

Jimenez v MXJO

2019 NY Slip Op 33859(U)

December 20, 2019

Supreme Court, Bronx County

Docket Number: 22920/2017E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. 3

RICARDO JIMENEZ,

Index No.: 22920/2017E

Plaintiff,

- against -

DECISION and ORDER

MXJO, SYSMAX INDUSTRY CO., LTD.,
and VAPOR VIPER,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant SYSMAX INDUSTRY CO., LTD.'s ("SYSMAX") motion is whether the default judgment entered against it should be vacated pursuant to CPLR §317 and/or §5015 and whether this court lacks personal jurisdiction over SYSMAX thereby, warranting a dismissal of the complaint pursuant to CPLR §3211(a)(8). This court finds that SYSMAX established sufficient grounds to warrant a vacatur of the default judgment. However, this court finds there is insufficient facts to dismiss the complaint.

Default Judgment

CPLR §317 and CPLR §5015 allow a defendant against whom a default judgment has been rendered to move to vacate that default. *Caba v. Rai*, 63 A.D.3d 578, 882 N.Y.S.2d 56 (1st Dep't 2009). CPLR §317 is available only to a defendant who: (1) was served by a method other than personal delivery; (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry); and (3) demonstrates a potentially meritorious defense to the action. *Id.*

By contrast, CPLR §5015(a)(1) is available to any defendant against whom a default

judgment was entered, provided that the defendant can demonstrate both a reasonable excuse for the default and a potentially meritorious defense. *Id.* Further, a defendant seeking to vacate the default judgment must move within one year of service on defendant of the default judgment with notice of its entry. *Id.*

Here, Plaintiff was granted default judgment against SYSMAX in August 2018.

SYSMAX is a foreign corporation based in China. It argued that it did not receive a copy of the summons and complaint in this action until January 2019, five months after the default judgment was granted. Plaintiff requested service upon SYSMAX pursuant to the Hague Convention through the Ministry of Justice in China on August 31, 2017. SYSMAX, however, was not served the summons and complaint by the Ministry of Justice until January 25, 2019. Thereafter, a certificate of attestation was provided on June 26, 2019, to Plaintiff.

The Hague Convention authorizes several different mechanisms for effectuating service of process. The primary vehicle, ..., requires each participating country to set up a Central Authority for receiving and processing requests for service upon defendants residing within the state. *See* Hague Convention, Art. 2–7. Under this method, an applicant must send a request for service directly to the Central Authority designated by the government of the receiving country, who then serves the document or arranges to have it served by the appropriate agency. Hague Convention, Art. 2–5. The Central Authority must then complete a Certificate detailing how, where, and when service was made, or explaining why service did not occur. *Id.* Art. 6. Finally, the completed Certificate is returned to the applicant. *Id.* Once the service is completed, the Central Authority completes a certificate as to whether service was made or not and will return the certificate to the applicant. *Id.*, Art. 5. *Unite National Retirement Fund v. Ariela, Inc.* 643 F.Supp.2d 328 (2008).

China is a signatory to the Hauge Convention. Therefore, Plaintiff's request for service upon SYSMAX via China's Ministry of Justice was proper. However, service was not effectuated upon Plaintiff when the summons and complaint were delivered to the Ministry of Justice in China in August 2018. Service was effectuated when SYSMAX received actual notice of the summons and complaint on January 25, 2019 as stated in the Certificate of Attestation. As such, this court finds that Plaintiff moved prematurely and misled this court when it requested a default judgment by attaching the request for service as proof of service, rather than attaching the Certificate of Attestation as proof. Therefore, this court finds that the default judgment must be vacated.

Dismissal

Plaintiff alleged he was injured when he purchased a battery charger from a retail store in New York and said product failed to perform as intended. SYSMAX designed and sold the battery charger in China to wholesalers. SYSMAX contends this court does not have personal jurisdiction and seeks a dismissal pursuant CPLR §302(a)(1) or (a)(3). However, based upon the affidavits and documentary evidence provided to this court, further disclosure is required to determine its jurisdictional arguments. As such, SYSMAX's application for a dismissal is denied pursuant to CPLR §3211(d).

Accordingly, it is

ORDERED, that the default judgment against SYSMAX is vacated, and it is further

ORDERED, that service upon SYSMAX is deemed effectuated, and it is further

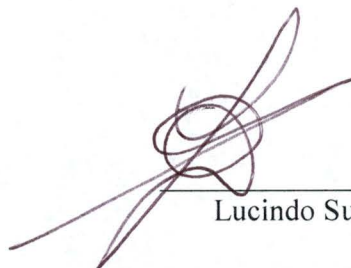
ORDERED, that SYSMAX shall interpose an answer within 20 days from receipt of

this decision and order.

ORDERED, that SYSMAX's portion of the motion seeking a dismissal is denied.

This constitutes the decision and order of the court.

Dated: December 20, 2019



Lucindo Suarez, J.S.C

LUCINDO SUAREZ, J.S.C.