

**Hicksville Mach. Works Corp. v Two Bros. Scrap
Metal, Inc.**

2011 NY Slip Op 32634(U)

October 3, 2011

Sup Ct, Nassau County

Docket Number: 13611/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

HICKSVILLE MACHINE WORKS CORP.,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 13611/10
Motion Seq. No.: 04
Motion Date: 07/21/11

TWO BROTHERS SCRAP METAL, INC.,
NELSON DELGADO, MARLON PUMAGUALLE and
MIGUEL PUMAGUALLE,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affidavit, Affirmation and Exhibits	1
Affidavit in Opposition and Exhibits	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Miguel Pumagualle moves, pursuant to CPLR § 5015(a), for an order vacating the Decision of this Court granting plaintiff a default judgment against him and, upon vacatur, dismissing plaintiff's Complaint against him or, in the alternative, permitting the instant action to proceed on the merits. Plaintiff opposes the motion.

Defendant Miguel Pumagualle argues that he never received a Summon and Complaint from plaintiff and was never personally served. He adds that "I later found out from Defendant Two Brothers Scrap Metal that all Court papers were being mailed to an address I know (*sic*)

longer lived at. Upon information and belief, Defendant Two Brothers advised that there was a preliminary conference scheduled for April 27, 2011 at 100 Supreme Court Drive, Mineola, NY, wherein I learned about this judgment against me.” Defendant Miguel Pumagualle further argues, “I was never part of the conversion and/or trespass act that Plaintiff alleges, I have served time for my role as the driver for defendants Marlon Pumagualle and Nelson Delgado. Furthermore, I have never trespassed nor have I ever been inside of Plaintiff’s company. I was never an employee of the Plaintiff nor did I ever negotiate with Defendant Two Brothers Scrap Metal.” Defendant Miguel Pumagualle contends that he has a reasonable excuse for the default and a meritorious defense.

In opposition to the instant motion, plaintiff argues that said motion is “replete with bald lies and fabrications, which deception should not be countenanced by this Court.” Plaintiff submits that, on July 26, 2010, defendant Miguel Pumagualle was served with the Summons with Notice pursuant to CPLR § 308(2) by leaving a true and correct copy of said Summons with Notice with a person of suitable age and discretion. An additional mailing was completed on July 27, 2010. *See* Plaintiff’s Affidavit in Opposition Exhibit B. On August 6, 2010, after receiving the Summons with Notice, defendant Miguel Pumagualle served and filed a Notice of Appearance. *See* Plaintiff’s Affidavit in Opposition Exhibit C. On August 26, plaintiff served defendant Miguel Pumagualle with a Verified Complaint by mailing a true copy of the Verified Complaint to the address listed by defendant Miguel Pumagualle on his Notice of Appearance. Defendant Miguel Pumagualle had until September 25, 2010 to serve a Verified Answer, but, despite the fact that he filed a Notice of Appearance, he never answered the Verified Complaint. Therefore, on October 5, 2010, plaintiff served a Motion for Default Judgment on defendant

Miguel Pumagualle. Defendant Miguel Pumagualle then submitted a purported non-notarized Affidavit in opposition to plaintiff's Motion for Default Judgment. *See Plaintiff's Affidavit in Opposition Exhibit F.*

Plaintiff argues that defendant Miguel Pumagualle has failed to satisfy either prong of the test for vacating his default as he has failed to show that his default is excusable and has failed to establish a meritorious defense.

With respect to the argument that defendant Miguel Pumagualle can show an excusable default, plaintiff asserts, "[i]ncredibly Pumagualle bases his Motion to Vacate on the fact that 'upon information and belief, I never received a summons and complaint from Plaintiff. I was never personally served and I later found out from Defendant Two Brothers Scrap Metal that all Court papers were being mailed to an address I know (sic) longer lived at.'...Pumagualle's counsel repeats the substance of the fallacious statement in her Affirmation, alleging Pumagualle 'never received the Summons and Complaint in this action and was not aware that there was an action pending against him. Defendant moved from the address that was stated in the affidavit of service.'...These statements are blatant lies and Pumagualle's own submissions to this Court evidence his untruthfulness. Indeed, as set forth above, following his evident receipt of the Summons with Notice following proper service on July 26, 2010 and additional mailing completed on July 27, 2010..., Pumagualle served a Notice of Appearance dated August 6, 2010, which **specifically requested that Hicksville Machine serve all papers in this action upon him at 59-39 60th Street, Maspeth, New York.** Following receipt of the Notice of Appearance, Hicksville Machine served Pumagualle with the Verified Complaint **at the address that Pumagualle specifically requested....**Inexplicably, Pumagualle now claims that the address that

he provided to the Court and to Hicksville Machine is the incorrect address. This is clearly untrue and Pumagualle's own submissions belie his current position....Also telling, Pumagualle did not claim that he was not served, or that Hicksville Machine had used the wrong address in this purported Affidavit that he submitted to oppose the default motion. Furthermore, Pumagualle claims that he relied upon Two Brothers to inform him about the Court dates in this matter. Yet, Two Brothers did not appear in this matter until in or around November 2010 - four (4) months *after* Pumagualle appeared in the action."

With respect to the argument that defendant Miguel Pumagualle has established a meritorious defense, plaintiff submits that defendant Miguel Pumagualle provides fewer allegations in his opposition papers to the instant motion than he did in his Affidavit in Opposition to the Motion for Default Judgment. "Furthermore, the only paragraph purportedly concerning the merits of this case contains statements by Pumagualle 'upon information and belief.'" Plaintiff further argues that, "Pumagualle admitted on multiple occasions during the criminal process in this matter that (i) he knew that the goods that he was helping to steal from Hicksville Machine's premises were in fact stolen, and (ii) he trespassed onto Hicksville Machine's property when he drove the U-Haul truck onto Hicksville Machine's driveway to load the stolen materials from Hicksville Machine's facility. Pumagualle then admittedly drove from Hicksville Machine to Two Brothers to sell the materials."

Relief under CPLR § 5015(a) is available where a defendant can demonstrate a reasonable excuse for the default *and* a showing of a meritorious defense (emphasis added). *See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986); *Szilaski v. Aphrodite Const. Co., Inc.*, 247 A.D.2d 532, 669 N.Y.S.2d 297 (2d Dept. 1998). The requirements are not alternative requirements and both requirements must be met in order to

vacate the default judgment.

The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. *See Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

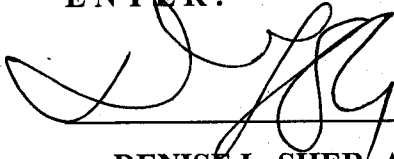
When viewing the moving papers in their best light, the Court finds that defendant Miguel Pumagualle failed to demonstrate a reasonable excuse for the default and failed to demonstrate a meritorious cause of action. The Court stands by its original determination in its March 11, 2011 Decision and Order when it stated, “[t]he Court finds that plaintiff has proven jurisdiction over defendants Delgado, Marlon Pumagualle and Miguel Pumagualle by annexing copies of the affidavits of service of the Summons With Notice upon defendants Delgado, Marlon Pumagualle and Miguel Pumagualle and an affidavit of service of the Verified Complaint upon defendant Miguel Pumagualle.” Said Decision also stated, “[i]n his Affidavit in Opposition, which is lacking the requisite notarization, defendant Miguel Pumagualle argues that plaintiff’s motion for a default judgment should be denied because ‘a) The amount of stolen goods have been changed by the Plaintiff in different occasions (*sic*) during the past year. Their method to keep track of material doesn’t seem to be accurate. b) I, Miguel Pumagualle, have never been inside the Plaintiff company’ (*sic*) premises. Therefore, a video of me inside the company can’t exist. c) I, Miguel Pumagualle, was not an employee of Hicksville Machine Works Corp. I didn’t acknowledge that these material were parts for the United States government. d) My only role on this unlawful act was to drive from point A to point B. I, Miguel Pumagualle, didn’t trespass into Plaintiff property to load material. Also, I was not the one negotiating with Two Brother (*sic*)

Scrap Metal, Inc. I was not part of the conversion process. e) Restitution payments are being made, at the rate of \$200.00 a month for a total amount of \$15,677.00 to Hicksville Machine Works Corp.’ The Court finds that defendant Miguel Pumagualle’s Affidavit in Opposition has failed to allege facts sufficient to defeat the instant motion for a default judgment. Said Affidavit in Opposition fails to demonstrate an excusable default or the existence of a meritorious defense.”

Accordingly, defendant Miguel Pumagualle’s motion, pursuant to CPLR § 5015(a), for an order vacating the Decision of this Court granting plaintiff a default judgment and, upon vacatur, dismissing plaintiff’s Complaint or, in the alternative, permitting the instant action to proceed on the merits is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 3, 2011

ENTERED
OCT 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE