

**215 African & Hispanic Am. Realty of N.Y. LLC v Air
Chef, Inc.**

2012 NY Slip Op 32187(U)

August 16, 2012

Supreme Court, New York County

Docket Number: 117923/09

Judge: Martin Shulman

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

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

215 African + Hispanic
American Realty of NY LLC

- v -

AirChef, Inc., et al.

INDEX NO.

117923/09

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to ~~for~~ vacate judgment

~~Notice of Motion~~ / Order to Show Cause — Affidavits — Exhibits A-F

Answering Affidavits — Exhibits A-D

Replying Affidavits - Exhibits G-I; A

PAPERS NUMBERED

1, 2, 3

4

5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the attached decision and
order.

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 16, 2012

Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
215 AFRICAN & HISPANIC AMERICAN REALTY
OF NEW YORK LLC,

Index No. 117923/09

Plaintiff,

Decision & Order

-against-

AIR CHEF, INC. AND RAKESH AGGARWAL,

Defendants.
-----X

MARTIN SHULMAN, J. :

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant-judgment debtor Rakesh Aggarwal ("Aggarwal" or "defendant") moves for an order: (1) pursuant to CPLR 5015(a)(4) and (a)(1), vacating the default judgment in the sum of \$183,151.40 entered against him on November 23, 2010 (the "judgment") in favor of plaintiff 215 African & Hispanic American Realty of New York LLC ("plaintiff"); (2) upon such vacatur, dismissing the complaint in its entirety due to lack of personal jurisdiction based upon improper service of process; and (3) enjoining and restraining the plaintiff from proceeding on, executing or otherwise engaging in any activities to enforce the judgment.

Background

Plaintiff commenced the instant action in December 2009 to recover amounts due under a lease agreement and personal guaranty. The affidavit of service indicates that the summons and complaint were served on Aggarwal by conspicuous place service pursuant to CPLR §308(4) at 76-27 85th Road, Woodhaven, New York (the "Woodhaven address"). Goldberg Aff. in Supp. of OSC, at Exh. D. Plaintiff contends that Aggarwal provided plaintiff with this

address on his credit/lease application, listing it as his residence. Fant Aff. in Opp, at Exh. G.

The affidavit of service indicates that on an unspecified date, the process server spoke to Mr. Singh, a neighbor residing at 76-29 85th Road, who allegedly stated that Aggarwal lived at the Woodhaven address. *Id.* at Exh. F. After making three (3) attempts at personal service the process server affixed the summons and complaint to the door of the Woodhaven address and the mailing under CPLR §308(4) was also sent there. *Id.* Plaintiff's counsel contends that this mailing was not returned. Fant Aff. in Opp., at ¶9.

In support of this motion, Aggarwal alleges that he did not reside at the Woodhaven address at the time the summons and complaint were served and has not resided there since 1999. In response, plaintiff's counsel's opposition details the following subsequent mailings to and service attempts upon defendant, all allegedly at the Woodhaven address, during the pendency of this action and the ensuing supplemental proceedings:

- Upon Aggarwal's failure to answer or appear this action, plaintiff sought to schedule an inquest and served a note of issue and RJI upon Aggarwal by mail (*id.* at Exh. H);
- By letter dated September 1, 2010, plaintiff's counsel notified defendant by mail that an inquest had been scheduled for September 14, 2010 (*id.* at Exh. I);
- On January 26, 2011, plaintiff served a subpoena to take Aggarwal's deposition in connection with supplementary proceedings to enforce the judgment by substituted service and mailing pursuant to CPLR §308(2) upon "Ms. Aggarwal", a relative; (*id.* at Exh. L);
- Upon Aggarwal's failure to comply with the subpoena, plaintiff moved by order to show cause ("OSC") to punish him for contempt of court and

purportedly served the OSC on Aggarwal personally, in hand, on February 21, 2011 (*id.* at Exh. N); and

- Aggarwal defaulted on the OSC's return date and plaintiff served notice of entry of this court's conditional order by mail on May 20, 2011 (*id.* at Exh. O).

Plaintiff's counsel avers that none of the above mailings was ever returned as undeliverable nor was there any indication to plaintiff that Aggarwal no longer resided at the Woodhaven address. *Id.* at ¶¶ 10, 11, 13, 16.

In October 2011, plaintiff discovered that Aggarwal allegedly was transferring his assets without fair consideration to avoid creditors. Plaintiff then commenced a separate action entitled *215 African & Hispanic American Realty of New York LLC v. Rakesh K. Aggarwal and Sheeli Aggarwal*, N.Y. County Index No. 111808/2011 (the "2011 action"), to set aside a conveyance of property that Aggarwal allegedly made to his wife without fair consideration to frustrate creditors. Goldberg Aff. in Supp. of OSC, at Exh. C.¹ Defendant claims that he first learned about this lawsuit² when he received the complaint in the 2011 action.³ Aggarwal Aff. of Merit, at ¶2.

¹ Aggarwal and co-defendant Sheeli Aggarwal, his wife, have appeared in the 2011 action by counsel and their motion to dismiss the complaint therein is presently *sub judice* before this court. This court stayed determination of the motion to dismiss upon learning of the untimely death of plaintiff's counsel, Mark E. Fant, Esq., pursuant to CPLR 321[c]. Plaintiff has since appeared by new counsel but has not interposed opposition to the motion to dismiss.

² At paragraph 2 of his reply affidavit, Aggarwal contradicts this statement, claiming that he first learned of this action when his bank received plaintiff's restraining notice.

³ The complaint in the 2011 action lists Aggarwal and his wife's residence as their claimed present abode, to wit, 84-61 Abingdon Road, Kew Gardens,

Analysis

Aggarwal moves pursuant to CPLR 5015(a)(4), which provides that a judgment or order may be vacated due to the court's "lack of jurisdiction to render the judgment or order". Defendant's motion also cites CPLR 5015(a)(1), which provides that a judgment or order may also be vacated where the defendant can establish an "excusable default" and a meritorious defense to the action. See *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141-142 (1986).

This court must first resolve the jurisdictional question. *Cipriano v Hank*, 197 AD2d 295, 298 (1st Dept 1994). Where proper service is lacking, a default judgment is a nullity and must be unconditionally vacated. *Chase Manhattan Bank, N.A. v Carlson*, 113 AD2d 734, 735 (2d Dept 1985). The existence or lack of a meritorious defense is irrelevant to this inquiry. *Id.* See also, *Johnson v Deas*, 32 AD3d 253, 254 (1st Dept 2006).

As previously stated, defendant was served with the summons and complaint herein pursuant to CPLR §308(4), which requires affixing the summons to the door of the defendant's "actual place of business, dwelling place or usual place of abode" and mailing to the defendant "at his or her last known residence". Such service is authorized only where, after due diligence, service cannot be effectuated on a natural person under CPLR §308(1) and (2).

New York (the "Kew Gardens address"). See Goldberg Aff. in Supp. of OSC, at Exh. C, ¶¶ 2-3.

In *Feinstein v Bergner*, 48 NY2d 234 (1979), the Court of Appeals interpreted CPLR §308(4) to require affixing at the defendant's actual dwelling place. There, the affixing occurred at the defendant's last known residence and the court held that while the last known residence may be a proper place for the mailing step, it does not suffice for the affixing component. Otherwise, there would be no distinction between a dwelling place and a last known residence, which "would diminish the likelihood that actual notice would be received by potential defendants." *Id.* at 240.

In the case at bar Aggarwal claims that service was not made at his actual place of residence, stating that at the time of service he had not lived at the Woodhaven address for 10 years but instead resided at the Kew Gardens address. He further denies any recollection of the purported neighbor the process server claims to have spoken to. In support of his claims, Aggarwal proffers publicly available property records obtained from the New York City Department of Finance's Automated City Register Information System ("ACRIS"), indicating that as of the date of service the Woodhaven address was owned by Sohan Singh and Surinder Kaur (Goldberg Aff. in Supp. of OSC, at Exh. E).

In his reply affidavit, Aggarwal further submits a series of utility bills (Aggarwal Reply Aff., at Exhs. H-I) and a copy of his driver's license (*id.* at Exh. G) depicting his residence at the relevant time as the Kew Gardens address. Defendant further responds to plaintiff's opposition by noting that the credit/lease application plaintiff relies upon is undated and, if he provided it at the time he entered into the initial lease with plaintiff, it was given no later than 1996 and it

was unreasonable for plaintiff to assume his residential address had not changed from 1996 to 2009. Finally, with respect to the alleged personal delivery of the OSC to Aggarwal and the alleged substituted service of a subpoena on his wife at the Woodhaven address, Aggarwal's reply affidavit and that of his wife⁴ deny such service, noting that neither one of them matches the physical descriptions of the individuals served⁵ as stated in the process server's affidavits of service.⁶

"While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn nonconclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing (citations omitted)." *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 (1st Dept 2004).

⁴ Defendant's wife, Sheeli Aggarwal, states at paragraph 3 of her affidavit:

I never accepted delivery of the subpoena on my husband's behalf. I was not living or otherwise present at the Woodhaven address on January 26, 2011. In fact, I have not returned to that address since my family and I sold the residence in 1999. I do not know who currently resides at that address or resided there on January 26, 2011.

⁵ Aggarwal avers at paragraph 13 of his reply affidavit that he was not the person served with the OSC on February 21, 2011. At that time, he was approximately 58 years old, while the person served was 40 years old, and he weighed 30 pounds more than the person served.

⁶ Mrs. Aggarwal submits a copy of her driver's license and states at paragraph 4 of her affidavit that on the date of the alleged service she was between 52 and 53 years old, while the process server's affidavit states that he served a woman around 35 years of age. Lastly, Mrs. Aggarwal states that the only other female in her family who could be deemed a person of suitable age and discretion would be her daughter, Payal Aggarwal, who was 22 years old at the time of the alleged service, and whose height and weight were not consistent with the process server's description. *Id.* at ¶5.

In *NYCTL 1998-1 Trust*, the process server stated in his affidavit that he served the defendant's son, however the defendant replied that he did not have a son. The defendant stated that he had a daughter in Washington DC, who has a different height and weight than the man in the process server's affidavit. The court granted the request to vacate the default judgment but set the matter down for a traverse hearing.

While case law provides authority for directing a traverse hearing, the undisputed facts in the case at bar compel dismissal. Here, no traverse hearing is needed in light of plaintiff's failure to refute Aggarwal's claim that the Woodhaven address was not his actual dwelling place or usual place of abode. Plaintiff's service of the summons and complaint at defendant's last known address is insufficient as a matter of law. See *Feinstein, supra*; *Timkin v Edwards*, 158 AD2d 973 (4th Dept 1990)(complaint dismissed where served at defendant's former address); *Rios v Zorrilla*, 8 AD3d 463 (2d Dept 2004)(complaint dismissed due to defective service of process where served at defendant's last known address). Accordingly, the judgment must be vacated and the complaint dismissed based upon plaintiff's failure to properly serve defendant within 120 days of filing this action, as required by CPLR §306-b.

Accordingly, it is

ORDERED that defendant Rakesh Aggarwal's motion to vacate the default judgment against him is granted, the complaint is dismissed and all restraining notices are vacated.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 16, 2012



HON. MARTIN SHULMAN, J.S.C.

FILED

AUG 20 2012

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