

Marcello v MK Cuisine Global LLC
2025 NY Slip Op 33048(U)
August 6, 2025
Supreme Court, New York County
Docket Number: Index No. 654805/2022
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M-----X
FRANCESCO MARCELLO,

Plaintiff,

- v -

MK CUISINE GLOBAL LLC, MATTHEW KENNEY,
LAZZARI LA, LLC, MKCCPB LLC,

Defendants.

INDEX NO. 654805/2022MOTION DATE 06/17/2025MOTION SEQ. NO. 003**DECISION + ORDER ON
MOTION**-----X
HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 6, 9, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to VACATE DEFAULT.

Defendant Matthew Kenney (“Defendant”), appearing pro se, moves pursuant to CPLR 5015(a)(1) and (4) for an order vacating the decision directing that a default judgment be entered against him (NYSCEF 18). Upon the foregoing documents and for the reasons stated below, Defendant’s motion is **DENIED**.

“When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4) and also seeks a discretionary vacatur pursuant to CPLR 5015(a)(1), a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of default under CPLR 5015(a)(1)” (*Ross v Sunrise Home Improvement*, 186 AD3d 633, 634 [2d Dept 2020], quoting *Wells Fargo Bank, N.A. v Besemer*, 131 AD3d 1047, 1047 [2d Dept 2015]).

“To be entitled to vacatur of a default judgment and dismissal of a complaint under CPLR 5015(a)(4), a defendant must overcome the presumption [of proper service] raised by the process server's affidavit of service” (*Machovec v Svoboda*, 120 AD3d 772, 773 [2014]; see

HSBC Bank USA, N.A. v Whitter, 159 AD3d 942, 945 [2d Dept 2018]). “Bare and unsubstantiated denials are insufficient to rebut the presumption of service” (*HSBC Bank USA, N.A. v Archibong*, 157 AD3d 662, 662-663 [2018] [internal quotations omitted]).

Defendant claims he was never served in this action and that “[t]here is no affidavit of service proving otherwise” (NYSCEF 59 [Defendant’s Memorandum of Law] at 1). That is not the case: the process server’s affidavit notes that the summons and complaint in this action were delivered to a person of suitable age and discretion at Defendant’s place of business (also believed to be his residence) and mailed to Defendant at the same address in accordance with the requirements of CPLR 308(2) on February 21, 2023 and March 6, 2023, respectively (NYSCEF 6).

Defendant does not deny that the address listed in the affidavit is his place of business/residence. Indeed, Defendant’s counsel in another action (Index. No. 656284/2020), affirmed that service of counsel’s motion to withdraw was made on Matthew Kenney at the same address (NYSCEF 67). While Defendant avers that there was an employee of Defendant MK Cuisine Global, LLC who would have been motivated to conceal documents related to this case, that is not the same employee to whom the process server delivered the summons and complaint (NYSCEF 76 [Reply Affirmation] ¶ 4). Defendant’s speculation as to what *might* have happened to the multiple copies of the summons and complaint delivered to that address fails to rebut the presumption of proper service created by the affidavit of service (*see US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743 [2d Dept 2011] [“where the defendant fails to swear to *specific facts* rebutting the statements in the process server’s affidavit[,]” a traverse hearing is not required] [emphasis added]). Defendant’s motion under CPLR 5015(a)(4) thus fails.

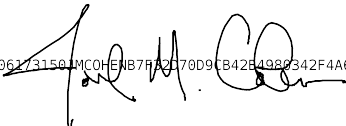
To vacate a default pursuant to CPLR 5015(a)(1), Defendant must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense (*Mut. Mar. Off., Inc. v Joy Const. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). Where a movant's only excuse for default under CPLR 5015(a)(1) is lack of service, as is the case here, and the movant does not prevail on the same theory under CPLR 5015(a)(4), courts find that there is no reasonable excuse for default (*see U.S. Bank, N.A. v Rauff*, 205 AD3d 963, 965-66 [2d Dept 2022]).

Nor has Defendant demonstrated a meritorious defense. Defendant's proposed answer simply denies the entire complaint and asserts boilerplate defenses lacking any factual allegations to support them (NYSCEF 60). Defendant's affidavits in support of this motion fare no better: "Plaintiff's claims are without basis. My company performed its obligations under the relevant agreement, and Plaintiff Marcello received substantial payments and benefits. If any breaches occurred, they were not caused by me" (NYSCEF 58 [Kenny Aff.] ¶ 6). These conclusory statements are insufficient to warrant vacating a default judgment (*see Matter of Giovanni Maurice D.*, 99 AD3d 631, 631-632 [1st Dept 2012] [affirming denial motion to vacate where the movant's "affidavit supporting vacatur of the default provides only generalized conclusory statements that are insufficient to establish a meritorious defense"]; *East N.Y. Sav. Bank v Sun Beam Enters.*, 234 AD2d 131, 132 [1st Dept 1996] ["conclusory denials [of allegations in the complaint] are insufficient to show a meritorious defense"]). Moreover, even if this statement were sufficient to establish a meritorious defense to Plaintiff's breach of contract claims (which it is not), it does not speak at all to Plaintiff's claims against Defendant for a declaratory judgment, breach of fiduciary duty, and aiding/abetting breach of fiduciary duty.

Accordingly, it is

ORDERED that Defendant's motion is **DENIED**.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

8/6/2025

DATE

CHECK ONE:

X

CASE DISPOSED

GRANTED

X

DENIED

SETTLE ORDER

APPLICATION:

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

--

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

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REFERENCE