Colebrooke Theat. LLP v Bibeau
2016 NY Slip Op 31489(U)
August 8, 2016
Supreme Court, New York County
Docket Number: 651440/2014
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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COLEBROOKE THEATRICAL LLP,

Plaintiff,

-against-

STEPHANE BIBEAU, JEAN-FRANCOIS RODRIGUE, and C3 GLOBAL CAPITAL HK LIMITED

Defendants.

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Index No.: 651440/2014

Mtn Seq. No. 005

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Defendants move, pursuant to CPLR 5015(a)(4), for an order vacating the default judgments against them, and, upon vacatur, for an order dismissing this action against them. In the alternative, they move, pursuant to CPLR 317 and 5015(a)(1), for an order vacating the default judgments, and permitting them to defend this action on the merits.

Factual Background

Plaintiff, a British theater production company, led a group of producers in assembling a new Broadway adaptation of "Breakfast at Tiffany's." In that regard, it created a New York limited partnership, Lulamae Productions LP ("Lulamae"), to serve as the production entity for the project. Plaintiff installed

itself as general partner in Lulamae's limited partnership agreement ("LPA").

Defendant Stephane Bibeau ("Bibeau"), a real estate developer and restaurant owner, expressed interest in investing in Lulamae. Bibeau informed plaintiff that defendant C3 Global, a Chinese corporation headquartered and incorporated in Hong Kong, would be the investor, and that he would sign on its behalf. When Bibeau signed the letter agreement on March 14, 2013 (the "letter agreement"), his signature block said that he was a director of defendant C3 Global. The letter agreement committed C3 Global to invest $500,000 by March 16, 2013. On March 18, 2013, defendant Bibeau signed the LPA on defendant C3 Global's behalf.

Plaintiff alleges that defendant Jean-Francois Rodrigue ("Rodrigue"), a director of C3 Global, was responsible for making the $500,000 payment, but that no payment was ever made. Plaintiff also alleges that Bibeau and Rodrigue dominated C3 Global's operations and treated themselves and C3 Global interchangeably.

On May 9, 2014 plaintiff commenced this breach of contract action. The summons and complaint was left at Rodrigue's home in Quebec on May 27, 2014 (Mangan Affirm., Ex. F) and also mailed to that address on July 2, 2014 (Rosenfeld Affirm., Ex. D).

Plaintiff's process server made four attempts to serve Bibeau at his home address in New York, each time ringing the door bell and knocking on the door (Mangan Affirm., Ex. E). After these efforts failed, the process server affixed a copy of the summons and complaint to the door of Bibeau's apartment on July 16, 2014 (Mangan Affirm., Ex. E). Bibeau maintains that he was home on each of the dates personal service was attempted, but did not hear the doorbell or a knock on his door, and never saw the summons and complaint purportedly affixed to his door (Bibeau Aff., ¶¶ 4-6, Mangan Affirm., Ex. A). Plaintiff also mailed a copy of the summons and complaint to Bibeau at his home address on July 21, 2014 (Rosenfeld Affirm. Ex. F).

Bibeau and Rodrigue concede that they received copies of the summons and complaint by mail in July 2014 (Bibeau Aff., ¶ 7, Mangan Affirm., Ex. A; Rodrigue Aff., ¶¶ 5-6, Mangan Affirm., Ex. B). They did not answer or otherwise act after receiving these documents, however, because they believed that this service was improper (Bibeau Aff., ¶¶ 7, 9, 12, Mangan Affirm., Ex. A; Rodrigue Aff., ¶¶ 5, 7, Mangan Affirm., Ex. B).

On November 11, 2014, service was effected on C3 Global by a process server leaving the summons and complaint at the address listed as C3 Global's registered office in the Companies Registry

of Hong Kong (Mangan Affirm., Ex F). C3 Global did not appear or interpose an answer.

On December 2, 2014, six months after the individual defendants received the summons and complaint by mail, plaintiff filed a motion for a default judgment against defendants Bibeau and Rodrigue. The Court granted this motion on January 15, 2015 (Mangan Affirm., Ex. J).

On January 9, 2015, plaintiff filed a motion for a default judgment against C3 Global (Dkt. No. 29). In response, C3 Global's attorney, Michael Mangan, filed an Affirmation in Opposition on February 4, 2015, in which he argued that plaintiff had not effected proper service on defendant C3 Global, and therefore could not succeed in obtaining a default judgment on its claims against C3 Global (Dkt. No. 40 at ¶¶ 19, 22, 25).

On April 22, 2015, this Court held that C3 Global was properly served, and granted plaintiff's motion for default judgment against C3 Global (4/22/15 Decision and Order, Mangan Aff., Ex. I at pp. 6-7).

Discussion

CPLR 5015(a)(4)

CPLR 5015(a)(4) permits a court to relieve a party from its prior judgment upon the ground of lack of jurisdiction to render the judgment or order (CPLR 5015[a][4]).

(i) C3 Global

Defendants argue that this Court did not acquire personal jurisdiction over C3 Global because it was not properly served. To begin, this Court has previously ruled that C3 Global was properly served, and the doctrine of the law of the case provides that "once an issue is judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (Spector v Cushman & Wakefield, Inc., 34 Misc 3d 1204(A) [Sup Ct 2011], affd, 100 AD3d 575 [1st Dept 2012] [internal quotations omitted]). While this doctrine "may be ignored in extraordinary circumstances" (Spector v Cushman & Wakefield, Inc., 34 Misc 3d 1204(A) [Sup Ct 2011], affd, 100 AD3d 575 [1st Dept 2012]), no such extraordinary circumstances exist here.

Nonetheless, C3 Global argues that it did not receive service because it moved offices in February 2013, and did not have any employees or agents at the location at which the summons and complaint were delivered. C3 Global failed to raise this argument in its opposition to plaintiff's initial default judgment motion, and, as such, it may not do so now (Lipp v Port Auth. of New York and New Jersey, 57 AD3d 953, 954-55 [2d Dept 2008]). In any event, this argument is unavailing in light of the fact that the address is listed as its corporate address in

its Incorporation Form and the Companies Registry of Hong Kong (C3 Global Incorporation Form, Rosenfeld Aff., Ex. G) and that C3 Global admitted that it uses this address to receive mail (Dkt. No. 84).

Accordingly, defendants' motion to vacate the default judgment and dismiss this action against C3 Global is denied.

(ii) Bibeau

Bibeau argues that the Court does not have jurisdiction over him because he was improperly served. The affidavit of service filed by plaintiff is prima facie evidence that he was properly served pursuant to CPLR 308(4) (See NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz, 7 AD3d 459, 460 [2004]). Bibeau's self-serving, conclusory claim to the contrary -- that he was at home on the dates of attempted service listed in the affidavit of service, but did not hear a doorbell or knock at the door on those four separate occasions and never saw a summons and complaint affixed to his door -- is insufficient to establish that he was not properly served (Caba v Rai, 63 AD3d 578, 582-83 [1st Dept 2009]). Indeed, Bibeau failed to proffer any evidentiary proof as to how he was purportedly unable to hear the door bell or the knock on the door on four separate occasions.

Accordingly, defendants' motion to vacate the default judgment and dismiss this action against defendant Bibeau is denied.

(iii) Rodrigue

Rodrigue, a Canadian citizen and resident, argues that New York does not have jurisdiction over him because: (1) CPLR 302(a)(1) does not grant it jurisdiction; or, alternatively, (2) he was not properly served.

CPLR 302(a)(1) permits a court to exercise personal jurisdiction "over any non-domiciliary ... who in person or through an agent ... transacts business within the state" (CPLR 302[a][1]). There is no dispute that Rodrigue did not personally transact business in New York. Furthermore, plaintiff has failed to allege facts suggesting that C3 Global or Bibeau was somehow acting as Rodrigue's agent. While plaintiff alleges that Rodrigue dominated and controlled C3 Global, this claim is entirely conclusory. The only specific allegation in the complaint regarding Rodrigue - that he failed to send plaintiff the $500,000 payment owed under the Letter Agreement -- is insufficient because participation in a corporation's breach of contract does not give rise to individual director liability (Fletcher v Dakota, Inc., 99 AD3d 43, 47 [1st Dept 2012]).

Accordingly, defendants' motion to vacate the default judgment against Rodrigue is granted, and the default judgment is hereby vacated. Upon vacatur, that branch of the motion to dismiss the action against Rodrigue is granted, and the action is hereby dismissed as against him.

The remaining defendants, Bibeau and C3 Global, make the following arguments to support their motion for vacatur of the default judgment.

CPLR 5015(a)(1)

A party seeking to vacate a default judgment under CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a meritorious defense (60 E. 9th St. Owners Corp. v Zihenni, 111 AD3d 511, 512 [1st Dept 2013]).

Here, defendants' conclusory assertion that they were not served is not a reasonable excuse (Carrenard v Mass, 11 AD3d 501 [2d Dept 2004]). Indeed, the individual defendants' excuse that they believed that service was not properly effected, and, as such, did not need to answer or otherwise appear is insufficient for CPLR 5015(a)(1) purposes (Yao Ping Tang v Grand Estate, LLC, 77 AD3d 822, 823 [2d Dept 2010] [defendants erroneous assumption that they did not need to appear or answer the complaint did not constitute a valid excuse for failure to do so]).

Accordingly, the remaining defendants' motion pursuant to CPLR 5015 for an order vacating the default judgment against them is denied.

CPLR 317

CPLR 317 allows a party to vacate a default judgment when that party: (1) was not served with process by personal delivery pursuant to CPLR 308(1); and (2) is able to demonstrate a potentially meritorious defense (David Wassertheil v Elburg, LLC, Defendant, and Encore Development, Inc., 94 AD3d 753 [2d Dept 2012]). A party must also demonstrate that it "did not receive actual notice of the summons and complaint in time to defend the action" (Id. [emphasis added]).

The remaining defendants have failed to demonstrate that they did not receive actual notice of the summons and complaint in time to defend. The mere denial of receipt of the summons and complaint is insufficient "to establish lack of actual notice for the purpose of CPLR 317" (Id. at 754). Bibeau concedes that he received the summons and complaint by mail in July 2014, six months before the plaintiff sought the default judgment against them.

Accordingly, the remaining defendants' motion, pursuant to CPLR 317, for an order vacating the default judgment against them is denied.

Accordingly, it is

ORDERED that defendants' motion to vacate the default judgment is granted as to Rodrigue, and, upon vacatur, this action is dismissed as to him; and it is further

ORDERED that defendants' motion to vacate the default judgment is denied as to C3 Global and Bibeau.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/8/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.