav, FSB v. Friedman, 216 AD2d 351; 1 NY Jur 2d Actions § 89). Accordingly, defendant's jurisdictional objection has been preserved.

"A process server's affidavit constitutes prima facie proof of service. However, where there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of evidence at a hearing" (Skyline Agency, Inc v Ambrose Coppotelli, Inc, 117 AD2d 135; Rox Riv 83 Partners v Ettinger, 276 AD2d 782). A judgment entered without personal jurisdiction is a nullity; hence, the party denying service is not required to set forth a meritorious defense (cf Deutsche Bank Nat Trust Co v Pestano, 71


AD3d 1074; Steele v Hempstead Pub Taxi, 305 AD2d 401, 402).

In an affidavit annexed to the moving papers, defendant Jorge Garcia avers "specific facts to rebut the statements in the process server's affidavit" (Simonds v Grobman, 277 AD2d 369). Notably, defendant makes a particularized denial of receipt and alleges material inaccuracies in the description of his sister, Sylvia Chomel, recorded by the process server. These conflicting accounts raise questions of fact that cannot be resolved upon the papers and require a hearing.

Accordingly, it is ORDERED the application seeking vacatur of the judgement on the ground that the Court lacked the requisite personal jurisdiction over defendant Jorge Garcia is referred to the Chief Court Attorney of Supreme Court, Bronx County for assignment of a Special Referee to hear and report with recommendations. Pending receipt of such report, final determination of the motion shall be held in abeyance, and it is further

ORDERED that counsel shall, within thirty days after entry of this order file a copy of the order with notice of entry upon John L. Segreti Chief Court Attorney for the purpose of assigning a special referee and scheduling a hearing.

Date: December 29, 2011
Bronx County



KIBBIE F. PAYNE
J.S.C.