

CIT Group/Commercial Services, Inc.

2004 NY Slip Op 30033(U)

June 8, 2004

Supreme Court, New York County

Docket Number: _300122/0102

Judge: Lewis Bart Stone

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. LEWIS BART STONE
Justice

PART JOS

QEP Group / Commercial Services Inc

INDEX NO.

122010/03

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

160-09 Jamaica Avenue L.P.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with attached decision & order.

FILED

JUN 16 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8 June 2004

Wm Bart Stone

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

J.S.C.

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 50S

-----X
 THE CIT GROUP/COMMERCIAL SERVICES, INC. :

Petitioner, : DECISIONAND
 ORDER

For a Judgment Pursuant to CPLR §5225(b)
 and 5227 to Compel Payment of Money or
 Delivery of Property

Index No. 122010/03

Respondent. :
 -----X

Hon. Lewis Bart Stone, J

Petitioner in this proceeding The CIT Group/Commercial Services, Inc. (“CIT”), a judgment creditor of Central Men’s Shop, Inc., (“Central”), commenced a supplementary proceeding against Central to collect on its judgment. Based upon information obtained in depositions in such proceeding, CIT, on December 24, 2003, commenced this proceeding before this Court against Respondent, 106-09 Jamaica Avenue Limited Partnership (“Jamaica LP”), Central’s landlord, to recover payments made to it by Central for rent on the grounds that such payments were fraudulent conveyances.¹ On February 6, 2003, this Court found that Jamaica LP defaulted in such proceeding, and ordered that a judgment be settled. A judgment was submitted, approved by this Court and ordered on March 31, 2004. Such judgment was filed on

¹ The petition also sought judgment against J.P. Morgan Chase & Co. for payments made in violation of a restraining notice. Such issue is not before this Court in this motion as J.P. Morgan Chase & Co. and CIT have resolved their differences.

April 8, 2004.

On April 16, 2004, Jamaica LP made, by order to show cause, the instant motion to vacate the default order, setting aside such judgment as to Jamaica LP, and allowing Jamaica LP to defend the proceeding.

Relief, if any, depends, as both parties have agreed, depends on the applicability of Civil Practice Law & Rules §5015 which sets forth grounds upon which this Court may vacate the default. Although §5015 sets forth five grounds for relief, the only relevant ground available to Jamaica LP is the first ground, that of “excusable default.” Although §5015 limits relief under this rubric to applications made within a year after service of notice of entry, there is no question that the motion for relief itself is not subject to such provision as such motion was made shortly after the entry of judgment.

Thus, the Court must address the issue whether Jamaica LP’s default was or was not excusable. Once such is determined, the Court must examine as a second step, whether there is any meritorious defense available to Jamaica LP.

Jamaica LP concedes that proper service was made on it, as service had been made on the Secretary of State, who it had duly appointed as agent for service of process. The Secretary of State, in turn, had sent a copy of the served documents to Jamaica LP to the address on file with the Secretary of State, which had been provided by Jamaica LP. Jamaica LP now offers as its excuse that the address is the

address of the store which had been rented to Central, and that as Jamaica LP was an “absentee landlord,” which did not “maintain any office or personnel at the store,” it was unaware of the proceeding.

This will not suffice. New York Partnership Law § 121-104 expressly deals with service of process upon a partnership. Recognizing the difficulty of finding entities, as distinct from people, such provision expressly conditions the ability of a limited partnership to conduct business in New York upon the designation of the Secretary of State as the agent for service of process, and provides that the validity of the address to which the Secretary is to send a copy of any such service continues until notice of change of address. The process is simple and the purpose is to prevent a Limited Partnership from avoiding service. Here, Jamaica LP, having elected the limited partnership form, cannot complain of its lack of notice of service. It had the absolute right and opportunity at any time to change its address for notice from the Secretary of State by a simple filing. As an aside, given that there is extensive evidence of cross ownership between Jamaica LP and Central, which occupied the premises to which the notice was sent, characterizing itself as an absentee landlord is somewhat disingenuous, even if technically correct.

In an analogous context, in General Crane Services, Inc. v. Whiting-Turner Contracting, Inc., 27 M.2d 403 (Sup Ct., Onondaga Co., 1960), a foreign corporation had, as required by statute, designated the Secretary of State its agent for service of

process and gave as the address to which a copy was to be sent, “90 State Street, Albany.” Service was made and the Secretary of State sent a copy to such address. The copy of the notice was returned “address unknown.” The inadvertence claimed was that the corporation “inadvertently” had omitted to state that its address was “c/o Fidelity and Deposit Company of Maryland,” at 90 State Street, Albany. The Court found this was not the “inadvertence” referenced by the statute. “Is this an inadvertence from the consequences of which the Court may relieve? We think not.” *Id.* See also, *Crespo v. A.D.A. Management*, 292 AD2d 5 (1st Dept. 2002) “the excuse would not suffice since defendants had the obligation to keep the Secretary of State advised of their current and correct address...The failure of a corporate defendant to receive service of process due to breach of the obligation to keep a current address on file with the Secretary of State...does not constitute a reasonable excuse.” Accord, *Cedeno v. Wimbleton Building Corp.*, 207 AD2d 297 (1st Dept. 1994), *lv. dismissed* 84 NY2d 978 (1994), and *Lawrence v. Esplanade Gardens. Inc.*, 213 AD2d 216 (1st Dept. 1994).

Although *General Crane Services, Inc. supra*, *Crespo. supra*, *Cedeno, supra*, and *Lawrence, supra*, all relate to the service upon a corporation, rather upon a limited partnership, as is the case here, the relevant provision of the Business Corporation Law and the Partnership Law relating to service upon the Secretary of State are parallel and serve the same purpose and should be read to the same effect.

According, the default was not excusable. As the default was not excusable it is not necessary to address whether Jamaica LP has a meritorious defense.

Accordingly, this motion must be denied.

This is the Decision and Order of the Court.

DATED: JUNE 8, 2004
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
JUN 16 2004
COUNTY CLERK'S OFFICE
NEW YORK