

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

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TALI PROPERTIES INC.,  
Plaintiff,

Index No.: 11441/04

Motion Dated:  
January 2, 2007

-against-

Cal. No.: 21

GAMS CONSTRUCTION CORP.,  
Defendant.

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The following papers numbered 1 to 13 read on this motion by plaintiff for an order directing the Queens Register's Office to cancel a deed from defendant to Pacific Plumbing & Heating Corp. and to direct the Queens Register's Office to cancel the mortgage to AM Holding Corp. Of NY Corp. from Northern Bell Associates, or in the alternative, for an order adding Pacific Plumbing & Heating Corp., AM Holding Corp. Of NY Corp. and Northern Bell Associates Inc. as additional defendants and other relief; and cross motion by defendant to vacate the default judgment entered against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits ..	5 - 8
Answering Affidavits .....	9 - 10
Replying Affidavits .....	11 - 13
Plaintiff's Memorandum of Law	

Upon the foregoing papers it is ordered that this motion by plaintiff and cross motion by defendant are decided as follows:

By order and judgment dated September 27, 2005, this court granted a default judgment directing specific performance against defendant of a contract of sale of real property dated February 2004. The order and judgment further directed that defendant appear at a closing on November 30, 2005, at which time plaintiff shall tender and deliver the balance of the purchase price to

defendant and defendant shall transfer title to the subject premises by way of a bargain and sale deed. Defendant failed to appear at the closing. Plaintiff learned that an updated title report revealed that defendant transferred the subject premises to Pacific Plumbing & Heating Corp. pursuant to a deed, which was recorded on September 20, 2005. Plaintiff also learned that a mortgage was taken by AM Holding Corp. of NY Corp. from Northern Bell Associates Inc.

In view of the allegations herein, the court finds that the interest of justice requires that Pacific Plumbing & Heating Corp., AM Holding Corp. Of NY Corp. and Northern Bell Associates Inc. be added as defendants in order to properly adjudicate the conflicting claims to the subject premises. Indeed, there will be no prejudice or surprise by amending the complaint to add these additional defendants. (CPLR 3025[b]; Crystal House Manor, Inc. v Totura, 5 AD3d 425, 426 [2004]; Holchender v We Transport, Inc., 292 AD2d 568, 569 [2002].)

With respect to the cross motion, the court initially rejects defendant's contention that plaintiff did not obtain personal jurisdiction over it. The affidavit of service constitutes prima facie evidence of proper service. (Galarza v Saddle Cove Assocs., LLC, 22 AD3d 523, 523 [2005]; Chemical Bank v Darnley, 300 AD2d 613, 613 [2002].)

The branch of the cross motion to vacate the default judgment pursuant to CPLR 5015[a][1] is denied. A motion to vacate a default judgment on the ground of excusable default pursuant to CPLR 5015(a)(1) must be made within one year after service of a copy of the judgment or order with notice of entry. (CPLR 5015[a][1].) In this case, the order and judgment was served on defendant on October 21, 2005, and the cross motion was made (CPLR 2211) on December 5, 2006, more than one year later. Thus, defendant's application pursuant to CPLR 5015(a)(1) is untimely.

Defendant also seeks to vacate the default judgment pursuant to CPLR 317. CPLR 317 permits a defendant who has been "served with a summons other than by personal delivery" to seek relief from a default upon a showing that it did not receive actual notice of the summons in time to defend the action and that it has a meritorious defense. (Tselikman v Marvin Court, Inc., 33 AD3d 908 [2006]; Calderon v 163 Ocean Tenants Corp., 27 AD3d 410, 410 [2006]; Hon-Kuen Lo v Gong Park Realty Corp., 16 AD3d 553, 553 [2005].) Service of process via delivery to the Secretary of State (BCL § 306[b]) is not personal delivery. (Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d 138, 142 [1986].) The fact that a defendant may fail to notify the Secretary of State of its change of address is not relevant to the issue of whether it

is entitled to relief under CPLR 317. (Samet v Bedford Flushing Holding Corp., 299 AD2d 404, 405 [2002].) Further, unlike CPLR 5015[a][1], a defendant moving for relief under CPLR 317 is not required to establish a reasonable excuse for its default. (Franklin v 172 Aububon Corp., 32 AD3d 454 [2006]; Paul Conte Cadillac, Inc. v C.A.R.S. Purchasing Serv., Inc., 126 AD2d 621, 622 [1987].)

In the matter at hand, the annexed affidavit of service indicates that defendant was served through the Secretary of State on June 7, 2004 rather than by personal delivery. Defendant further established that it did not receive notice of the summons, and there is no basis in the record for this court to conclude that the defendant was deliberately attempting to avoid service of process. (see Marinoff v Natty Realty Corp., 17 AD3d 412, 413 [2005]; Samet v Bedford Flushing Holding Corp., 299 AD2d at 405.) Moreover, the affidavit of Evangelos Gerasimou, the President and sole officer of defendant alleges sufficient facts to demonstrate a meritorious defense. Mr. Gerasimou avers that he alone is authorized to execute contracts on behalf of defendant. He further avers that the signature on the subject contract for real property is not his nor was it ever authorized by him. Thus, defendant has established its right to relief under CPLR 317.

The branch of the cross motion to vacate the Notice of Pendency is denied. CPLR 6512 provides that "[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant..." In this matter, the County Clerk database indicates that the Notice of Pendency was filed on May 18, 2004. Further, the annexed affidavit of service avers that the Notice of Pendency was served on June 7, 2004. Thus, the Notice of Pendency was timely served.

Accordingly, the motion by plaintiff is granted solely to the extent that plaintiff is given leave to serve and file a supplemental summons and amended complaint adding Pacific Plumbing & Heating Corp., AM Holding Corp. Of NY Corp. and Northern Bell Associates Inc. as additional defendants within 20 days from the date hereof.

The cross motion by defendant is granted solely to the extent that defendant's default in answering and appearing is vacated, this court's order dated February 28, 2005 is vacated, and this court's order and judgment dated September 27, 2005 is vacated.

The time for defendant to serve an Answer is extended through and including March 20, 2007.

The matter is set down for a Preliminary Conference, which shall be held on Thursday, April 12, 2007 at 11:30 A.M. in Room 314 of this Courthouse.

Dated: February 23, 2007

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AUGUSTUS C. AGATE, J.S.C.