

**Spa Castle Premier 57 Inc. v Natural Life
Entertainment LLC**

2021 NY Slip Op 30528(U)

February 25, 2021

Supreme Court, New York County

Docket Number: 154018/2019

Judge: Louis L. Nock

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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: HON. LOUIS L. NOCK **PART** **IAS MOTION 38EFM**

Justice

-----X

SPA CASTLE PREMIER 57 INC. and BOUTIQUE HOTEL
THE ONE, INC.,

Plaintiff,

- v -

NATURAL LIFE ENTERTAINMENT LLC and ANTONEE
JAMES,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion of plaintiffs Spa Castle Premier 57 Inc. and Boutique Hotel The One, Inc. (together, "Plaintiffs"), for entry of a default judgment is denied, and the motion of defendant Antonee James to dismiss the complaint is also denied. The motions are consolidated for decision in the following memorandum decision.

Background

Plaintiff Spa Castle Premier 57 Inc. ("Spa Castle") is a New York corporation that owns and operates a large spa and bath facility located in New York, New York. Plaintiff Boutique Hotel The One, Inc. ("One Hotel"), is a New York corporation that owns and operations a hotel located in Flushing, New York. Plaintiffs commenced this action to recover damages from defendants Natural Life Entertainment LLC ("Natural Life") and Antonee James ("James") for

allegedly promoting or hosting unauthorized events at their respective locations. James is the purported “owner and/or operator of Natural Life.” The complaint alleges that on March 7, 2019, customers visited Spa Castle to attend an event called “Envy Me Splash Party,” that was organized by defendants and not hosted or approved by Spa Castle (Complaint ¶¶ 6-7, NYSCEF Doc. No. 2). Tickets to the event were purportedly sold through the website eventbrite.com (*id.* ¶ 8). The complaint alleges “upon information and belief” that defendants posted an advertisement on eventbrite.com that “advertised tickets at certain prices to visitors in exchange for reserving their right to enter and participate in the event,” and that customers purchased such tickets and then attempted to enter Spa Castle in order to attend the event (*id.* ¶¶ 9-12). Plaintiffs further allege, upon information and belief, that defendants promoted several additional events at Spa Castle and One Hotel, citing to five different events between June 16, 2018 and March 30, 2019 (*id.* ¶¶ 15-16). Plaintiffs allege that these unauthorized events damaged the credibility and reputations of Spa Castle and One Hotel, and assert causes of action for defamation, unjust enrichment, unauthorized use of Plaintiffs’ names and trade names, and violation of New York Civil Rights Law §§ 50, 51 (*id.* ¶¶ 20-44).

Plaintiffs commenced this action on April 18, 2019, and now move for entry of a default judgment. Defendant James timely opposed the motion for default and also filed the instant motion to dismiss the action. In opposition to the motion for default, and in support of the motion to dismiss, James asserts that he had a business agreement with the general manager of One Hotel, non-party Kevin Le, to arrange the events in question, stating in sworn affidavits that “I have done business with one of the two listed businesses. And I was asked by a general manager of the business (The One Hotel) to market and promote the other business” (James Opp. Aff., NYSCEF Doc. No. 19). James further states that “I know that I was asked by Kevin Le to

host an event at Spa Castle[.] I tried to host and promote the event. But the event was canceled due to unforeseen circumstances. All monies was refunded to all guests” (*Id.*) James also submits an affidavit in support of the motion dismiss, which reiterates the statements made in his above-referenced affidavit in opposition to the plaintiff’s motion. In his affidavit in support of his motion to dismiss, James attests that “I have worked with this establishment. I had a successful event with one of their properties. The mange[r] Kevin Le asked me to market and promote another event at the property location named above” (James Aff. In Support, NYSCEF Doc. No. 21). James has also attached several photos to his affidavits, which he attests are screenshots of his text messages between himself and Kevin Le (NYCEF Doc. Nos. 18, 20). In the text messages, two parties appear to coordinate some details of events of the type at issue in this case (*see, id.*). In one message (bearing the date/time Jul 6, 2018, 10:53 PM) the party presenting as Kevin Le asks, “Do you want to do a pool party end of this month” (NYSCEF Doc. No. 20).

In response to the James affidavits, Plaintiffs submit an affidavit of Joshua W. Lee (NYSCEF Doc. No. 22), the Operating Director of Spa Castle and One Hotel. Lee attests that “[t]he individual Mr. James refers to as “Kevin Le” is a former bar manager at the “Oo” bar located on the 8th floor of [One Hotel]” (*id.* ¶ 4). Lee further states that “[u]pon investigation, the only event that was sanctioned by Mr. Kevin Le was on August 25, 2018. However, after learning that he was selling tickets on websites such as ‘Eventbrite,’ Mr. Le told Mr. James to stop because this was not approved” (*id.* ¶ 5). Lee continues, “[t]here is no record of any sanctioned events related to defendant nor any indication that payments were made to Premier or [One Hotel]” (*id.* ¶ 6). Lee also states that “[u]pon information and belief, Mr. Kevin Le and Mr. James had one conversation about his interest in potentially planning an event at [Spa Castle],

but this plan was never finalized (*id.* ¶ 7). Mr. James went ahead on his own and began selling tickets without approval (*id.*). His claims that he refunded the tickets for the event dating November 15th, 2018 cannot be verified” (*id.*). No affidavit of Kevin Le was offered to corroborate Lee’s statements.

Discussion

To satisfy their *prima facie* burden, a plaintiff that seeks entry of a default judgment for a defendant’s failure to answer must submit proof of service of the summons and complaint or summons with notice upon the defendant, proof of the facts constituting the claim, and proof of the defendant’s default (CPLR 3215). In support of their motion, Plaintiffs submit an affirmation of their counsel, Jonathan Y. Sue, to demonstrate proof of service of the summons and complaint upon defendants and proof of the default. With respect to service, Sue affirms that Plaintiffs commenced this action by filing a Summons with Notice on April 18, 2019 (Sue Affirmation in Support [included in NYSCEF Doc. No. 4] ¶ 3). Sue states that on April 22, 2019, he “forwarded an ‘acknowledgment of service’ form to defendants’ email address. Defendants responded with ‘I need the complaint’ So I can understand what this is about and I can proceed with my course of action” (*id.* ¶ 5). Plaintiffs then “prepared a Verified Complaint . . . on or about May 7, 2019 and served it on both defendants on May 9, 2019” (*id.* ¶ 6). The affidavit of service for the verified complaint indicates that a copy was sent, by U.S. Mail, to defendants to an address in Maplewood, New Jersey, noted on the affidavit of service as “[t]he designated addresses for the office of said parties” (Affidavit of Service, NYSCEF Doc. No. 12). As set forth in a second affidavit of service, on June 17, 2019, Plaintiffs served a copy of the summons and notice with notice of electronic filing upon James by leaving a copy with a person of suitable age and discretion, who identified himself as a co-tenant, at an address in Roselle, New Jersey,

identified as “Defendant’s dwelling house,” and by mailing a copy of same to James’ “last known residence/actual place of business” (NYSCEF Doc. No. 13). Plaintiffs represent that Natural Life could not be served “after proper and diligent effort was made on May 9, 2019” (NYSCEF Doc. No. 4 ¶ 8) and submit an affidavit of service to that effect (NYSCEF Doc. No. 14).

Based on the facts set forth in the Sue Affirmation and supporting documentation, Plaintiffs have failed to satisfy their *prima facie* burden for entry of a default judgment. At the outset, Plaintiffs concede that Natural Life was never served with the summons and notice or the complaint (*see* NYSCEF Doc. No. 4 ¶ 8 [“The service on Defendant Natural Life LLC was not able to be effectuated by a process server after proper and diligent effort was made on May 9, 2019”]). The court does not have jurisdiction over a defendant until service of process is completed, and therefore, CPLR 3215 does not permit entry of a default judgment on the basis of attempted service. As such, the plaintiffs’ motion for a default judgment is denied as to Natural Life.

On the other hand, it does appear that James was served with process, but he did not default in the action. Plaintiffs assert that James was served “more than 50 days” before it filed the motion for a default judgment, but it is unclear how Plaintiffs arrived at this conclusion. CPLR 312-a authorizes an alternative method of personal service on an individual whereby a plaintiff may mail, “by first class mail, postage prepaid,” a copy of the summons and notice together with two copies of a statement of service by mail and acknowledgment of receipt, in the form set forth in CPLR 312-a (d), with a return envelope, postage prepaid, addressed to the sender. If the defendant returns the acknowledgment of receipt by mail or delivery within 30 days from the date of receipt, service is complete on the date the signed acknowledgment of

receipt is mailed or delivered to the sender (CPLR 312-a [b]). Plaintiffs allege that they “forwarded an ‘acknowledgement of service’ form to defendants’ email address on April 22, 2019” (NYSCEF Doc. No. 4 ¶ 5). Plaintiffs have not submitted a copy of the form purportedly sent to the defendants, nor do Plaintiffs assert that either defendant returned the form. Moreover, service of a form of acknowledgment by email is not provided for by CPLR 312-a. Therefore, James was not served on April 22, 2019.

The affidavit of service for James states that Plaintiffs’ process server followed the proper procedures for substitute service by serving a copy of the summons with notice and notice of electronic filing on a person of suitable age and discretion at James’ dwelling place and then, within twenty days, mailing a copy of same to James’ last known address or place of business. An affidavit of service constitutes *prima facie* evidence of proper service (*Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591, 591 [1st Dept 2020], *appeal dismissed* ___ NY3d ___, 2021 WL 628708 [Feb. 18, 2021]). Plaintiffs have, therefore, sufficiently demonstrated that James was served with process. Nevertheless, pursuant to CPLR 320 (a), a defendant served with substitute service pursuant to CPLR 308 (2) shall appear in the action within 30 days after service is complete. Substitute service made pursuant to CPLR 308 (2) is deemed complete ten days after proof of service is filed with the clerk of the court. Here, Plaintiffs first filed a copy of the affidavit of service as an attachment to their motion, with the result that service of process was not complete until ten days after their motion for default was filed. James then timely appeared on August 30, 2019, by filing a pre-answer motion to dismiss and opposition to Plaintiffs’ motion. Therefore, Plaintiffs’ motion is denied as to James because he is not in default in appearing in this action.

In addition to failing to meet their *prima facie* burden for entry of a default judgment

against either defendant, the affidavits submitted by James raise material questions of fact that would preclude entry of a default judgment in any event, including whether non-party Kevin Le had the authority to bind the Plaintiffs and whether he authorized the events in question. The affidavit of Joshua Lee, submitted by Plaintiffs on reply (NYSCEF Doc. No. 22), does not rebut James' assertions of fact. On the contrary, Lee appears to confirm some of the details of James' narrative. More importantly, because no affidavit of Kevin Le is offered, Joshua Lee's attestations, made "upon information and belief," regarding communications between Kevin Le and James are inadmissible hearsay. But at the same time, the documents submitted by James in support of his motion to dismiss do not "utterly refute" Plaintiffs' factual allegations so as to conclusively establish a defense as a matter of law (*see Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [A motion to dismiss under CPLR 3211 (a)(1) "may be granted if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law"])). Therefore, the motion to dismiss is also denied.

Accordingly, it is

ORDERED that Plaintiffs' motion for a default judgment is denied; and it is further ORDERED that defendant Antonee James' motion to dismiss is denied; and it is further ORDERED that defendant Antonee James shall file an answer to the complaint no later than 60 days from the date of filing hereof; and it is further

ORDERED that a preliminary conference shall be held in this matter on May 19, 2021 at 11:00 a.m.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>2/25/2021</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE