

Information Sales Assoc. v Gabrell Food Mkt. Inc.

2013 NY Slip Op 32492(U)

October 9, 2013

Sup Ct, NY County

Docket Number: 651148/12

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTY**

PRESENT: SALIANN SCARPULLA
Justice

PART 19

INFORMATION SALES ASSOCIATES

INDEX NO. 651148/2012

MOTION DATE 6/26/2013

- v -

GABRELL FOOD MARKET INC., 681 9TH AVE FRUIT
MARKET CORP.1 and NABIL ABDULLAH

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) _____

Answering Affidavits - Exhibits No(s) _____

Replying Affidavits No(s) _____

Upon the foregoing papers, it is ordered that this motion is

ORDERED that plaintiff Information Sales Associates' motion is decided per the memorandum decision dated 10/9/13

This constitutes the Decision and Order of the Court.

DATED: 10/9/13



SALIANN SCARPULLA, J.S.C.

1. CHECK ONE : CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE : SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
INFORMATION SALES ASSOCIATES,

Index Number: 651148/12
Submission Date: 6/26/13

Plaintiff,

- against -

DECISION and ORDER

GABRELL FOOD MARKET INC., 681 9TH AVE
FRUIT MARKET CORP.1 and NABIL ABDULLAH,

Defendants.
----- X

For Plaintiff:
Laurence J. Sass, Esq.
20 Vesey Street, Suite 1400
New York, NY 10007

For Defendant Nabil Abdullah:
Thomas & Spikes, Esqs.
111 Court Street, 2nd Floor
Brooklyn, NY 11201

Papers considered in review of plaintiff's motion for default judgment (motion seq. no. 001):

Notice of Motion/Affirm. of Counsel/Affidavits/Exhibits.....	1
Affirm. in Opp./Affidavit in Opp.....	2
Reply Affirmation	3

HON SALIANN SCARPULLA, J.:

In this action, plaintiff Information Sales Associates (“Plaintiff”) moves for a default judgment against defendants 681 9th Ave Fruit Market Corp.1 (“681”) and Nabil Abdullah (“Abdullah”) (collectively, “defendants”) pursuant to CPLR § 3215(a).

Plaintiff is a company that maintained and installed an ATM machine at a food market located at 681 Ninth Avenue, New York, NY (“the food market”). On October 10, 2008, Plaintiff obtained a judgment against the operator of the food market, defendant

Gabrell Food Market Inc., in the amount of \$63,139.65 (“the judgment”).¹ Plaintiff claims that it has not been able to collect the judgment from Gabrell.

On April 9, 2012, Plaintiff commenced this action to recover the judgment from defendants 681 and Abdullah. Plaintiff alleges that Abdullah operated the food market under the corporate entity Gabrell, and that he fraudulently conveyed Gabrell’s assets to 681 to avoid the collection of the judgment. Plaintiff further alleges that Abdullah commingled the assets of the two corporate entities Gabrell and 681.

Plaintiff now moves for a default judgment against 681 and Abdullah. In support of the motion, Plaintiff submits an affidavit of merit from its chief financial officer James S. McGuire (“McGuire”). McGuire states that a marshal attempted to execute the judgment against Gabrell, but that the marshal was “turned away because the food market was then allegedly being operated by defendant 681 9th Avenue Fruit Market Corp.”

McGuire further states that Abdullah diverted and transferred Gabrell’s business and operations to 681 and himself, but that the food market still “operates simultaneously under the names Gibrell Food Market and 681 9 Ave Food Market.” McGuire asserts that 681 and Gabrell are “effectively the same entities but with different names and act as a single entity to operate the food market at 681 9th Avenue.” For example, McGuire states that the food market’s liquor license is held by Gabrell, but the food market’s stoop line stand license is held by 681.

¹ The judgment was entered against “Gabrell Food Market Inc. d/b/a Gibrell Food Market.” The parties use “Gabrell” and “Gibrell” interchangeably in their submissions.

Plaintiff submits an affirmation of counsel, Laurence J. Sass (“Sass”), who states that 681 and Abdullah failed to answer the complaint. Plaintiff also attaches affidavits of service to show that the summons and complaint were served on 681 and Abdullah.

Plaintiff argues that the summons and complaint were properly served on Abdullah. In the affidavit of service, the process server stated that the summons and complaint were served on Abdullah by delivery to his actual place of business, 681 Ninth Avenue on April 16, 2012. The process server also stated that the summons and complaint were delivered to Mr. Sala who identified himself as a co-worker, but that the “person spoken to refused to state true first and/or last names.”

Plaintiff further submits an affirmation from counsel Sass stating that the notice of motion and supporting papers were served on Abdullah by mail to his actual place of business and his last known residence.

In opposition to the motion, Abdullah argues that his default should be excused because he never received a copy of the summons and complaint. Abdullah submits his own affidavit in which he states “I never received a copy of the summons and complaint in this action. I only learned of the action upon receipt of the Notice of Motion.”

Abdullah also states that he no longer had an interest in Gabrell when its assets were sold to 681, and that he did not relinquish his shares to Gabrell to defraud anyone. Abdullah asserts “I held no personal interest in the market after any transfer occurred” and that “no one in the subject premises is authorized to accept service of any papers legal or otherwise on my behalf.” 681 does not submit any opposition to this motion.

Discussion

CPLR § 3215(a) provides that a plaintiff may seek a default judgment against a defendant who has failed to appear, plead, or proceed to trial. An application for a default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the merits of the claim; and (3) proof of the default. CPLR § 3215(f).

To successfully oppose a motion for default judgment, a defendant must demonstrate a justifiable excuse and a meritorious defense. *Johnson v. Deas*, 32 A.D.3d 253, 254 (1st Dep't 2006). However, where there is a defense of lack of personal jurisdiction based on improper service, a defendant need not show a reasonable excuse and meritorious defense. *Ortiz v. Santiago*, 303 A.D.2d 1, 4 (1st Dep't 2003).

1. Motion for Default Judgment Against Abdullah

I find here that Plaintiff submitted a proper affidavit of merit and proof of default. McGuire's affidavit sets forth a *prima facie* case against Abdullah for fraudulent conveyance and piercing the corporate veil. McGuire states that Abdullah diverted and transferred Gabrell's assets to 681, and that Gabrell and 681 are operating as single entity to operate the food market. Plaintiff also submitted proof of default through the affirmation of its counsel Laurence Sass who stated that Abdullah never filed an answer to the complaint.

Plaintiff also submits a process server's affidavit, which constitutes *prima facie* evidence of proper service. *Johnson v. Deas*, 32 A.D.3d at 254. However, I find that Abdullah raises a genuine question as to whether proper service was made when the

summons and complaint were delivered and mailed to the food market. Plaintiff claims that it properly served Abdullah at the food market, but I find that a question of fact exists as to whether the food market was Abdullah's actual place of business at the time of service. Abdullah stated that after he conveyed his interest in Gabrell, he did not retain any interest in the food market. Furthermore, the process server's statement that he delivered the summons and complaint to a co-worker "Mr. Sala" but that the "person spoken to refused to state true first and/or last names" further raises questions as to whether service was effected.²

Based on my finding that a genuine question is raised as to proper service, I therefore direct the parties to appear for a traverse hearing.

2. Motion for Default Judgment Against 681

I grant Plaintiff's motion for a default judgment against 681. Plaintiff submitted a proper affidavit of merit that sets forth *prima facie* claims for fraudulent conveyance and piercing the corporate veil against 681. In his affidavit, McGuire states that Gabrell's corporate assets were fraudulently conveyed to 681 to avoid payment of the judgment, and that 681 and Gabrell are operating as a single entity to warrant piercing of the corporate veil. *Wall Street Assoc. v. Brodsky*, 257 A.D.2d 526, 528-29 (1st Dep't 1999); *Solow v. Domestic Stone Erectors, Inc.*, 229 A.D.2d 312, 313 (1st Dep't 1996).

² Abdullah also stated that he first received notice of this action upon his receipt of Plaintiff's notice of motion. Unlike the summons and complaint which were only delivered and mailed to the food market, the motion papers were also mailed to Abdullah's residence.

Plaintiff also submitted proof of service of the summons and complaint, as well as proof of default. Plaintiff's counsel affirmed that 681 never submitted an answer to the complaint. Accordingly, Plaintiff's motion for a default judgment against 681 is granted.

In accordance with the foregoing, it is

ORDERED that plaintiff Information Sales Associates, Inc.'s motion for default judgment against 681 9th Ave Fruit Market Corp.1 and Nabil Abdullah is granted only with respect to 681 9th Ave Fruit Market Corp.1, and denied as to Nabil Abdullah; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Information Sales Associates, Inc. and against 681 9th Ave Fruit Market Corp.1 in the amount of \$63,139.65, with interest from October 10, 2008 to the date that the judgment is entered; and it is further

ORDERED that plaintiff Information Sales Associates, Inc. shall file and serve a note of issue for an inquest on attorney's fees within 30 days of the date of this order; and it is further

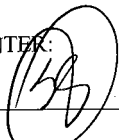
ORDERED that the Clerk is directed to place this matter on the inquest calendar for an assessment of attorney's fees against 681 9th Ave Fruit Market Corp.1; and it is further

ORDERED that plaintiff Information Sales Associates, Inc. and defendant Nabil Abdullah are directed to appear for a traverse hearing on November 8, 2013 at 11:00 a.m., 60 Centre Street, Room 335; and it is further

ORDERED that plaintiff Information Sales Associates, Inc. shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 30 days of entry.

This constitutes the decision and order of this Court.

Dated: New York, New York
October 9, 2013

ENTER:


Saliann Scarpulla, J.S.C.