

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 28, 2021

530241

ROBERT R. GREENE,
Appellant,

v

MEMORANDUM AND ORDER

PEOPLE'S NEIGHBORHOOD BANK,
PEOPLE'S SECURITY BANK &
TRUST COMPANY,
Respondent.

Calendar Date: January 11, 2021

Before: Lynch, J.P., Clark, Mulvey, Pritzker and Colangelo, JJ.

John D. Cadore, Binghamton, for appellant.

Cipriani & Werner, PC, Scranton, Pennsylvania (Myles R. Wren of counsel), for respondent.

Lynch, J.P.

Appeal from an order of the Supreme Court (Lebous, J.), entered July 30, 2019 in Broome County, which granted defendant's motion for summary judgment dismissing the complaint.

In July 2017, a judgment creditor served upon People's Neighborhood Bank (hereinafter People's Bank) a restraining notice entered by Binghamton City Court directing it to hold \$11,542.22 from plaintiff's bank account pursuant to CPLR 5222 (b). People's Bank removed the hold on the funds in October

2018 following receipt of an order vacating the judgment that had led to the issuance of the restraining notice.

On November 7, 2018, plaintiff commenced this action for tortious conversion of said funds, asserting over 400 causes of action and naming People's Bank in the caption. Plaintiff purported to serve the summons and complaint upon People's Bank that same day by delivering a copy thereof to an unspecified person at a branch in the City of Binghamton, Broome County. However, the affidavit of service in the record lists a "notice of motion and affidavit in support" as the documents that were served.

On November 28, 2018, People's Bank moved to dismiss the complaint pursuant to CPLR 2311 (a) (8) and 302 (a), arguing, among other things, that plaintiff had named a nonexistent entity insofar as People's Bank had merged with "Penn Security Bank" in 2013 to form "People's Security Bank & Trust Company." Accordingly, People's Bank contended that Supreme Court lacked personal jurisdiction over it. Plaintiff cross-moved for a default judgment on the ground that People's Bank had failed to appear within 20 days of receiving the summons and complaint. People's Bank opposed the cross motion, arguing that a default judgment was unavailable because plaintiff failed to establish proper service upon it and named a nonexistent entity.

Following a hearing on the motion and cross motion, Supreme Court received a letter from an attorney for "People's Security Bank and Trust Company" stating that he would accept service of a supplemental summons and an amended complaint with the proper entity named as the defendant in order to avoid a traverse hearing. Accordingly, in January 2019, Supreme Court denied the motion and cross motion, directing plaintiff to file and serve a supplemental summons and amended complaint with the proper entity named in the caption (hereinafter the January 2019 order). On January 18, 2019, prior to the issuance of Supreme Court's January 2019 order, plaintiff filed a supplemental summons and amended complaint listing "People's Neighborhood Bank, People's Security Bank & Trust Company" as defendant. Plaintiff served those documents the same day by delivering a

copy to a customer service representative at defendant's branch in Binghamton.

In March 2019, plaintiff again moved for a default judgment against defendant claiming that it had failed to timely answer the amended complaint. Defendant subsequently answered the amended complaint and moved for summary judgment dismissing it. A hearing on the motions ensued, at which defendant argued that plaintiff's motion for a default judgment should be denied because defendant was under the impression that the amended complaint would be served upon its attorney directly insofar as it had previously appeared in the action as a represented party (see CPLR 2103 [b]). Defendant also argued that it could not be held liable for conversion because it lawfully placed a hold on plaintiff's funds pursuant to a duly executed restraining notice (see CPLR 5222). In July 2019, Supreme Court granted defendant's motion for summary judgment and dismissed the amended complaint, with prejudice, finding that plaintiff had "no damage claim against the bank under [CPLR 5222-a] or under the common law." Plaintiff appeals.

We affirm. Initially, contrary to defendant's contention, plaintiff's challenge to the January 2019 interim order denying his motion for a default judgment on the original complaint is properly before us on his appeal from the July 2019 final order (see CPLR 5501 [a] [1]). Nevertheless, Supreme Court did not abuse its discretion in denying plaintiff's request for a default judgment on the original complaint, as not only was plaintiff's November 2018 affidavit of service manifestly deficient to establish proof of service of the correct documents (see CPLR 3215 [f]; Levi v Oberlander, 144 AD2d 546, 547 [1988]), but the complaint named and was purportedly served upon a nonexistent entity (see Curry v New York City Tr. Auth., 30 AD3d 299, 299 [2006]; see generally Maldonado v Maryland Rail Commuter Serv. Admin., 91 NY2d 467, 472 [1998]; Ross v Lan Chile Airlines, 14 AD3d 602, 603 [2005]). Nor did Supreme Court abuse its discretion in denying plaintiff's motion for a default judgment pertaining to the amended complaint, as plaintiff did not establish any prejudice resulting from defendant's delay (see Meyer v Rose, 160 AD2d 565, 565 [1990]), and defendant

demonstrated both a reasonable excuse and a potentially meritorious defense (see Fried v Jacob Holding, Inc., 110 AD3d 56, 60-61 [2013]).

Finally, Supreme Court did not err in granting summary judgment to defendant dismissing the amended complaint. Defendant established that it held the funds in plaintiff's account pursuant to a duly executed restraining notice (see CPLR 5222 [b]) and released those funds immediately upon being notified that an order had been entered extinguishing the restraining notice. Even if some of those funds should not have been restrained due to their status as statutorily exempt workers' compensation funds (see CPLR 5222 [h]; 5205 [2]), no plenary action for common-law conversion lies. Rather, any claim for relief should have been brought by way of a summary proceeding commenced under CPLR article 52 (see Cruz v TD Bank, N.A., 22 NY3d 61, 65 [2013]).

Clark, Mulvey, Pritzker and Colangelo, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court