Thomas v Karen's Body Beautiful LLC
2017 NY Slip Op 32664(U)
December 18, 2017
Supreme Court, New York County
Docket Number: 650779/2016
Judge: Martin Schoenfeld
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28
---x
JAMES W. THOMAS II,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 650779/2016

KAREN'S BODY BEAUTIFUL LLC, RAFIQ KALAM ID-DIN, DAMANI SAUNDERSON and KAREN TAPPIN,

Defendants.
---x

HON. MARTIN SCHOENFELD, J.:

Defendants, Karen's Body Beautiful, LLC (KBB), Rafiq Kalam Id-Din, Damani Saunderson, and Karen Tappin, move to vacate the Default Judgment pursuant to CPLR §§ 5015(a)(4), 5015(a)(1) and 317. For the reasons set forth below, the motion is denied.

BACKGROUND

In September 2015, Defendants hired Plaintiff, James W. Thomas II, to work as a full-time accountant for KBB, a Limited Liability Company, owned, operated, and controlled by Id-Din, Saunderson, and Tappin. [Plaintiff's Affirmation in Opposition at 10]. Plaintiff's employment was terminated in January 2016. [Defendants' Order to Show Cause (Defendants' OSC), Exhibit A at 1]. Defendants failed to compensate Plaintiff for his services rendered to KBB. [Plaintiff's Affirmation in Opposition at 11].

On February 15, 2016, Plaintiff commenced the above-captioned action against Defendants, seeking compensation for his services rendered to KBB, reimbursement for work-related expenses, liquidated damages, and legal fees. [*Id.* at 6, 11]. Thomas asserted claims for, inter alia, breach of contract, violations of the New York Labor Law, Articles 6 and 19 (NYLL), and joint and several liabilities pursuant to NYLL § 198 (1-a) and New York Limited Liability Company Law § 609 (c) and (d) (NYLLCL). [*Id.* at 11, 14]. Plaintiff was granted the Default Judgment on February 21, 2017 and the case was sent for an inquest. [*Id.* at 12].

On May 2, 2017, this Court held an inquest to determine damages against Defendants. The primary issue addressed at the inquest was the amount in compensation and liquidated damages owed to Plaintiff. So ordered Transcript of Inquest, *James W. Thomas II v. Karen's Body Beautiful LLC, Rafiq Kalam Id-Din, Damani Saunderson and Karen Tappin*, Index No. 650779/2016 (Sup. Ct. NY County May 17, 2017).

This Court found that Plaintiff worked full-time as an accountant for KBB, starting September 1, 2015 through January 15, 2016, when Defendants terminated his employment. *Id.* at 2. Id-Din, Saunderson, and Tappin owned and controlled KBB. *Id.* This Court also found that Plaintiff's hourly rate was $90 in addition to time and a half for overtime, he worked 846 hours, and he was entitled to $82,980 in unpaid wages, including overtime. *Id.* at 3. Thomas was entitled to reimbursement of work-related expenses in the amount of $1,431.40 and his $300 loan to KBB. *Id.* He was entitled to liquidated damages in the form of a penalty in the amount of 100% of unpaid wages, i.e. an additional $82,980, plus reasonable legal fees. *Id.;* NY Lab. Law §198 (1-a).

Accordingly, this Court awarded Thomas damages in the total sum of $167,691 with interest commencing as of January 15, 2016, the date of termination, in addition to $11,655 in legal fees with interest to run from date of entry of judgment. *Id.* Finally, this Court found Defendants joint and severally liable for all damages. NY Ltd. Co. Law § 609 (c) & (d). Default Judgement was entered on May 31, 2017. [Plaintiff's Affirmation in Opposition at 12].

On August 4, 2017, subsequent to having their personal and business bank accounts restrained, Defendants submitted an Order to Show Cause seeking to vacate the Default Judgment. [Defendants' OSC]. They argue, inter alia, that Plaintiff failed to effect proper service upon them.[1] [*Id.*]. They submit affidavits in support by the following persons: (1) Id-Din, co-owner and General Counsel of KBB; (2) Saunderson, co-founder/owner and Chief Operating Officer of KBB (COO); (3) Nilda Arias, an Executive Officer at Ember Charter School (formerly Teaching Firms of America Professional Preparatory Charter School, Id-Din's actual place of business (Charter School)); and (4) Carol Simpson, a former employee of KBB (collectively, Affidavits in Support). [*Id.*]. Each affidavit includes the following statements: (1) "I have never been given or served any legal documentation related to this matter"; and (2) "I have never met nor interacted in any way with Lingo Sanchez". [*Id.*]. Tappin, co-founder/owner and Chief Executive Officer of KBB (CEO), did not submit a personal affidavit denying service. [*Id.*].

In response, Plaintiff argues that all Defendants were properly served. [Plaintiff's Affirmation in Opposition at 2]. Thomas claims that KBB was properly served pursuant to CPLR 311(a), by personally delivering and leaving a copy of the Summons with Notice with Saunderson, COO and "member" of KBB, at KBB's office located in Brooklyn, NY. [*Id.* at 6]. This claim is substantiated with an Affidavit of Service upon KBB, duly sworn to and signed by process server, Sanchez, before a notary public. [*Id.*, Exhibit B]. The Affidavit clearly identifies the papers served upon KBB and notes the time, date, and address of service. [*Id.*]. Sanchez names Saunderson as the person who accepted service and describes his sex, skin color,

[1] Defendants assert disjointed defenses for breach of contract and liability; their supporting documents directly contradict their claims. Nevertheless, this decision does not address said defenses, as proper service is the determinative issue.

approximate age, approximate height, approximate weight, hair color, eye color, and his moustache. [*Id.*]. Sanchez also notes that Saunderson stated he was authorized to accept service. [*Id.* at 7]. Defendants admit that KBB's office address is the one specified in the Affidavits of Service. [*Id.* at 6].

Plaintiff argues that Id-Din, Tappin, and Saunderson were properly served pursuant to CPLR § 308(2). [*Id.* at 7-9]. Id-Din was served by personally delivering and leaving a copy of the Summons with Notice with Arias, a person of suitable age and discretion at Charter School, located in Brooklyn, NY, his actual place of business, and by mailing copies to Charter School and KBB's office. [*Id.* at 7]. Defendants admit that Charter School's address is the one specified in the respective Affidavit of Service. [*Id.*]. Tappin and Saunderson were served by personally delivering and leaving copies of the Summons with Notice with Simpson, a person of suitable age and discretion at KBB's office in Brooklyn, NY, their actual place of business, and by mailing copies to KBB's office. [*Id.* at 3].

Plaintiff submits Affidavits of Service, duly sworn and signed by Sanchez, before a notary public. [*Id.* at 7-9]. Each Affidavit clearly identifies the papers served and notes the time, date, and address of service. [*Id.*, Exhibits D, H, I]. Said Affidavits identify Arias and Simpson as the persons who accepted service and describes their sex, skin color, approximate age, approximate height, approximate weight, hair color and length, and eye color. [*Id.*]. They also show that, within twenty days of personal delivery, copies of the Summons were properly mailed to Defendants' actual place of business; i.e., said mailings were enclosed in an envelope bearing the legend "personal and confidential" and did not indicate that they were from an attorney or concerning an action. CPLR § 308(2); [*Id.*].

DISCUSSION

Vacatur of the Default Judgment Pursuant to CPLR § 5015(a)(4)

CPLR § 5015(a)(4) is available for any defendant against whom a default judgment was entered, provided the defendant can demonstrate that the court lacked jurisdiction over him to render the judgment or order. *Caba v. Rai*, 63 A.D.3d 578, 580 (1st Dept. 2009).

Where a defendant seeks vacatur of a default judgment under both CPLR §§ 5015(a)(1) and 5015(a)(4), the court should first rule on the 5015(a)(4) point and determine whether it has personal jurisdiction over the defendant. The court needs to rule on the CPLR § 5015(a)(1) points, only if personal jurisdiction is sustained. *Wells Fargo Bank, N.A. v. Jones*, 139 A.D.3d 520, 522 (1st Dept. 2016).

The 1st Department has held that while a properly-executed affidavit of a process server constitutes prima facie evidence of proper service, e.g. proper delivery and mailing, *e.g., Am. Transit Ins. Co. v. Lucas*, 111 A.D.3d 423, 424 (1st Dept. 2013), "a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing". *NYCTL 1998-1 Tr. v. Rabinowitz*, 7 A.D.3d 459, 460 (1st Dept. 2004). Thus, a traverse hearing is only necessary where a defendant has submitted a personal affidavit, in which he denied service and demonstrated factual disputes as to the validity of service. *Walkes v. Benoit*, 257 A.D.2d 508 (1st Dept. 1999); *Ananda Capital Partners, Inc. v. Stav Elec. Sys. (1994) Ltd.*, 301 A.D.2d 430 (1st Dept. 2003). To demonstrate such factual disputes, a defendant must challenge specific points within the process server's affidavit of service, such as contesting the physical description of the person served (*Haberman v. Simon*, 303 A.D.2d 181 (1st Dept. 2003)), asserting that the person who accepted service was not at the place at the time and date the process server sworn to have served him (*Ananda Capital Partners*, 301 A.D.2d at 430), or contesting the specified mailing address (*Wells Fargo*, 139 A.D.3d at 523). *See also,* *Haberman*, 303 A.D.2d 181 (traverse hearing ordered where defendant contested his physical description noted in the process server's affidavit); and *In re de Sanchez*, 57 A.D.3d 452, 454 (1st Dept. 2008) (no traverse hearing ordered where defendant's affidavits only contained conclusory denials of service).

Here, Plaintiff submits Affidavits of Service, which were duly sworn to by Sanchez in front of a notary public. CPLR § 306. [Plaintiff's Affirmation in Opposition, Exhibits B, D, H, I]. They specify the papers served and the time, date and addresses of service. [*Id.*]. Additionally, they identify the person served, the qualified person who accepted service, along with a description of the persons to whom the papers were delivered. [*Id.*]; CPLR §§ 311(a) & 308. Said Affidavits also include the facts concerning mailing requirements pursuant to CPLR § 308(2). [*Id.*, Exhibits D, H, I]. Accordingly, this Court finds that Plaintiff submitted properly-executed Affidavits of Service, which creates a legal presumption of proper service. CPLR §§ 306, 308; *NYCTL 1998-1 Tr.*, 7 A.D.3d at 460.

Defendants fail to rebut the legal presumption of proper service. Notably, CEO Tappin did not submit a personal affidavit denying service. Defendants submit nearly identical Affidavits in Support, which merely deny service and state that they "have never been given or served any legal documentation related to this matter" nor have they met Sanchez. Their "mere denial" of service is insufficient to create a question of fact as to proper service. *Ananda Capital Partners*, 301 A.D.2d at 430. Accordingly, this Court finds that there was proper service upon Defendants and the court had jurisdiction over Defendants to render the Default Judgment. This Court denies their motion to vacate the Default Judgment pursuant to CPLR § 5015(a)(4).

<u>Vacatur of the Default Judgment Pursuant to CPLR § 5015(a)(1)</u>

A defendant seeking to vacate a default judgment pursuant to CPLR § 5015(a)(1) must demonstrate a reasonable excuse for its default and proffer a potential meritorious defense to the underlying action. *Caba*, 63 A.D.3d at 580. A defendant will not be entitled to relief if he fails to demonstrate a reasonable excuse, regardless of whether the defendant has proffered a potentially meritorious defense. *M.R. v. 2526 Valentine LLC*, 58 A.D.3d 530, 532 (1st Dept. 2009). Where a defendant's only proffered reasonable excuse for its default is improper service and the court finds there was proper service, then the court shall deny such motion. *Citibank, N.A. v. K.L.P. Sportswear, Inc.*, 144 A.D.3d 475, 476-77 (1st Dept. 2016).

Here, Defendants only proffer improper service as its reasonable excuse for their default. In accordance with the foregoing, this Court finds that there was proper service and Defendants fail to establish a reasonable excuse for their default. Accordingly, this Court denies their motion to vacate the Default Judgment pursuant to CPLR § 5015(a)(1). *Id.*

<u>Vacatur of the Default Judgment Pursuant to CPLR § 317</u>

A defendant may move to vacate a default judgment under either CPLR §§ 5015(a) or 317. "A court has discretion to treat a motion made under CPLR 5015(a) as having been made as well pursuant to CPLR 317". *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 143 (NY 1986). In contrast with CPLR §§ 5015(a)(1), 317 does not require a defendant to show a "reasonable excuse" for its default. *Id.* at 141.

A motion pursuant to CPLR § 317 presumes that the court had personal jurisdiction over the defendant, which authorized it to enter the default judgment; however, since it is the New York Courts' policy to decide cases on their merits, the defendant may defend its case on the merits. *Pena by Pena v. Mittleman*, 179 A.D.2d 607, 608 (1st Dept. 1992).

CPLR 317 requires a defendant to, inter alia, establish that the defendant was served by a method other than personal delivery [i.e., CPLR § 308(1): personally delivering the Summons and placing it in the hands of a named defendant within NY] and show he did not receive actual notice in time to defend the action.[2] CPLR § 317; *Caba*, 63 A.D.3d at 580. Where personal service is executed pursuant to CPLR § 308(2), merely denying receipt of the mailing is insufficient to rebut the legal presumption, created by a properly-executed affidavit of service, that the mailing was received. *Reliable Abstract Co., LLC v. 45 John Lofts, LLC*, 152 A.D.3d 429 (1st Dept. 2017).

Here, the Affidavit of Service upon KBB demonstrates that Plaintiff properly served KBB, via personal delivery of the Summons to Saunderson, KBB "member" and a named defendant, who accepted in-hand delivery in Brooklyn, NY. CPLR § 311(a). Said Affidavit creates a legal presumption of proper service upon both KBB *and* Saunderson. CPLR § 308(1); *NYCTL 1998-1 Tr.* at 460. Therefore, this Court finds that Saunderson fails to show that he was served in a manner other than personal delivery.

The Affidavits of Service upon Tappin and Id-Din show that they were properly served pursuant to CPLR § 308(2). Thus, they demonstrate service in a manner other than personal delivery, however, they fail to show that they did not have actual notice in time to defend this action. *Eugene Di Lorenzo, Inc.* at 142. Defendants do not specifically deny receipt of the mailings and they admit that the mailing addresses specified in the respective Affidavits of Service are correct. *Id.* As previously mentioned, Tappin did not submit an affidavit and Id-Din

[2] CPLR § 317 requires a defendant to (1) file a motion to vacate the default judgment within one year of learning of it, but not exceeding five years from its date of entry; however, here the motion appears timely and Plaintiff doesn't argue the contrary; and (2) demonstrate a potentially meritorious defense to the underlying action; here, Defendants fail to show that they lacked actual knowledge, so this Court does not discuss; nevertheless, this Court finds that Defendants' vague and unsubstantiated assertions are insufficient to demonstrate a potentially meritorious defense.

submits an Affidavit merely denying receipt of "legal documentation". His mere denial is insufficient to rebut the legal presumption, created by Sanchez's Affidavit of Service, that the mailing was received. *Reliable Abstract Co., LLC* at 429.

This Court finds that Defendants fail to meet the requisites pursuant to CPLR § 317; Saunderson fails to show that he was served in a manner other than personal delivery, while Tappin and Id-Din fail to show that they did not have actual knowledge in time to defend the action, i.e., they did not receive the mailings. Therefore, this Court denies their motion to vacate the Default Judgment pursuant to CPLR § 317.

In accordance with the foregoing, it is

ORDERED that Defendants' motion to vacate the Default Judgment is denied.

This constitutes the decision and order of this Court.

Dated: New York, New York

December 18 ~~September~~ 2017

Martin Schoenfeld, J.S.C.