Diaz v Altamirano
2018 NY Slip Op 30338(U)
February 21, 2018
Supreme Court, Suffolk County
Docket Number: 04615/2016
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 04615/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 09/07/17
Motion Seq #: 002 - Mot D; RTC

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ARIANE DIAZ,

Plaintiff,

-against-

GIOVANNY ALTAMIRANO,

Defendant.

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PLAINTIFF'S COUNSEL:
Thomas Weiss & Assocs., PC
By: Thomas Weiss, Esq.
1305 Franklin Avenue, Suite 300
Garden City, NY 11530

DEFENDANT: ***Pro Se***
GIOVANNY ALTAMIRANO
384 Kansas Street
Lindenhurst, NY 11747

In connection with defendant's motion pursuant to CPLR 5015(a) seeking an order vacating a default judgment, the Court has considered the following papers:

1. Defendant's Order to Show Cause dated September 11, 2017; Affidavit in Support dated February 16, 2017; and other supporting papers;
2. Plaintiff's Affirmation in Opposition dated July 10, 2017 and supporting papers; it is

ORDERED that defendant *pro se*'s motion to vacate a prior judgment entered against him pursuant to CPLR 5015(a) is determined as follows.

Presently before the Court is defendant *pro se's* motion to vacate a default judgment granted on plaintiff's unopposed application by Short-Form Order of this Court dated November 18, 2016.

This matter is a real property dispute brought by plaintiff Ariane Diaz against her former paramour defendant Giovanny Altamirano. Both parties reside at the subject premises located at 384 Kansas Street, Lindenhurst, New York 11747. The action was commenced when plaintiff filed summons and complaint seeking partition against defendant on May 6, 2016. By her complaint, plaintiff generally alleges that the parties are both owners in fee simple. Plaintiff additionally asserts that the premises was purchased by plaintiff and defendant as joint tenants with rights of survivorship on September 2, 2011. Plaintiff relies upon a property value appraisal conducted on April 1, 2016 at defendant's request, assessing its value at $325,000. Plaintiff claims that the mortgage and property carrying costs, including a monthly mortgage obligation of $2776.00, have been solely borne by her alone, with defendant merely contributing $500.00.

Thus, plaintiff suggests that presently $277,333.31 is due and owing on the property's mortgage to the bank, and that on or about August 26, 2011, plaintiff borrowed $28,000.00 from her 401 K retirement account for home repairs which cost $25,000.00. Plaintiff seeks partition of the subject property allowing her to purchase defendant's interest therein.

Plaintiff previously moved for entry of default judgment against the defendant for his failure to timely answer, appear or contest the allegations in the pleadings by motion returnable on September 1, 2016. In support of that application, plaintiff submitted proof of service with an Affidavit of Service dated May 19, 2016, filed with the Suffolk County Clerk on June 14, 2016. By her process server's affidavit, plaintiff represented that defendant was served with a copy of the pleadings personally at his residence pursuant to CPLR 308(1) on May 6, 2016.

Upon this showing, this Court granted plaintiff's application, entered default judgment against defendant for the plaintiff, and set this matter down for inquest, which was held on February 27, 2017 with defendant *in absentia*. At the close of the proceedings, this Court entered a Judgment in plaintiff's favor dated March 3, 2017, entered by the Suffolk County Clerk on March 9, 2017, which *inter alia* appointed attorney Francesco P. Tini, Esq. as referee for the purposes of selling the subject premises.

Subsequent to plaintiff's inquest and entry of the judgment, this Court received defendant's application seeking to vacate both his default in appearance and the subsequent judgment. Supporting his application, defendant argues that service on him was defective based on his incarceration. At the time of his application, defendant stated he was an incarcerated inmate housed at Lakeview Correctional Facility. Thus, he argued that he was deprived notice in a reasonably calculated way to allow him to appear and contest plaintiff's application by inquest. Notably however, in his application to vacate the judgment, defendant does not dispute or otherwise contest receipt of the pleadings or service as attested to by plaintiff's process server. Thus, this Court deems defendant's application solely as challenging the validity of the judgment on inquest, and not seeking to disturb the underlying default in his appearance in the litigation.

At the outset, the Court pauses to note that it is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

A defendant seeking to vacate a default in appearing or answering the complaint in an action on the ground of excusable default must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (***Codoner v Bobby's Bus Co., Inc.,*** 85 AD3d 843, 844, 925 NYS2d 352 [2d Dept 2011], *citing* CPLR 5015 [a] [1]; ***Citimortgage, Inc. v Brown,*** 83 AD3d 644, 919 NYS2d 894 [2011]; ***US Consults v APG, Inc.,*** 82 AD3d 753, 917 NYS2d 911 [2011]; ***Hageman v Home Depot U.S.A., Inc.,*** 25 AD3d 760, 761, 808 NYS2d 763 [2006]; ***Fekete v Camp Skwere,*** 16 AD3d 544, 545, 792 NYS2d 127 [2005]). A process server's affidavit constitutes *prima facie* evidence of proper service (***Reich v Redley,*** 96 AD3d 1038, 2012 NY Slip Op 5160 [2d Dept 2012]).

Whether or not service was properly effectuated is a threshold issue to be determined before consideration of discretionary relief pursuant to CPLR 5015(a)(1) (***Marable ex rel. Ralph v Williams***, 278 AD2d 459, 459–60, 718 NYS2d 400, 401 [2d Dept 2000]). "The plaintiff bears

the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" and New York's appellate courts have clearly cautioned that the absence of proper service of process, renders a resulting default judgment was a nullity (***Pearson v. 1296 Pac. St. Associates, Inc.***, 67 AD3d 659, 660, 886 NYS2d 898 [2d Dept. 2009]).

Put somewhat differently, "[i]t is 'axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void' " and thus on an application falling under CPLR 5015(a)(4), a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (***Hossain v. Fab Cab Corp.***, 57 AD3d 484, 485, 868 NYS2d 746, 746 [2d Dept. 2008][internal citations omitted]). Where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived (***Cadlerock Joint Venture, L.P. v. Kierstedt***, 119 AD3d 627, 628, 990 NYS2d 522, 524 [2d Dept. 2014]).

It is settled that a process server's affidavit of service constitutes prima facie evidence of proper service on a corporation pursuant to CPLR 311(a)(1) (*see* ***Indymac Fed. Bank FSB v. Quattrochi***, 99 AD3d 763, 764, 952 NYS2d 239; ***C & H Import & Export, Inc. v. MNA Global, Inc.***, 79 AD3d 784, 784, 912 NYS2d 428; ***McIntyre v. Emanuel Church of God in Christ, Inc.***, 37 AD3d 562, 562, 830 NY2d 261). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server affidavits" (*see* ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984–985, 912 NYS2d 96; ***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; ***Rosario v. NES Med. Servs. of N.Y., P.C.***, 105 AD3d 831, 832, 963 NYS2d 295, 296–97 [2d Dept 2013]).

Thus, a defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (***Cummings v Rosoff***, 101 AD3d 713, 714, 955 NYS2d 193, 194 [2d Dept 2012]; ***Ennis v. Lema***, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 A.D.2d 494, 495, 717 N.Y.S.2d 923 [2d Dept. 2000]).

Furthermore, as applicable here, it is settled that the mere denial of receipt of the summons and the complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (*see* Business Corporation Law § 306 [b] [1]; ***Commissioners of State Ins. Fund v. Nobre***, *Inc.*, 29 AD3d 511, 816 NYS2d 493; ***Truscello v. Olympia Constr.***, 294 AD2d 350, 741 NYS2d 709; ***De La Barrera v. Handler***, 290 AD2d 476, 736 NYS2d 249; ***Trini Realty Corp. v Fulton Ctr. LLC***, 53 AD3d 479, 480, 861 NYS2d 743, 744–45 [2d Dept 2008]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012][" mere denial by corporate defendant of service of the summons and the complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service"]).

Having reviewed the motion record, both plaintiff's moving papers and defendant's

opposition, several observations bear mention. First and foremost, defendant does not dispute receipt of service at his residence, prior to his incarceration. As a matter of public knowledge in the records kept, created and maintained by the New York State Department of Correctional Services, defendant did not present for incarceration until October December 20, 2016, and was released into the custody of parole status after hearing in October 2017. Thus. as noted above, defendant does not dispute he was properly served with legal process, and accordingly, does not seek to vacate his default for his failure to answer or appear in a timely matter.

However, defendant makes a compelling case for vacatur of the underlying judgment after inquest. It is clear from the motion record that defendant was incarcerated during the pendency and at the time the inquest was held. Plaintiff served notice of entry of its successful application for default judgment against the defendant by certified mail addressed to defendant at Lakeview Correctional Facility during his incarceration. Clearly, plaintiff knew or had reason to know and expect that defendant would not attend the inquest proceedings, being in the care, custody and control of the State's Correctional Services.

At least one New York court has previously determined that under similar circumstances, the provision of legal process or service of notices or pleadings on an inmate at his usual dwelling place or abode constitutes deficient service (*see* ***JP Morgan Chase Bank, N.A. v Peters***, 55 Misc3d 849, 852, 53 NYS3d 460, 463 [Sup Ct, New York Co. 2017][finding that prison is not defendant's usual place of abode because "[a] degree of permanence and stability cannot be ascribed to a location to which the sovereign involuntarily places a person in cases not involving long term imprisonment"]). However, this precedent is of questionable value as factually distinguishable, where as here, the situation presents the converse: defendant an inmate was provided with notice of the proceedings not at his usual dwelling place, but in jail where he is incarcerated and housed.

This Court's research has noted that on occasion the Appellate Division has denied defendant's application to vacate default based on a failure to appear due to incarceration (*see e.g.* ***In re Deyquan M.B.***, 124 AD3d 644, 645, 1 NYS3d 345, 346 [2d Dept 2015][affirming Family Court's denial of defendant's motion to vacate her default for lack of reasonable excuse, premised upon movant's failure to adequately explain her absence to the court or counsel]); ***In re Fa'Shon S.***, 40 AD3d 863, 836 NYS2d 636, 637 [2d Dept 2007][affirming denial of motion to vacate default on movant's failure to offer a reasonable excuse based upon movant's failure to explain lack of notice to counsel or the court of his imprisonment]; *accord* ***Womack v Rosario***, 50 AD3d 1212, 1213, 855 NYS2d 698, 699–700 [3d Dept 2008][affirming denial of movant's application to vacate default for failure to present reasonable excuse where movant failed to refute motion court's finding that movant refused to be transported from jail to the courtroom to attend court proceedings]).

Applied here however, unlike the unsuccessful applicants cited above, this defendant apprised this Court as well as the Second Department of his incarcerated status by sworn affidavit dated February 16, 2017, received by the Court on March 15, 2017. Thus, albeit late, defendant discharged his obligation to advise the Court of his incarceration, although his correspondence, deemed an application here, was not otherwise provided to opposing counsel, absent court intervention.

This all notwithstanding, the Court remains mindful of the fact that defendant does not set forth any reasonable excuse for his failure to answer the pleadings. Subsequent to defendant's making of the instant application, defendant submitted several correspondences to

the Court, on notice to plaintiff, advising that he has sought to reunite with his former paramour, the plaintiff, and resolve their differences concerning the subject premises. Within this Court's discretion, none of these advisements constitute anything close to resembling a meritorious defense to the plaintiff's action. In fact, to the present time, defendant has still failed to join issue in this matter.

Given all of the above, this Court determines that defendant's application is **granted in part, and denied in part**. That branch of defendant's motion to vacate the prior judgment is **granted** to the extent that it questionable whether he received notice of the pendency of the inquest which resulted in the judgment under attack. While it is arguable that defendant undoubtedly had notice, given his correspondence serving as the motion to vacate, plaintiff's affidavit indicating mere mail service of the default judgment determination with notice of entry alone is insufficient to this Court's mind. Nevertheless, defendant has not presented any reasons to disturb the underlying default judgment. Accordingly, to the extent that his application can be read as seeking such relief, it is hereby **denied.**

Thus, it is accordingly

ORDERED counsel for the plaintiff serve a copy of this decision and order with notice of entry on the defendant by personal service **on or before** March 29, 2018, and it is further

ORDERED that the judgment after inquest dated March 3, 2017, entered by the Suffolk County Clerk on March 9, 2017 is vacated pending further proceedings of this Court; and it is further

ORDERED that the parties and their counsel as applicable are hereby directed to appear before this Court, IAS Part 38 located at 1 Court Street, Riverhead, New York 11901 in the Supreme Court Annex Building, Courtroom 229-A on **April 4, 2018 at 10:00 a.m.**

The foregoing constitutes the decision and order of this Court.

Dated: February 21, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**