

Doe v City of New York
2016 NY Slip Op 32817(U)
November 29, 2016
Supreme Court, Queens County
Docket Number: 11675/15
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

FILED
DEC 20 2016
COUNTY CLERK
QUEENS COUNTY

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John Doe, an infant by his mother and guardian, Maria Maldonado, and Maria Maldonado, individually,
Plaintiffs,
- against -

Index
Number: 11675/15

Motion
Date: 11/16/16

The City of New York, The New York City Department of Housing & Development, Waclaw Dobrowski, Teresa Dobrowski, Donnett Bryan and G.N. Construction, Inc.,
Defendants.

Motion
Cal. Number: 53
Motion Seq. No.: 3

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The following papers numbered 1 to 7 read on this motion by defendant, Donnett Bryan, to dismiss.

Papers
Numbered

- Notice of Motion-Affirmation-Exhibits..... 1-4
- Affirmation in Opposition-Exhibits..... 5-7

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

As a preliminary matter, the moving papers are not in proper order since they are in violation of this Court's Part Rules requiring all motion exhibits to be tabbed with proper exhibit tabs protruding from the motion papers and since they are in violation of the CPLR requiring the movant to annex all papers constituting the record to the moving papers. Nevertheless, this Court, in the interest of judicial economy, shall consider the instant motion.

Motion by Bryan to dismiss the complaint for lack of personal jurisdiction pursuant to "CPLR 5015(a)(4)" or, in the alternative, for a traverse hearing, is denied.

Pursuant to the order of this Court issued on July 18, 2016 and entered on July 26, 2016, that branch of plaintiff's motion for a default judgment against Bryan was denied and Bryan's answer was

deemed served. Bryan's counsel, in opposition to that motion for a default judgment, argued that service of the summons and complaint upon Bryan was defective in that the envelope in which the summons and complaint were mailed was not marked "private and confidential" as required under CPLR 308(2).

Bryan did not deny that the summons and complaint was delivered to a person of suitable age and discretion at his residence, that he actually received the summons and complaint or that the additional mailing of the summons and complaint was received by him as indicated by the process server. Rather, he averred in his affidavit in opposition to plaintiff's motion that the envelope containing the additional mailing was not marked "private and confidential" and, as a result, he thought the envelope contained legal papers or correspondence relating to a pending foreclosure action against him and that if he knew it was a summons and complaint, he would have opened it. This Court notes that Bryan did not deny receipt of the summons and complaint via substituted service upon his son as the process server set forth in his affidavit of service and, thus, his excuse that he did not discover that he had been served with a summons and complaint because the additional mailing did not say "private and confidential" borders upon the frivolous, especially in light of his further explanation that he indeed received the additional mailing but did not open it because he thought it contained legal papers relating to his foreclosure action, thus asking this Court to consider as good cause for his failure to answer the complaint in a timely fashion that he thought he was ignoring legal correspondence on a foreclosure action and not pleadings on the present action. Nevertheless, such was his explanation for his default in answering. However, instead of cross-moving for leave to serve a late answer and to compel plaintiff to accept his late answer, he filed his answer and then improperly sought vacatur of the "default judgment" pursuant to CPLR 5015(a)(4) as well as for an order, pursuant to CPLR 317, which allows a defendant who was served by any method other than personal delivery to defend the action within one year after obtaining knowledge of the default judgment if the Court determines that the defendant did not actually receive notice of the summons in time to defend and that defendant has a meritorious defense.

Since counsel filed Bryan's answer and annexed it to his opposition papers, and the answer did not contain the affirmative defense of lack of personal jurisdiction, and since he requested vacatur of Bryan's default and also sought relief under CPLR 317, which, as heretofore noted, allows a defaulting defendant who has been served to nevertheless defend on the merits, and furthermore, since he did not cross-move to dismiss, his request in the

"wherefore" paragraph of his affirmation in opposition that the action be dismissed made no sense. Moreover, his request for vacatur of the default judgment under CPLR 5015(a)(4) made no sense since there was no default judgment entered to be vacated, since that section is not a ground for dismissal and since Bryan did not move or cross-move for such affirmative relief. Likewise, his request for relief under CPLR 317 made no sense since for the same reasons, and additionally since that section is a request to allow the defendant to defend on the merits upon a showing that the defendant did not actually receive notice of the summons and complaint in time to interpose a timely answer. Since Bryan did not deny actually receiving the summons and complaint via the substituted service, there was no basis for relief under CPLR 317. Thus, counsel's request for dismissal for lack of personal jurisdiction, aside from being improper since no motion or cross-motion was made for that relief, was entirely irrational on multiple levels.

Notwithstanding that Bryan did not move or cross-move for any affirmative relief, whether for dismissal or for leave to interpose a late answer, and despite his citation of completely irrelevant sections of the CPLR, this Court, cognizant of the strong public policy favoring determination of a case on the merits rather than by a default judgment, exercised its discretion and, in the interest of justice, denied that branch of plaintiff's motion for a default judgment against Bryan and compelled plaintiff to accept Bryan's answer that had been filed, albeit late, notwithstanding that Bryan had failed to set forth good cause for his failure to answer the complaint in a timely fashion and failed to cross-move for any relief.

Now Bryan's counsel moves for dismissal for lack of personal jurisdiction or for a traverse hearing, again invoking one of the same inapposite section of the CPLR he cited in his opposition to plaintiff's previous motion, CPLR 5015(a)(4), and upon the same ground that plaintiff did not acquire personal jurisdiction over Bryan because the mailing envelope did not say "private and confidential". Counsel also made it a point in his affirmation to infer that the present motion was necessitated by error on the part of this Court in its order of July 18, 2016, informing that the Court "was silent on that part of the Defendant motion requesting the Claim be dismissed for lack of jurisdiction" (sic).

This Court was not "silent" on any motion for dismissal of the action for lack of personal jurisdiction. As stated, Bryan neither moved nor cross-moved for dismissal for lack of personal jurisdiction but merely submitted opposition papers to plaintiff's motion and improperly and in non-sequitur fashion, sought, in his

bare opposition, the affirmative relief of dismissal notwithstanding that he filed an answer that did not contain that defense. Even had he cross-moved for dismissal, Bryan's counsel sought relief under CPLR 5015(a)(4) and 317, which sections have nothing to do with this matter since a default judgment had not been entered against Bryan and, in fact, this Court denied plaintiff's request for a default judgment against him and directed that plaintiff accept Bryan's answer.

Thus, Bryan's counsel's present motion seeking dismissal under CPLR 5015(a)(4) makes all the less sense, to the extent that any value less than zero can be assessed. Since there was no default judgment entered against Bryan, but, rather, Bryan interposed an answer and this Court denied plaintiff's motion for a default judgment and compelled plaintiff to accept his answer, there is no rational ground for relief under CPLR 5015(a)(4).

In addition, as stated, Bryan's counsel served an answer, which, according to counsel's affidavit of service thereof, was mailed on June 1, 2016. The answer did not contain the affirmative defense of lack of personal jurisdiction, which defense would, in any event, be pursuant to CPLR 3211(a)(8), not CPLR 5015(a)(4). Pursuant to CPLR 3211(e), the defense of lack of personal jurisdiction is waived if not raised in a pre-answer motion to dismiss or included in the answer. Since the affirmative defense of lack of personal jurisdiction was not interposed in the answer served on June 1, 2016, it was waived. Therefore, the present motion to dismiss lacks merit for this additional reason.

Accordingly, the motion is denied.

Finally, it is further ordered, sua sponte, that counsel for Bryan shall pay to plaintiffs' counsel \$100.00 representing the costs of this baseless motion, pursuant to CPLR 8202, within 10 days of service of a copy of this order with notice of entry. Bryan's counsel shall demonstrate proof of payment of said costs at the time of trial.

Dated: November 29, 2016



KEVIN J. KERRIGAN, J.S.C.

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