Asset Acceptance LLC v. Scott

2007 | Cited 0 times | New Jersey Superior Court | October 30, 2007

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted: October 9, 2007

Before Judges C.S. Fisher and C.L. Miniman.

Defendant Norman L. Scott appeals from the denial of his motion to vacate a judgment by default and from the entry of an order for wage execution. He contends that he was not properly served and asserts as a defense that the statute of limitations bars this action. We reverse.

Plaintiff Asset Acceptance LLC filed a Special Civil Part complaint on July 15, 2005, seeking a $7676.37 judgment against defendant. Plaintiff's attorney signed a Statement of Case alleging that plaintiff was the assignee of "WFNNB/Micro Furniture" to which defendant owed the principal sum of $3578.38 plus $4097.99 as interest on principal "for the use and retention of a credit card."

Attached to the Statement of Case was an affidavit of Flora Stewart who certified that she was familiar with the records of plaintiff,[1] that plaintiff was the owner of a claim against defendant on Account Number 005856370021279618 from WFNNB/Micro Furniture and that the total sum due was $7676.37. She further stated "that the business records of this account received at the time of purchase have been reviewed and the information contained herein was obtained from said business records." She did not indicate who reviewed the records nor did she aver that the account was a credit card.

Also attached to the Statement of Case was a Statement of Account that indicated that the date of the last payment was January 30, 2000, and the date of charge off was April 25, 2000. It further indicates that plaintiff acquired the account on July 13, 2002, from "World Financial/WFNNB/Micro Furniture."

The summons was addressed to "Norman L Scott, 211 Keats Ct, Sicklerville NJ 08081-1112" and was sent by certified and regular mail. The certified mail was returned on July 27, 2005, as unclaimed. The record does not indicate if the regular mail was returned or not. When no answer was filed, Angela Harkness, an employee of plaintiff as a records custodian, signed a certification of proof and nonmilitary service on September 6, 2005. She averred that "[t]he goods [or] services for which said charges were made, were sold, delivered to and accepted by the Defendant at the special instance and request of Defendant." She further averred that the charges were fair and reasonable and in accordance with the agreement. She certified to the amounts due consistently with the Statement of

Account. The certification was filed on September 12, 2005.

There is no further evidence or pleadings in the record on appeal and we glean the following additional facts from the written opinion of the Special Civil Part judge denying defendant's motion to vacate the judgment by default, which was apparently triggered by an application for a wage execution. The opinion was addressed to defendant at 211 Keats Drive, not Keats Court. The judge found that the judgment was entered against defendant on October 4, 2005. Defendant's motion was heard on January 4, 2006. The judge addressed two issues in his opinion, failure of service and the statute of limitations.

The defendant apparently certified that he had not received the summons and complaint. The court resolved this issue as follows:

The Court record shows that the defendant was served on July 28, 2005, at 211 Keats Court, Sicklerville, New Jersey. It's difficult for me to believe that the defendant wasn't served, because he filed this Motion from the same address at 211 Keats Drive. The record shows that he was properly served . . . .

As to the statute of limitations defense, the judge determined that "[p]laintiff is the assignee of a debt owed to the credit card company known as World Financial Network National Bank." The judge rejected defendant's argument that N.J.S.A. 12A:2-725(1) governed the time in which suit may be brought. That section of the Uniform Commercial Code (UCC) establishes a four-year statute of limitations. The judge explained that UCC § 2-725 applied only to the sale of goods. He found that UCC § 2-102, N.J.S.A. 12A:2-102, made it clear that UCC § 2-725 did not apply "to any transaction which, although in the form of an unconditional contract to sell . . ., is intended to operate only as a security transaction." He concluded that the proper statute of limitations was the six-year period prescribed by N.J.S.A. 2A:14-1. Concluding that there was no defense to the action and finding that defendant had been properly served, the judge denied the motion to vacate and ordered the wage execution. This appeal followed.

Pursuant to R. 6:2-3(d)(1) the clerk of court effects service by mailing the summons and complaint by certified and regular mail. If the certified mail is returned as unclaimed or refused, then the regular mail service constitutes effective service. R. 6:2-3(d)(4). However, that is no more than a rebuttable presumption that service was made.

"A presumption . . . is no substitute for affirmative proofs." State v. Cuccio, 350 N.J. Super. 248, 257 (App. Div.), certif. denied, 174 N.J. 43 (2002). "The function of a presumption is to allocate the burden of producing evidence; it should not be used as a surrogate for substantive evidence or as a substitute for satisfying the burden of proof assigned by law." Id. at 257 (internal citations omitted). Thus, "a valid presumption can be used to establish a prima facie case, but the presumption normally disappears in the face of conflicting evidence." Biunno, Current N.J.

Rules of Evidence, comment on N.J.R.E. 301 (2003) (quoting the 1991 Supreme Court Committee Comment). [Jameson v. Great Atlantic and Pacific Tea Co., 363 N.J. Super. 419, 427 (App. Div. 2003), certif. denied, 179 N.J. 309 (2004).]

Where the defendant has advanced some proof tending to rebut the presumption of effective service, the burden shifts to the plaintiff to establish that service was actually made. Id. at 428-29. Here, defendant asserted that he did not receive the summons and complaint and there was a discrepancy between the two addresses. Before determining that service was effective, the judge needed to do more that just express his disbelief that service was not made. Even properly addressed mail can be lost. Here, the record indicates that defendant lived on 211 Keats Drive and the summons and complaint were mailed to 211 Keats Court. In light of this uncertainty, the judge should have listened to testimony from the parties, considered any evidence they wished to submit, determine credibility and find the facts before concluding that service was effective.

Even if service was properly effected, the judge should have viewed this application to set aside the judgment by default "with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Const. Co., 84 N.J. Super. 313, 319 (App. Div.), aff'd, 43 N.J. 508 (1964). That principle is as viable today as it was in 1964. Regional Const. Corp. v. Ray, 364 N.J. Super. 534, 540-41 (App. Div. 2003). Of course, a failure to answer must be excusable under R. 4:50-1(a) and the defendant must have a meritorious defense to either liability or damages. Marder, supra, 84 N.J. Super. at 319. We cannot determine on the record before us whether service was properly made, and if so, whether the neglect of the defendant in failing to answer was nevertheless excusable. It was certainly short-lived because only two months elapsed between entry of default and the return date of the motion to vacate default judgment.

As to a meritorious defense, there is not a sufficient evidential record to support the judge's conclusion that there was no meritorious statute of limitations defense. This is so because there was no competent evidence before the judge establishing that the underlying transaction was a credit card debt.[2] The attorney for plaintiff in his Statement of Case said that it was a credit card debt, but the statement was not sworn and the attorney patently has no personal knowledge of the transaction between defendant and WFNNB/Micro Furniture. It is entirely possible that the underlying transaction was a purchase of furniture under an installment sale contract that was assigned by Micro Furniture to WFNNB. If so, the four-year statute of limitations found in N.J.S.A. 12A:2-725 may very well apply, in which event the complaint would be time barred. Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198, 200 (App. Div. 2002) (four year statute of limitations for breach of contract for sale of goods). This can only be determined on a full record, including inspection of the original documents giving rise to the debt.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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1. Ms. Stewart did not indicate whether she was a manager, employee or officer of plaintiff, nor did she certify that she was the custodian of plaintiff's records regarding this account. She did not state that she had personal knowledge of the facts to which she averred.

2. We note that the account number appears to have more digits than Mastercard, Visa and American Express credit card accounts.