SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RIVIERA PRODUCE CORP.,

Plaintiffs,

Index No.
159299/15

DECISION and ORDER

- against -

Mot. Seq. #003

MICHAEL PARK, and
830 THIRD AVE GOURMET FOOD INC.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

By complaint filed September 10, 2015, plaintiff, Riviera Produce Corp., commenced this lawsuit seeking to recover monies for produce sold and delivered to defendant 830 Third Ave. Gourmet Inc. ("830 Third Ave.") in the sum of $88,157.08 from April 2015 through June 2015. The Complaint alleges that defendant Michael Park ("Park") "executed a written guarantee of all invoices for produce sold, delivered, and accepted by Defendant." Plaintiff claims that despite demand for payment, Defendants have failed to pay the outstanding amount due on their account.

Plaintiff served 830 Third Ave. on September 15, 2015 through BCL 306. Plaintiff served on Park on October 19, 2015 pursuant to CPLR 308(2).

By Notice of Motion filed on December 3, 2015, Plaintiff moved for default judgment against Defendants based on Defendants' failure to answer or otherwise appear. By Order dated March 7, 2016, Plaintiff's motion for default judgment was granted as against Park, and the Clerk was directed to enter judgment in favor of Plaintiff and against Park in the amount of $76,957.08.

By Notice of Motion filed on November 1, 2016, Park moves to vacate the default judgment entered against him pursuant to CPLR 5015(4) (lack of jurisdiction to enter default) and CPLR 5015(1) (excusable default). Defendant opposes.

CPLR §5015(a) provides that a court may vacate prior order or judgment on the grounds of:

> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
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> 4. lack of jurisdiction to render the judgment or order ...

Pursuant to CPLR § 5015(a)(1), the court which rendered a decision may, on motion, grant relief from the judgment or order upon the ground of "excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." (CPLR § 5015[a][1]). In order to prevail on a motion to vacate a default judgment upon the ground of excusable default under § 5015, the moving party must show that its default was "excusable" and demonstrate a "meritorious defense" to the underlying action. (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 1992]; *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dep't 2007]).

CPLR § 5015(a)(4) further provides, "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of . . . lack of jurisdiction to render the judgment or order". (CPLR § 5015[a][4]). A motion predicated upon lack of jurisdiction need not assert a meritorious defense; a default judgment entered in the absence of personal jurisdiction over the defendant is a nullity. (*Boorman v. Deutsch*, 152 A.D.2d 48, 51 [1st Dep't 1989]). Where the plaintiff fails to properly serve the summons and complaint, the court fails to acquire personal jurisdiction over the defendant, and any subsequent proceedings are null and void. (*Prudence v. Wright*, 94 A.D.3d 1073,

1074 [2d Dep't 2012]; *Adames v. New York City Transit Authority*, 510 N.Y.S.2d 610, 611 [1st Dep't 1987]).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]). A defendant's "mere denial" of service is insufficient, without more, to rebut the presumption of proper service. By contrast, a defendant's "sworn non-conclusory denial" of service is sufficient to dispute the veracity or content of a process server's affidavit. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]; *Hinds v. 2461 Realty Corp.*, 169 AD2d 629 [1st Dep't 1991]). Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D. 3d 459 [1st Dept. 2004]).

Under CPLR § 308(2), if a summons is served "within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served," it must also be mailed "to the person to be served at his or her last known residence" or "by first class mail to the person to be served at his or her actual place of business ..."

With respect to the portion of Park's motion which seeks to vacate the Default Judgment based on a lack of personal jurisdiction pursuant to CPLR 5015(a)(4), Park submits a sworn affidavit in which he attests:

> My residence address on October 19, 2015, was 455 West 37th Street, #1113, New York NY 10018. This was not the address where service of process on me was claimed, as shown in the Affidavit of Service filed by plaintiff in this action. The process server was effected by delivering a copy to a person of suitable age and discretion (my mother) at her residence located at 30 Regency Place, Weehawken NJ 07086 on October 19, 2015. The process server further states on the following day, a copy was mailed to the same Weehawken address, that "being the usual place of abode, last known residence of the Defendant" ("Defendant" is me, Michael Park). I did not live with my mother in Weehawken on October 19, 2015. I attach hereto as Exhibit 1 a letter from my landlord confirming that I have lived in the apartment on West 37th Street in Manhattan since 2012.

Here, Defendant's statement that he did not reside at the location where service was made is sufficient to dispute the veracity or content of Plaintiff's affidavit of service and to warrant a traverse hearing as to whether proper service was made upon Defendant.

Wherefore, it is hereby

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: February 23, 2017

FEB 23 2017

EILEEN A. RAKOWER, J.S.C.