

**Harris Beach, LLP v 125 Broadway, LLC**

2007 NY Slip Op 30497(U)

March 30, 2007

Supreme Court, Albany County

Docket Number: 0073905/2007

Judge: George B. Ceresia

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

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HARRIS BEACH, LLP,

Plaintiff,

-against-

Index No.: 739-05

RJI No.: 01-06-085927

125 BROADWAY, LLC,

Defendant.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

HARRIS BEACH PLLC  
Attorneys for Plaintiff  
(Mark J. McCarthy, Esq., of Counsel)  
54 State Street, 8<sup>th</sup> Floor  
Albany, New York 12207

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.  
Attorneys for Defendant  
(Kenneth L. Gellhaus and Jacob F. Lamme, Esqs., of Counsel)  
P.O. Box 459  
Albany, New York 12207-0459

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

Defendant has moved for an order vacating a default judgment entered herein pursuant to CPLR § 317 and/or CPLR R 5015 (a) (1) on the grounds that it did not receive notice of the summons in time to defend the action and that it has a meritorious defense to the action. Plaintiff served defendant by service upon the Secretary of State pursuant to Limited Liability Company Law § 301 and thereafter obtained a default

judgment for the value of attorneys' services rendered and based on an account stated.

A party may be relieved of a default judgment pursuant to CPLR § 317 upon a showing that no notice of the summons was received in sufficient time to defend the action and that there is a meritorious defense to the action. No other excuse for the default need be shown (see Gardner v Another Phyllis's, 216 AD2d 620 [3d Dept 1995]; Executive Motor Car v Allen, 211 AD2d 871 [3d Dept 1995]). Defendant has submitted an affidavit from Michael O'Brien, its member-owner, stating that he did not have any notice of the action or knowledge of the default judgment until he was performing a judgment search concerning an unrelated matter. However, Mr. O'Brien failed to set forth any explanation as to why he did not receive notice. There is no indication that the address on file with the Secretary of State is not valid or current, or that defendant does not actually receive mail sent to such address. Defendant has also failed to submit a copy of the default judgment or proof of service filed therewith. As such, the Court will presume that the judgment was taken and filed properly, and that a copy of the summons was actually mailed to the address on file with the Secretary of State. Defendant's conclusory denial of receipt is insufficient to warrant vacatur of the default judgment (see Commissioners of State Ins. Fund v Nobre, Inc., 29 AD3d 511 [2d Dept 2006]; General Motors Acceptance Corp. v Grade A Auto Body, Inc., 21 AD3d 447 [2d Dept 2005]; Electric Ins. Co. v Grajower, 256 AD2d 833, 836 [3d Dept 1998]).

In addition, defendant has failed to show a meritorious defense to the action. Mr.

O'Brien has admitted that plaintiff performed significant legal services on behalf of the defendant. His primary objection is addressed to regular amounts added to the bill on a monthly basis under the category "costs/other," claiming that no costs or disbursements in such amounts were incurred. However, the amounts are clearly late fees and no issue of fact is raised. Defendant also contends in conclusory fashion that the services rendered did not total the sum of \$50,000 as set forth in plaintiff's account, and further that plaintiff represented defendant's tenants in various proceedings. No factual basis for either claim is provided.

In any event, the complaint herein also contained a cause of action on an account stated. The verified complaint alleged that plaintiff sent defendant regular monthly bills for legal services rendered and that defendant never raised any objection to the bills. Such allegations are sufficient to establish an account stated regardless of whether the fee was reasonable (see Cohen Tauber Spievak & Wagner, LLP v Alnwick, 33 AD3d 562 [1st Dept 2006]; O'Connell & Aronowitz v Gullo, 229 AD2d 637 [3d Dept 1996]). Defendant has failed to allege that it ever raised any objection to the items or amounts set forth in the bills. It has certainly not offered the requisite evidentiary detail as to how, when and to whom the objections were made or as to the substance of the objections (see Fink, Weinberger, Fredman, Berman & Lowell v Petrides, 80 AD2d 781 [1st Dept 1981]).

It is therefore determined that defendant has failed to make a sufficient showing

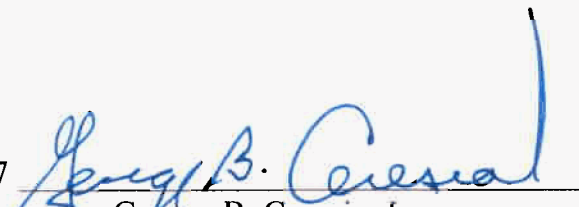
that it did not receive notice of the summons in time to defend the action or that it has a meritorious defense to the action.

Accordingly it is

**ORDERED** that defendant's motion to vacate the default judgment is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve defendant's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York  
March 30, 2007

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

Order to Show Cause dated June 6, 2006; Affirmation of Kenneth L. Gellhaus, Esq. dated June 2, 2006;

Affidavit of Michael O'Brien sworn to June 2, 2006 with Exhibits A-C annexed;  
Memorandum of Law dated June 5, 2006;

Affidavit of Mark J. McCarthy, Esq. sworn to June 22, 2006 with Exhibits A-G annexed;

Affidavit of Mark J. McCarthy, Esq. sworn to December 26, 2006 with Exhibit A annexed;  
Memorandum of Law dated December 22, 2006.