

Perez v Batiz

2024 NY Slip Op 31062(U)

March 29, 2024

Supreme Court, New York County

Docket Number: Index No. 651888/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. DEBRA A. JAMES</u> <i>Justice</i> -----X</p> <p>ANGEL PEREZ and B & A RESTORATION CONTRACTORS INC.,</p> <p align="center">Plaintiffs,</p>	<p>PART 59</p> <p>INDEX NO. <u>651888/2018</u></p> <p>MOTION DATE <u>04/21/2023</u></p> <p>MOTION SEQ. NO. <u>004 005</u></p>
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- v -

EDWIN BATIZ, BAR 13, INC., and ZOE REALTY CORP.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 94, 97, 99, 100, 101
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 98, 102, 103, 104, 105, 106, 107, 108
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant Bar 13, Inc., pursuant to CPLR §§ 5015(a) and 317, to vacate the default judgment against it (motion sequence number 004) is DENIED; and it is further

ORDERED that the motion of defendant Zoe Realty Corp pursuant to CPLR § 5015 to vacate the default judgment against it is GRANTED, and the judgment filed on January 25, 2022, as against defendant Zoe Realty Corp. only is hereby vacated; and it is further

ORDERED that, within twenty (20) days of the date hereof, plaintiffs shall file an amended judgment removing defendant Zoe Realty Corp, nunc pro tunc, in accordance with the foregoing; and it is further

ORDERED that the action against defendant Zoe Realty Corp is severed, restored to the calendar, and shall continue; and it is further

ORDERED that, within thirty (30) days of the date hereof, defendant Zoe Realty Corp shall serve and file an answer to the complaint or otherwise move; and it is further;

ORDERED that counsel for plaintiffs and for defendant Zoe Realty Corp are directed to post on NYSCEF a proposed preliminary discovery conference order or competing proposed preliminary discovery conference order(s) at least two days before May 2, 2024, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

Affiant Thomas Sullivan alleges that he is the "sole proprietor of [defendant} Bar 13 Inc", but such characterization of his ownership is incorrect, as a matter of law, given that Bar 13, Inc. is a corporate entity and not a sole proprietorship. In addition, neither he nor defendant Batiz deny that at all pertinent times, defendant Batiz was a principal (specifically, president) of corporate defendant Bar

!3, Inc. Sullivan does not contest the affidavit, wherein under oath on August 16, 2019, defendant Batiz stated that he is the president of defendant Bar 13 Inc, which affidavit was submitted in support of a motion to stay issuance of a warrant in a landlord and tenant non-payment summary proceeding, entitled Zoe Realty Corp v Bar 13 Inc, NYC Civil Court Index No 078035/2018 (NYSCEF Document Number 101).

Furthermore, defendant Batiz does not deny that, in the herein action, he retained counsel, who appeared at the remote oral argument and challenged the motion of plaintiffs for a default judgment against him on September 24, 2019. As such principal's knowledge of the judgment is imputed to defendant Bar 13, Inc., such defendant corporation is unable to demonstrate that it did not have knowledge of entry of the judgment on September 24, 2019. Therefore, defendant Bar 13, Inc is not entitled to relief from such judgment pursuant to CPLR § 317. This court likewise agrees with plaintiffs that defendant Bar 13 Inc has, thereby, failed to assert a reasonable excuse for its default or a meritorious defense, and therefore relief pursuant to CPLR 5015(a)(3) is also unwarranted.

However, defendant Zoe Realty Corp. has established entitlement to relief from the default judgment against it pursuant to CPLR § 317. See Eugene Di Lorenzo, Inc v AC Dutton Co Inc, 67 NY2d 138 (1986). Corporate defendant Zoe Realty Corp

was served via the Secretary of State and not personally. As its principal Hyam Tsadok states under oath that he received no copy of the complaint and attached to plaintiff's opposition is no receipt showing that the Secretary of State served process by certified mail, return receipt requested, upon defendant Zoe Realty Corp pursuant to CPLR § 306(a), affiant Tsadok's assertion that he did not obtain knowledge of entry of the default in time to defend same establishes that defendant Zoe Realty Corp had no such knowledge. Defendant Zoe Realty Corp, also by the affidavit of its principal Tsadok, states a meritorious defense to the complaint against it, in which he alleges that plaintiff defendant Perez has an ownership interest in Bar 13 Inc and as such, defendant Perez has no right to file a mechanic's lien for any "investment" he made in the real property against Zoe Realty Co., landlord of the property. See *Palette Stone Corp v Bokus*, 208 AD2d 1138 (3rd Dept 1994).

Debra A. James

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<u>3/29/2024</u> DATE					<hr/> DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER	
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART		
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	