

Western Heritage Ins. Co. v Aura LLC

2017 NY Slip Op 31317(U)

June 14, 2017

Supreme Court, New York County

Docket Number: 151480/2016

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

WESTERN HERITAGE INSURANCE COMPANY,

Plaintiff,

-against-

AURA LLC D/B/A MICKEY SPILLANE'S HELL'S
KITCHEN NYC,

Defendant.

Index No.: 151480/2016
DECISION/ORDER
Motion Sequence No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for default judgment under CPLR 3215.

Papers	Numbered
Plaintiff's Notice of Motion.....	1
Defendant's Affirmation in Opposition.....	2
Plaintiff's Affirmation in Reply.....	3

Maidenbaum & Associates, P.L.L.C., Merrick, New York (Jeffrey A. Maidenbaum of counsel), for plaintiff.

Maureen Neff, Esq., New York, for defendant.

Gerald Lebovits, J.

Plaintiff, Western Heritage Insurance Company, brought this account-stated action against defendant, Aura LLC d/b/a Mickey Spillane's Hell's Kitchen NYC, for allegedly not paying outstanding insurance premiums, for an insurance policy that ended on November 14, 2014. Plaintiff now moves for a default judgment against defendant. In support of its motion, plaintiff attaches proof that it served the summons and complaint on defendant on March 4, 2016, through the Secretary of State. (Notice of Motion, Exhibit C.) On March 14, 2016, plaintiff also sent an additional mailing of the summons and complaint to defendant's place of business, at 350 West 49th Street in New York County. (Notice of Motion, Affirmation of Mailing, Exhibit D.) After waiting over seven months for defendant to answer, plaintiff moved for a default judgment. Plaintiff argues that it is entitled to a default judgment because plaintiff properly served defendant and defendant never answered.

In opposition, defendant argues that the complaint was served on defendant's bartender at defendant's place of business. Defendant contends that the bartender placed the complaint under the cash register and did not inform defendant about the complaint. (Affirmation in Opposition, at 2.) Defendant also argues that the bartender was not authorized to accept service for defendant. (Affirmation in Opposition, Affidavit in Opposition, at 1.) Further, defendant contends that the amount of money demanded in the complaint exceeds the services provided to

defendant and that defendant never agreed to pay the excess insurance premiums: “Defendant has never brought any claims for the [p]laintiff to pay and the premiums were not agreed upon and the amount of money demanded is in excess to the services provided to the [d]efendant and as such, the [d]efendant disputes the amount that the [p]laintiff claims that the [d]efendant owes.” (Affirmation in Opposition, Affidavit of Mickey Spillane, at ¶ 8.)

In reply, plaintiff argues that service was proper. (Plaintiff’s Reply, at 2.) Plaintiff served the summons and complaint through the Secretary of State. (Plaintiff Notice of Motion, Exhibit C.)

CPLR 3215 provides the following: “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.”

Service on the Secretary of State is prima facie evidence of service. (*Konig v Hermitage Ins. Co.*, 93 AD3d 643, 646 [2d Dept 2012] [noting that when a plaintiff delivers a copy of the summons and verified complaint to the Secretary of State, proper service is effected, and a process server’s affidavit of service is considered prima facie evidence of service].)

Mailing additional copies of the summons and complaint to the correct business address creates a presumption of proper mailing and receipt. (*Thas v Dayrich Trading Inc.*, 78 AD3d 1163, 1164 [2d Dept 2010] [“[T]he affidavit of service attesting that, pursuant to CPLR 3215 (g) (4), an assistant employed by the plaintiffs’ attorney mailed additional copies of the summons and complaint to [defendant] at its correct business address, created a presumption of proper mailing and receipt, and [defendant] did not adequately rebut that presumption.”].)

A defendant’s conclusory denials of receiving the summons and complaint without explaining why service is improper is insufficient. (*Id.* [“In opposition to the plaintiffs’ showing in this regard, [defendant] did not contend that the address that it had on file with the Secretary of State was incorrect, and the mere denial of receipt of the summons and complaint was insufficient to rebut the presumption of proper service created by service upon the Secretary of State.”].) Furthermore, whether defendant received the pleadings through its bartender is immaterial: the court obtains jurisdiction over defendant through serving the defendant through the Secretary of State. (*E. New York Sav. Bank v Sun Beam Enter. Inc.*, 234 AD2d 131, 131 [1st Dept 1996].)

As to the merits, if an insured has a benefit of an insurance policy, the insured may not repudiate the policy. (*See Marine Off. of Am. Corp. v Regal Accessories, Inc.*, 162 AD2d 232, 233 [1st Dept 1990].) An insurance carrier can establish a prima facie case for premiums through setting forth affidavits and documents establishing the issuance of the policy and earned premiums thereunder. (*Fed. Ins. Co. v 603 Warehouse Assoc., Inc.*, 254 AD2d 232, 232 [1st Dept 1998].)

For defendant to avoid a default judgment against it, defendant “must show a reasonable excuse for the default and a potentially meritorious defense.” (*Josovich v Ceylan*, 133 AD3d 570, 571 [2d Dept 2015]; *accord U.S. Bank N.A. v Alba*, 130 AD3d 715, 716 [2d Dept 2015]; *Fried v*

Jacob Holding, Inc., 110 AD3d 56, 60 [2d Dept 2013]; *King v King*, 99 AD3d 672, 672 [2d Dept 2012].)

Plaintiff's service of the complaint on defendant through the Secretary of State is prima facie evidence of proper service. (See *Konig*, 93 AD3d at 646.) Plaintiff proves that it served the summons and complaint on defendant through the Secretary of State. (Notice of Motion, Exhibit C.) Defendant does not contend that the address it on file with the Secretary of State was incorrect. Its simple denial of receiving the summons and complaint is insufficient to rebut the presumption of proper service created by plaintiff's service through the Secretary of State.

Plaintiff also shows that it mailed defendant additional copies of summons and complaint at defendant's place of business. (See *Thas*, 78 AD3d at 1164.) Plaintiff attaches proof of the additional mailing of summons and complaint. (Notice of Motion, Affirmation of Mailing, Exhibit D.)

Also, on January 22, 2015, plaintiff sent an invoice to defendant for the premiums due and defendant retained the invoice without objecting to it. (Notice of Motion, L. Jean Ross Affidavit, at ¶ 4.) Plaintiff attaches proof of the invoice it sent to defendant. (Notice of Motion, Exhibit B.)

Defendant's argument that plaintiff served the summons and complaint on defendant's bartender — who did not deliver it to defendant — is insufficient to rebut the presumption of plaintiff's proper service. Defendant may not claim it did not have notice of the pending cause of action because service occurred through the Secretary of State's office and the court as a result, has jurisdiction over the defendant.

Also, defendant does not demonstrate that it has an excusable default and a meritorious defense. Defendant's argument that they did not have notice of the action is insufficient to rebut the plaintiff's service of summons and complaint through the Secretary of State. Defendant acknowledges that their bartender received service and failed to give defendant the summons and complaint (Affirmation in Opposition, Affidavit in Opposition, at 1.) Defendant had the benefit of the insurance policy, and plaintiff makes a prima facie case for premiums due. (Notice of Default Judgment, Exhibit B.) Defendant's conclusory assertions — that the money plaintiff seeks is in excess to the services provided to defendant and that defendant disputes the amount owed — are insufficient to show that it has a meritorious defense. (See Affirmation in Opposition, Affidavit of Mickey Spillane, at ¶ 8.)

Accordingly, it is

ORDERED that plaintiff's motion for default judgment is granted and plaintiff is entitled to a default judgment against defendant for \$33,135.04 with interest from January 22, 2015, plus costs and disbursements upon submission of a bill of costs; and it is further

NYSCEF DOC. NO. 21

RECEIVED NYSCEF: 06/20/2017

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry on defendant and upon the County Clerk, which is directed to enter judgment accordingly.

Dated: June 14, 2017



J.S.C.

HON. GERALD LEBOVITS
J.S.C.