

<b>Blackbaud, Inc. v Long Life Info. &amp; Referral Network, Inc.</b>
2023 NY Slip Op 33258(U)
September 19, 2023
Supreme Court, Kings County
Docket Number: Index No. 509578/2023
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of September 2023

HONORABLE FRANCOIS A. RIVERA

-----X

BLACKBAUD, INC.,

Plaintiff,

- against -

LONG LIFE INFORMATION AND REFERRAL NETWORK, INC.

Defendant.

-----X

Recitation in accordance with CPLR 2219 for the papers considered on the order to show cause, under motion sequence number one, filed on July 31, 2023, by defendant Long Life Information and Referral Network, Inc. (hereinafter the defendant) for an order: (1) dismissing the complaint of Blackbaud, Inc (hereinafter the plaintiff) or in the alternative, (2) vacating the default judgment entered in the instant matter for lack of proper notice and service; and (3) restraining any execution of judgment pending the full and final adjudication of this matter. This application is opposed by the plaintiff.

- Order to Show Cause
- Affirmation in Support
- Affidavit in Support
  - Exhibits A-D
- Affidavit of Service
- Affirmation in Opposition
  - Exhibit A
- Affirmation of Service

**BACKGROUND**

On March 29, 2023, the plaintiff commenced the instant action for breach of an agreement by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk’s office. The complaint was verified by the plaintiff’s counsel pursuant to CPLR 3020(d)(3) and alleged the following four allegations of fact:

1. "Plaintiff is a [c]orporation."
2. "That the defendant(s) resides in the county in which this action is brought; or that the defendant(s) transacted business within the county in which this action is brought in person or through his agent and that the instant cause of action arose out of said transaction."
3. "That defendant(s) on or about 12/12/2019 entered into an agreement Goods sold delivered, and, work labor services, and, rental in the agreed and specific amount of \$21796.75."
4. "Upon information and belief, defendant(s) defaulted under the terms of the agreement by failing to make the payments after plaintiff fully performed & there is due a balance in the specific sum of \$21796.75."

On July 3, 2023, the plaintiff obtained a Kings County Court Clerk's Judgment (hereinafter the Clerk Judgment) in the amount of \$29,049.02. The papers submitted to the Kings County Clerk's office in support of the Clerk Judgment the included the pleadings, an affidavit of service of the pleading on the defendant through service upon the New York State Secretary of State; and an affidavit of additional mailing of the pleadings to the defendant by first class mail.

#### LAW AND APPLICATION

The defendant seeks dismissal of the verified complaint or, in the alternative, vacating the default judgment for lack of proper notice; and restraining any execution of judgment pending the full and final adjudication of the matter. The defendant's evidentiary submission does not support dismissal of the instant action. At best it raises questions of fact. The motion to vacate the default judgment, however, has merit, but not based on improper service of the commencement papers.

CPLR 3215(a) and (f) provides in pertinent as follows:

(a) Default and entry. When a defendant has failed to appear, plead, or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest.

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due, including, if applicable, a statement that the interest rate for consumer debt pursuant to section five thousand four of this chapter applies, by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. In an action arising out of a consumer credit transaction, if the plaintiff is not the original creditor, the applicant shall include: (1) an affidavit by the original creditor of the facts constituting the debt, the default in payment, the sale or assignment of the debt, and the amount due at the time of sale or assignment; (2) for each subsequent assignment or sale of the debt to another entity, an affidavit of sale of the debt by the debt seller, completed by the seller or assignor; and (3) an affidavit of a witness of the plaintiff, which includes a chain of title of the debt, completed by the plaintiff or plaintiff's witness. The chief administrative judge shall issue form affidavits to satisfy the requirements of this subdivision for consumer credit transactions. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the defendant, describe the property, and state its value. Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear (*Deutsche Bank Nat'l Tr. Co. v Amoah*, 188 AD3d 647, 648 [2d Dept 2020]; CPLR 3215[f]). Where, as here, a complaint is not verified by the party, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party (*id*).

The complaint was verified by the plaintiff's counsel pursuant to CPLR 3020(d)(3). The verification by counsel does not demonstrate the counsel's personal knowledge of the

transactions alleged in the complaint. The papers submitted to the Kings County Clerk's office in support of Clerk Judgment did not include an affidavit by the plaintiff setting forth a viable claim. Consequently, plaintiff did not comply with the proof required to be submitted pursuant to CPLR 3215(f). Accordingly, the Clerk Judgment was improperly obtained and is vacated.

Under this circumstance, it was unnecessary to determine whether the defendant had been properly served with the summons and complaint to vacate the default judgment. Inasmuch as the default judgment is vacated, all collection activity pursued pursuant to the Clerk Judgment must cease and any recovery obtained pursuant to the judgment must be returned.

The defendant contends that it was not properly served with the summons and complaint. It also contends that the default should be vacated pursuant to CPLR 317. To determine whether the defendant has defaulted in answering the verified complaint the Court must first determine whether it has personal jurisdiction over the defendant and then, if it does, whether the defendant may be relieved of its default.

The affidavit of service of plaintiff's process server demonstrates proper service upon the corporate defendant on April 5, 2023, via the New York State Secretary of State pursuant to Business Corporation Law § 306. A defaulting defendant that is served with a summons other than by personal delivery may be permitted to defend the action upon a finding that the defendant did not personally receive notice of the summons in time to defend and has a meritorious defense. (*Schirmer v Piazza*, 214 AD3d 749 [2d Dept 2023], citing CPLR 317). Service on a corporation through delivery of process to the Secretary of State is not personal delivery to the corporation (*id.*). A defendant moving to vacate a default for insufficient service of process need not establish a reasonable excuse for the delay in answering or appearing (*id.*).

Although the general rule is that to vacate a default, a party must demonstrate a reasonable excuse for the default and a potentially meritorious defense (*see* CPLR 5015 [a] [1]), the sufficiency of an excuse is not as significant where the default is only a short period (*P&H Painting, Inc. v Flintlock Constr. Servs., LLC*, 179 AD3d 1086 [2d Dept 2020])

Here, the clerk judgment was improperly obtained and has been vacated. Moreover, the sixteen-week delay between when the defendant's time to answer expired and when the defendant moved to vacate the default judgment was based in part on the defendant not being served by personal delivery. The delay was not extensive, and the plaintiff does not allege that the defendant's default was intentional or part of a pattern of neglect (*id.*). Moreover, considering the lack of prejudice to the plaintiff resulting from the defendant's relatively short delay in appearing, the existence of a potentially meritorious defense, and the strong public policy favoring resolution of cases on the merits, the Court also grants the defendant's motion to vacate its default pursuant to CPLR § 317. Accordingly, the defendant is directed to interpose an answer to the verified complaint within thirty days of notice of entry of the instant decision and order.

## CONCLUSION

The branch of the order to show cause by defendant Long Life Information and Referral Network, Inc. for an order dismissing the verified complaint of Blackbaud, Inc. is denied.

The branch of the order to show cause by defendant Long Life Information and Referral Network, Inc. for an order vacating the default judgment entered in the instant matter is granted. Long Life Information and Referral Network, Inc. is directed to interpose an answer to the verified complaint within thirty days of notice of entry of the instant decision and order.

The branch of the order to show cause by defendant Long Life Information and Referral Network, Inc. for an order restraining any execution of judgment pending the full and final adjudication of this matter is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.