American Express Bank, FSB v Thompson
2017 NY Slip Op 31448(U)
July 5, 2017
Supreme Court, New York County
Docket Number: 156006/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C. **PART** 2
Justice

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AMERICAN EXPRESS BANK, FSB,

Plaintiff,

- v -

LUSHAWNDA THOMPSON and HAPILOS ENTERTAINMENT GROUP, INC.

Defendants.

INDEX NO. 156006/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this application to/for Default Judgment

Upon the foregoing documents, it is

ordered that the motion is denied with leave to renew upon proper papers.

Plaintiff American Express Bank, FSB commenced this action against defendants Lushawnda Thompson ("Thompson") and Hapilos Entertainment Group, Inc. ("HEG") on July 19, 2016. In the complaint, plaintiff claims breach of contract and an account stated arising from defendants' alleged failure to pay credit card debt in the amount of $26,982.01. Ex. A. Plaintiff claims that, despite serving defendants with process (Exs. B and C), defendants have failed to answer or otherwise appear in this action. Plaintiff now moves, pursuant to CPLR 3215, for a default judgment against defendants in the amount of $26,982.01, the amount of credit card debt

allegedly incurred by defendants. For the reasons set forth below, the motion is denied with leave to renew upon proper papers.

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

Here, issues exist regarding service of the summons and complaint which preclude the issuance of a default judgment. In the affidavit of service purporting to establish proper service on defendant Thompson, the process server states that he served Thompson on September 21, 2016 at "POB: Hapilos Entertainment . . . " Ex. B. Although this suggests that Thompson was served at her place of business, plaintiff does not specify what "POB" means. The process server simultaneously represents, in the same affidavit of service, that Thompson was served when the summons and complaint were delivered to Antuanet Cocha, a receptionist and person of suitable age and discretion, at Thompson's "dwelling place/usual place of abode." Id. The affidavit of service is thus deficient since it does not specify whether Thompson was served at her place of business or her home.

Additionally, the affidavit of service with respect to defendant HEG reflects that the said entity, a corporation, was served when the summons and complaint was personally delivered to Cocha, its receptionist, on October 24, 2016 and that the process server knew Cocha to be an authorized agent of HEG. Ex. B. However, the process server does not set forth the basis for his knowledge that Cocha was authorized to accept service on behalf of HEG. Indeed, the motion

papers contain "no evidence that [the receptionist] was an agent authorized by appointment or law to accept service on its behalf (citations omitted)." *Gleizer v American Airlines, Inc.*, 30 Ad3d 376, 376 (2d Dept 2006). Thus, proper service on HEG has not been established. See CPLR 311 (a)(1).

The additional service of the summons and complaint pursuant to CPLR 3215(g) raises further questions about the validity of the service on the defendants. On November 4, 2016, this additional service was purportedly made on "[d]efendant's residence" and "[d]efendant's business" at 295 Madison Avenue, Floor 12, New York, New York 10017. Ex. C. However, the affirmations of additional service do not specify which defendant was served at this address or whether one or both defendants had a business or residence at this address.[1]

Finally, although plaintiff's counsel represents in her affirmation in support of the motion that "[d]efendant failed to file an [a]nswer or other responsive pleading in this action", she fails to specify which defendant she is referring to. Thus, she has failed to specifically establish a default by either defendant.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff is denied with leave to renew upon the submission of proper papers; and it is further,

[1] **Error! Main Document Only.**Given the expiration of the 120-day period in which to serve Thompson and Hapilos Entertainment Group, which began to run on the date of the commencement of this action (see CPLR 306-b), plaintiff would, at this point, be required to move to extend the time to re-serve these entities, if it be so advised.

ORDERED that this constitutes the decision and order of this Court.

7/5/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE