

Advance Servs. Group LLC v Round Table Enters.
2021 NY Slip Op 32159(U)
November 5, 2021
Supreme Court, Kings County
Docket Number: Index No. 503261/2020
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 5th day of November, 2021.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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ADVANCE SERVICES GROUP LLC,

Plaintiff,

Index No. 503261/2020

-against-

DECISION AND ORDER

ROUND TABLE ENTERPRISES D/B/A
ESSENTIAL SEDONA, DURANGO and
ROY ARTHUR PIUBENI,

Defendants,

-----X

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	8-10
Answering Affidavit (Affirmation) _____	33, 36, 39
Reply Affidavit (Affirmation) _____	40
Supplemental Affidavit (Affirmation) _____	
Pleadings – Exhibits _____	11-23, 34-35, 37-38, 41
Stipulations – Minutes _____	
Filed Papers _____	

This action involves a breach of contract cause of action and breach of guaranty cause of action. A default judgment was entered against Defendants ROUND TABLE ENTERPRISES D/B/A ESSENTIAL SEDONA, DURANGO and ROY ARTHUR PIUBENI (“Defendants”) on March 20, 2020. Defendants now move to vacate the default judgment pursuant to CPLR 5015(a).

“A defendant seeking to vacate an order or judgment entered upon a default must demonstrate a reasonable excuse for the default *and* a potentially meritorious defense to the action” (*Mid-Hudson Properties v. Klein*, 167 AD3d 862, 864 [2d Dept 2018] [emphasis added]).

Defendants argue that the contractual mode of service of process was improper. However, Plaintiff served Defendants, both Merchant and Guarantor, with the Summons and Complaint pursuant to their contract. Plaintiff and Defendants entered into a Merchant Agreement on October 31, 2019. Pursuant to the Waiver of Personal Service addendum, Defendants, Merchant and Guarantor, “waives personal service of any summons, complaint, or other process, which may be made by any other means permitted by New York law”. Further, Defendants, Merchant and Guarantor, “agrees to accept service of any summons, complaint, or other process by electronic mail (“email”) at publisher@essentialmagazines.net or by United States Postal Service at 2073 W University Ave. Flagstaff, AZ 86001 or by any other means permitted by New York Law”.

Defendants claim that they were not served with the Summons and Complaint via email at publisher@essentialmagazines.net as attested to in the Affidavits of Service. However, Defendants do not make any specific allegations to contradict that service was effectuated via email as attested to in the Affidavits of Service.

Service by email is a manner of service expressly permitted in the Waiver of Personal Service addendum of the parties contract. “Parties can contractually agree to other methods of service beyond those set forth in the CPLR, and a contract provision designating a party's service agent is valid” (*GSO RE Onshore LLC v. Sapir*, 29 Misc 3d 1234(A) [Sup Ct, New York County 2010, Fried, J.]; see *National Equip. Rental, Ltd. v. Szukhent*, 375 US 311 [1964]).

“By definition, such waivers render inapplicable the statutes that normally direct and limit the acceptable means of serving process on a defendant” (*Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140 [1st Dept 2010]). “Indeed, a stipulation waiving service confers jurisdiction, precluding the defendant from successfully challenging the court's jurisdiction over him: ‘Jurisdiction over the person of the defendant may be acquired by his consent’, and jurisdiction is conferred by a stipulation waiving service” (*id.*, quoting *Gilbert v. Burnstine*, 255 NY 348, 355 [1931]).

Defendants have failed to demonstrate that service of the summons and complaint was improper.

However, Defendant Guarantor ROY ARTHUR PIUBENI, has shown a reasonable excuse for his default as the notice pursuant to CPLR § 3215(g)(3) was improper. CPLR 3215(g)(3)(i) imposes special requirements upon plaintiffs where the action involves three things: 1) an action based upon the non-payment of a contractual obligation, 2) by a defendant who is a natural person, and 3) the defendant has failed to appear in the action. Under that trifecta, the plaintiff is required to provide to the defendant an additional notice of the suit, beyond service of process (*see* CPLR § 3215). Here, the CPLR § 3215(g)(3) notice requirement only applies to Defendant Guarantor ROY ARTHUR PIUBENI as a natural person in this contract action in which he has failed to appear.

Plaintiff did not serve the CPLR § 3215(g)(3) notice on Defendant Guarantor ROY ARTHUR PIUBENI, a natural person, pursuant to the parties’ contract. As discussed *supra*, Defendants agreed “to accept service of any summons, complaint, or other process by electronic mail (“email”) at publisher@essentialmagazines.net or by United States Postal Service at 2073 W University Ave. Flagstaff, AZ 86001 or by any other means permitted by New York Law”. Plaintiff served the CPLR § 3215(g)(3) notice on Defendant

ROY ARTHUR PIUBENI by mailing it to 161 Oak LN, Glenwood Springs, CO, 81601, an address not covered in the parties' contract. Further, the notice to Defendant ROY ARTHUR PIUBENI at 161 Oak LN, Glenwood Springs, CO, 8160 was returned to sender.

Since Defendant Merchant ROUND TABLE ENTERPRISES D/B/A ESSENTIAL SEDONA, DURANGO failed to demonstrate a reasonable excuse for their default, it is unnecessary to determine whether they established a potentially meritorious defense (*see Wilmington Savings Fund Society, FSB v. Rodriguez*, 197 AD3d 784 [2d Dept 2021]).

However, Defendant Guarantor ROY ARTHUR PIUBENI has demonstrated a reasonable excuse for his default; he was never served with the CPLR § 3215(g)(3) notice as required in this action. Now it must be determined whether he has a potentially meritorious defense to the action.

Defendants argue that Plaintiff ADVANCE SERVICES GROUP LLC cannot maintain this action because it is not formed or registered to do business in New York. A New York State Department of State search shows that there are no business entities found for "Advance Services Group, LLC".

Plaintiff argues it is a New York business corporation in good standing, but due to a clerical error commenced the action in the name of "Advance Services Group LLC" rather than "Advance Service Group, LLC". A New York State Department of State search shows a business entity for Advance Service Group, LLC. Although Plaintiff asserted that "this clerical error will be cured with a stipulation amending the caption prior to the return date of this motion", no stipulation amending the caption was ever filed.

Further, the problem goes deeper than misnaming the Plaintiff in the complaint and the judgment. The contract submitted lists the funder as Advance Services Group

LLC, a non-existent entity. Thus, Plaintiff can not simply amend the complaint and judgment, but must reform the contract.

Therefore, Defendant Guarantor ROY ARTHUR PIUBENI has demonstrated a meritorious defense that Plaintiff does not have legal capacity to sue.

WHEREFORE it is hereby ORDERED that the motion to vacate the judgment of March 20, 2020 is denied as to Defendant ROUND TABLE ENTERPRISES D/B/A ESSENTIAL SEDONA, DURANGO; and it is further

ORDERED, that the judgment of March 20, 2020 is vacated as against Defendant ROY ARTHUR PIUBENI; and it is further

ORDERED, that the complaint is dismissed as against Defendant ROY ARTHUR PIUBENI.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.