Cortese v Panzanella
2010 NY Slip Op 34022(U)
October 18, 2010
Supreme Court, Cortland County
Docket Number: 09-083
Judge: Phillip R. Rumsey

At a Special Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York, on the 16th day of September, 2010.

PRESENT: HONORABLE PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

GRACE CORTESE,

Plaintiff,

vs.

VITTORIO PANZANELLA, SANTINA PANZANELLA, and PAUL V. PANZANELLA,

Defendants.

DECISION AND ORDER
Index No. 09-083
RJI No. 2010-0052-M

APPEARANCES:

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PHILLIP R. RUMSEY, J. S. C.

On February 9, 2009, plaintiff commenced this action against Vittorio Panzanella and Santina Panzanella and their son, Paul V. Panzanella, to foreclose a mortgage on property located at 16 – 18 Main Street, Cortland (the property). Plaintiff later filed proof showing that defendant Paul V. Panzanella was personally served with the summons, complaint and notice of pendency on March 6, 2009, at his parents' residence in Barefoot Bay, Florida.[1] He did not answer the complaint or otherwise appear in this action. By decision, order and judgment dated April 16, 2010 (the prior order), the court dismissed the complaint against defendants Vittorio Panzanella and Santina Panzanella, with prejudice, determined that plaintiff would be entitled – upon a proper subsequent application – to a judgment foreclosing the equity of redemption held by Paul V. Panzanella by reason of his default in appearing or answering the complaint, and referred the action to a referee to compute the balance due on the mortgage.

A judgment of foreclosure was granted on June 7, 2010, and a foreclosure sale was scheduled for August 30, 2010. By order to show cause signed on August 19, 2010, Paul V. Panzanella (herein defendant) moves for an order vacating the judgment of foreclosure and sale and permitting him to answer and defend the action.[2] The order to show cause contained a

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[1] Although, the affidavit of service filed by plaintiff did not contain a description of the person to whom the summons was delivered, as required by CPLR 306(b), it was sufficient evidence of service to establish entitlement to a default judgment (see Van Wert v Black & Decker, 246 AD2d 773 [1998]). Moreover, no additional notice was required to be provided to Paul V. Panzanella prior to the court granting a default judgment based on his nonappearance in this action to foreclose a mortgage on commercial property (see CPLR 3215[g][3][iii]).

[2] The motion made by defendants Vittorio Panzanella and Santina Panzanella for leave to renew the prior order and permitting them to file and serve an amended answer was withdrawn by counsel at oral argument on September 16, 2010.

temporary restraining order barring plaintiff and the referee from selling the property until further order of this court.

The affidavit of service filed by plaintiff is presumptive proof that the summons and complaint were served by personal delivery to defendant, pursuant to CPLR 308(1), in Barefoot Bay, Florida on March 6, 2009. Defendant denies that the summons and complaint were personally served upon him on that date, explaining that he lives in New York City, where he is employed, and that he was in Amsterdam, the Netherlands, on a business trip from March 2, 2009 through March 8, 2009 (Affidavit of Paul V. Panzanella, sworn to August 18, 2010, ¶¶ 1, 5 – 13; Affidavit of Paul V. Panzanella, sworn to September 9, 2010, ¶¶ 4 – 13). He submits a copy of an American Express bill which shows charges that tend to corroborate his claim that he was not present at his parents' residence when service was allegedly effected (id., ¶¶ 8 – 13, Exhibit B). Defendant's denial of service raises the threshold issue of whether the court had jurisdiction to render the default judgment (see CPLR 5015[a][4]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:9).

In light of the competing proof, a traverse hearing is necessary to determine whether service was properly effected on defendant (Taylor v Jones, 172 AD2d 745 [1991]; County of Rockland v Coakley, 235 AD2d 782 [1997]). If it is determined that jurisdiction over the person of the defendant was not obtained, defendant will be entitled to an unconditional vacatur of the default judgment against him (Taylor v Jones, 172 AD2d at 746; Wilber Natl. Bank v F & A, Inc., 301 AD2d 706 [2003]; Delgado v Velecela, 56 AD3d 515 [2008]). If, on the other hand, it is determined that personal jurisdiction was obtained, the court will decide whether defendant has established a reasonable excuse for default and the existence of a meritorious defense sufficient

to entitle him to vacatur pursuant to CPLR 5015(a)(1).

Accordingly, a traverse hearing will be held on **December 20, 2010, at 9:00 a.m., at the Cortland County Courthouse**. Decision on defendant's motion to vacate will be held in abeyance pending completion of the traverse hearing. The temporary restraining order contained in the order to show cause dated August 19, 2010 shall remain in effect and the receiver shall continue to perform her duties in accordance with her appointment until further order of this court.

This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry.

Dated: October 18, 2010
Cortland, New York

HON. PHILLIP R. RUMSEY
Supreme Court Justice

ENTER