

LVNV Funding, LLC v Smith
2022 NY Slip Op 33709(U)
October 6, 2022
Civil Court of the City of New York, Richmond County
Docket Number: Index No. CV-012323-11/RI
Judge: Matthew P. Blum
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF RICHMOND

-----X
LVNV FUNDING, LLC.

Index No. CV-012323-11/RI

Plaintiff,

-against-

JOANN SMITH

Defendant,

-----X

DECISION AND ORDER

**HON. MATTHEW P. BLUM
JUDGE CIVIL COURT**

Papers Numbered

Plaintiff’s Summons and Complaint with Affidavit of Service..... 1

Marshal’s Return of Execution..... 2

Defendant’s November 18, 2019 Order to Show Cause 3

Plaintiff’s January 8, 2020 Opposition to Order to Show Cause, Exhibits
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Defendant’s June 17, 2022 Order to Show Cause..... 6

Plaintiff’s July 7, 2022 Opposition to Defendant’s Order to Show Cause7

Upon the foregoing cited papers, the Decision/Order on the motions is as follows:

I: PROCEDURAL HISTORY

On June 30, 2011, LVNV Funding, LLC (hereinafter, Plaintiff) filed a summons and complaint against Joann Smith (hereinafter, Defendant) for breach of contract from a credit account in the amount of \$10,902.72 plus interest from May 31, 2009. Pursuant to the affidavit of service from process server, Anthony Yannucci, said summons and complaint were served personally on the Defendant on July 7, 2011 at 7:11 A.M. at 67 Warren Street, Apartment 1N, Staten Island, New York 10304. Furthermore, according to the sworn statement by Mel S. Harris, attorney for the Plaintiff, a copy of the summons and complaint were mailed via first class mail to that same address on July 14, 2011. On September 26, 2011, a default judgment was entered against Joann Smith for \$13,432.44. After income execution began, on June 12, 2013, a City Marshal's Return of Execution was filed acknowledging partial satisfaction of the judgment in the amount of \$6,235.01 and \$1,715.66 in interest.

On November 18, 2019, the Defendant filed an Order to Show Cause to vacate the default judgment. In the Defendant's Order to Show Cause, Defendant states that she was not properly served with a summons and complaint. She contends that her excusable default was based on the fact that she did not receive the court papers. Additionally, she maintains as her defenses that she never received the documents of the alleged debt against her, that this is a fraudulent debt that she does not owe, and the statute of limitations on the debt has passed. This Order to Show Cause was signed by the Honorable Lisa Grey.

The matter was adjourned to December 4, 2019 and then subsequently adjourned to January 8, 2020. On January 8, 2020, Plaintiff filed a motion in opposition to Defendant's Order to Show Cause. On that same date, the Honorable Joy F. Campanelli adjourned the matter to March 25, 2020 for Defendant's response to the motion by March 9, 2020. On March 5, 2020, Defendant filed a response to Plaintiff's motion opposing Defendant's Order to Show Cause. The subsequent Court dates (March 25, 2020 and May 20, 2020) were rescheduled and eventually were adjourned to April 6, 2022. The motions were not decided.

On April 6, 2022, the Defendant failed to appear and her motion was denied by the Honorable Brendan T. Lantry. On June 17, 2022, Defendant filed an Order to Show Cause to vacate a dismissal citing her failure to appear was due to her own illness and never having received notification of the new court date that was postponed previously. This Order to Show Cause was signed by Your Honor. On July 7, 2022, Plaintiff filed another opposition to Defendant's Order to Show Cause prior to the July 13, 2022 court appearance. The matter was adjourned to September 14, 2022 and the motions were taken on submission by the Court.

II: DISCUSSION

Defendant moves this Court to vacate a default judgment and a subsequent dismissal by default pursuant to two Orders to Show Cause filed respectively on November 18, 2019 and June 17, 2022. In the November 18, 2019 Order to Show Cause, Defendant argues an excusable default for failing to answer the summons and complaint as well as a defense pursuant to CPLR §5015(a)(1) in order to vacate a judgment based on lack of service and that the debt itself did not belong to her. That Order to Show Cause was denied by the Honorable Brendan T. Lantry for Defendant's failure to appear. In the June 17, 2022, Order to Show Cause, Defendant cites an

excusable default for failing to appear in court based on her own illness and never receiving the new court date. Defendant reiterates the same potential meritorious defense.

Plaintiff opposes both of Defendant's Orders to Show Cause. First in the January 8, 2020 opposition to Defendant's November 18, 2019 Order to Show Cause, Plaintiff argues that Defendant's potential meritorious defense is deficient. Plaintiff maintains that Defendant has not met her burden to show a potential meritorious defense because she waited over eight years from the time of her first wage garnishment to institute any proceeding against the default judgment and because she had not produced any documentary evidence in support of the defense. Plaintiff also argues that Defendant did not have a reasonable excuse for default based on the presumption of validity of a process server's affidavit of service of the summons and complaint. Plaintiff's July 7, 2022 opposition to Defendant's June 17, 2022 Order to Show Cause is almost identical to the January 8, 2020 motion. Notably, this opposition does not address Defendant's reason for failing to come to court on April 6, 2022.

II-A: CPLR §5015(a)(1)

On a motion to vacate a default pursuant to CPLR §5015(a)(1), the movant is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious defense to the action. Gray v. B.R. Trucking Co., 59 N.Y.2d 649, 650 (1983); Rekhtman v. Clarendon Holding Co., Inc., 165 A.D.3d 856, 857 (2d Dep't. 2018). It is within the sole discretion of the Court to determine the reasonableness of the excuse provided by the defaulting party. Torres v. DeJesus, 197 A.D.3d 1260, 1261 (2d. Dep't. 2021) quoting Harcztark v. Drive Variety, Inc., 21 A.D.3d 876, 876-877 (2d. Dep't. 2005); HSBC Bank USA, N.A. v. Izzo, 177 A.D.3d 648, 649 (2d. Dep't. 2019). In assessing the reasonableness of the excuse, Courts must weigh all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party,

whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits. Patel v. New York City Tr. Auth., 199 A.D.3d 925, 927 (2d. Dep't 2021); Nowakowski v. Broadway Stages, 179 A.D.3d 824, 825 (2d. Dep't 2020); Fried v. Jacob Holding, Inc., 110 A.D.3d 56, 60 (2d. Dep't 2013). Though less stringent than opposing a motion for summary judgment, the defaulting party must submit evidence in admissible form establishing both the reasonable excuse and potentially meritorious defense. Global Liberty Ins. Co. v. Shahid Mian, M.D., P.C., 172 A.D.3d 1332, 1333 (2d. Dep't 2019); OneWest Bank, FSB v. Singer, 153 A.D.3d 714, 716 (2d. Dep't 2017); King v. King, 99 A.D.3d 672, 673 (2d. Dep't 2012). Generally, defendants seeking to vacate the judgment based on excusable default must make their motion to vacate a default judgment within one year after service of a copy of the judgment. CPLR §5015(a)(1). However, courts are permitted to exercise discretion in extending that time period. Levine v. Berlin, 46 A.D.2d 902, 903 (2d. Dep't 1974).

II-B: DEFENDANT'S JUNE 17, 2022 ORDER TO SHOW CAUSE TO VACATE

THE DISMISSAL.

On April 6, 2022, Defendant's motion for her November 18, 2019 Order to Show Cause was dismissed based on her failure to appear. Subsequently, on June 17, 2022, Defendant filed another Order to Show Cause. This June 17, 2022 Order to Show Cause was filed by the Defendant for the purpose of vacating the dismissal by explaining why the Defendant failed to appear on that April 6, 2022 Court date.

In the June 17, 2022 Order to Show Cause to vacate the dismissal, Defendant explains why she failed to come to court on April 6, 2022. Essentially, Defendant claims that after the case was postponed multiple times due to the Covid-19 pandemic, she was never notified of the new court

date. Defendant argues that she had attempted contacting the Court numerous times to find out updated information to no avail. Furthermore, Defendant states that she no longer had the P.O. Box where mail had been sent previously. In addition, Defendant states that she was battling her own serious illness at the time and was physically unable to come to court. Defendant further maintains her potential meritorious defense that she was never served with the summons and complaint and that this debt is fraudulent and does not belong to her.

Plaintiff's opposition to the June 17, 2022 Order to Show Cause to vacate a dismissal is essentially identical to the opposition to the November 18, 2019 Order to Show Cause. Notably however, Plaintiff fails to address Defendant's argument for excusable default on the April 6, 2022 court date.

Given the uncertain nature of the Covid-19 pandemic and the profound impact it had on society, specifically, courts and the scheduling of cases, the Court finds that Defendant's excuse for failing to appear on April 6, 2022 is reasonable. It is not beyond the realm of reasonable possibility that human error would lead the Defendant to not receiving the new court date. Moreover, Defendant's health condition would also be a reasonable excuse for failing to appear.

Furthermore, with respect to Defendant's burden to show the existence of a potential meritorious defense, the Court finds that Defendant has satisfied this prong of the analysis as well. Defendant proffers the existence of the potential meritorious defense that the debt does not belong to her and that the statute of limitations has passed. Defendant does not submit any documentation that specifically addresses her defenses. Although Plaintiff argues that Defendant is required to submit admissible proof in support of the existence of a potential meritorious defense, the Court raises the question as to what would admissible proof be of a debt one claims they did not know about? What documentation would a defendant who is arguing that an unknown debt does not

belong to them provide to show proof that he or she did not have any contractual relationship with a Plaintiff? Should Defendants be expected to proactively engage every potential creditor and obtain documentation stating that they are not engaged in any contractual relationship just in case one day they become litigants in a consumer credit action? Clearly that is not reasonable nor feasible. The same can be said for the statute of limitations defense. What documentary evidence would the Defendant submit to show that the Plaintiff commenced this action after the statute of limitations ran? The distinction between the case at bar and the cases that Plaintiff cites in its motion is that in the cited cases, the defendants acknowledge the existence of a contractual relationship. Essentially those defendants knew of the plaintiffs because of their contractual relationship. Thus, there would be documentation to turn to. The Court does note that that the Plaintiff attaches to its motion a copy of the statement that allegedly belongs to the Defendant. However, the address on that statement is different than the address on Defendant's W-2. Thus, a review of the statement to dispose of this issue is not sufficient.

For these reasons, the Court hereby grants the Defendant's Order to Show Cause to vacate the dismissal from April 6, 2022.

**II-C: DEFENDANT’S NOVEMBER 18, 2019 ORDER TO SHOW CAUSE TO
VACATE THE DEFAULT JUDGMENT FOR FAILING TO ANSWER THE SUMMONS
AND COMPLAINT MUST BE HELD IN ABEYANCE PENDING A TRAVERSE
HEARING.**

As the Court has decided to vacate the dismissal from April 6, 2022, the Court now turns to the Order to Show Cause to vacate the default judgment for failing to answer the summons and complaint filed by the Defendant on November 18, 2019.

On November 18, 2019, Defendant filed an Order to Show Cause to vacate the default judgment issued against her based on her failure to answer the summons and complaint that were allegedly served on her in July 2011. Defendant argues that pursuant to CPLR §5015, she had an excusable reason for the default and a potential meritorious defense to the action. Defendant argues that she was never served with the summons and complaint in the action and did not receive the court papers. Looking at Defendant’s Order to Show Cause to vacate the dismissal, Defendant asserts that the first time she even was aware of the matter was through her wages being garnished. Defendant explains that the garnishment by the Plaintiff was not apparent because she had also taken out loans against her pension and believed the deductions from her paycheck to be attributable to those loans. In support of her argument that she was not properly served, Defendant asserts that the address listed in the Plaintiff’s affidavit of service, 67 Warren Street, Staten Island, New York, is an address that is unknown to her and was never an address that she maintained. Defendant includes tax returns and a W-2 from 2011, neither showing that address. In addition, she claims two defenses to the action. First, she claims that this debt does not belong to her and that the debt is fraudulent. Second, she asserts that the statute of limitations for the alleged debt has passed.

Plaintiff opposes Defendant's arguments. First, Plaintiff argues that Defendant's proposed meritorious defense is deficient and states that Defendant is required to produce documentary evidence to support her defense. Next, Plaintiff argues that Defendant failed to provide a reasonable excuse for failing to answer the summons and complaint because Defendant was allegedly served personally by a process server. Lastly, in Plaintiff's motion in opposition to the June 17, 2022 Order to Show Cause, Plaintiff adds another argument that the Defendant's motion for vacating the dismissal is untimely.

The burden of proving that personal jurisdiction was acquired over a defendant rests with a plaintiff. Absent sworn specific factual allegations to the contrary to refute it, a process server's affidavit of service constitutes rebuttable prima facie evidence of proper service. See: Federal Natl. Mtge. Assn. v. Castoldi, 187 A.D.3d 988, 989 (2d. Dep't 2020); Nationstar Mtge., LLC v. Einhorn, 185 A.D.3d 945, 946 (2d. Dep't 2020); HSBC Bank USA, N.A. v. Assouline, 177 A.D.3d 603, 604 (2d. Dep't 2019). An evidentiary traverse hearing to determine the validity of service of process is required when a defendant asserts specific and detailed facts to rebut the statements in the process server's affidavit. OneWest Bank FSB v. Perla, 200 A.D.3d 1052, 1055 (2d. Dep't 2021); HSBC Bank United States, N.A. v. Rahmanan, 194 A.D.3d 792 (2d. Dep't 2021); Wells Fargo Bank, N.A. v. Enitan, 200 A.D.3d 736, 738 (2d. Dep't 2021). When a defendant seeks to vacate a default judgment by raising a jurisdictional objection, the court is required to resolve the jurisdictional question before determining whether to vacate the default judgment. Canelas v. Flores, 112 A.D.3d 871 (2d. Dep't 2013); Emigrant Mtge.Co.v. Westervelt, 105 A.D.3d 896,897 (2d. Dep't 2013); Roberts v. Anka, 45 A.D.3d 752, 753 (2d. Dep't 2007).

Plaintiff contends that proper service was effectuated through proof of an affidavit of service that the summons and complaint as well as subsequent notices were served. Despite the presumption of validity of the Plaintiff's affidavit of service, Defendant has provided specific and detailed facts in support of her position that she did not reside at the location at the time of the service. Plaintiff's motion, including official documentation of her address, is specific enough to satisfy the Court and overcome the presumption of validity, thus effectuating the need for a traverse hearing to resolve the jurisdictional issue. Defendant's argument, though succinct, is specific and detailed. Her claim is that she does not have any affiliation with the address where process was served. An affidavit of service claiming that the Defendant was personally served at that location is in stark contrast to that argument. Therein lies an issue of fact that must be resolved. As the burden is on the Plaintiff to prove proper service, the issue of fact raised by the Defendant requires an evidentiary traverse hearing to be held to determine the validity of the service of process. The Court is unable to further conduct any analysis into the reasonable excuse or potential meritorious defense prior to the adjudication of the jurisdictional issue to be resolved at the traverse hearing.

Accordingly, Defendant's November 18, 2019 Order to Show Cause to vacate the default judgment is to be held in abeyance pending the determination of a traverse hearing.

III: TIMELINESS OF THE MOTION

The Court does not agree with Plaintiff's argument that Defendant's motion to vacate the default judgment is untimely. While it may have been several years after imposition of the judgment and the commencement of the wage garnishment, Defendant's argument of a change of address and the confusion regarding other loans potentially refutes the knowledge requirement. Accordingly, drawing on the strong favor of public policy on deciding the action on the merits, the Court is exercising its discretion in permitting the motion after the one year time limit.

Accordingly, it is hereby

ORDERED, that Defendant's June 17, 2022 Order to Show Cause to vacate the dismissal be granted.

ORDERED, that all Judgments, liens, income executions, and restraining notices be stayed immediately.

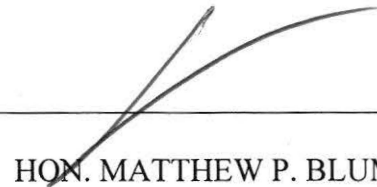
ORDERED, that Defendant's November 18, 2019 Order to Show Cause to vacate the default judgment be held in abeyance pending the determination of a traverse hearing, and it is further

ORDERED, that the parties are to appear and produce evidence for a traverse hearing on December 13, 2022 at 11:30 A.M. in Part 11C.

This foregoing constitutes the Decision and Order of the Court.

Dated: Staten Island, New York

October 6, 2022



HON. MATTHEW P. BLUM, J.C.C.

ASN by FP on 10/06/2022

**Hon. Matthew P. Blum
Judge, Civil Court**