

Boyle v 400 W. 58th St. Owners Corp.
2007 NY Slip Op 31260(U)
May 15, 2007
Supreme Court, New York County
Docket Number: 0117989/2005
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ED MEAD
Justice

PART 35

BOYLE, TERRENCE

INDEX NO.

117989/05

MOTION DATE

5/15/07

MOTION SEQ. NO.

02

MOTION CAL. NO.

- v -
400 WEST 58TH STREET
OWNERS CORP.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendant 400 West 58th Street Owners Corp. ("defendant") moves pursuant to CPLR §§ 317 and 5015 by order to show cause to vacate the default judgment entered in favor of plaintiff, Terrence Boyle, and against defendant on July 28, 2006, and upon vacatur, for costs associated with the making of defendant's order to show cause and for leave to answer, move or otherwise respond to the complaint.

Plaintiff commenced this action on or about December 29, 2005 for injuries he allegedly sustained on October 13, 2004 as result of his fall on the sidewalk in front of the premises located at 893 Ninth Avenue, New York, New York (the "subject premises"). Defendant is the owner of the land and apartment building located at 400 West 58th Street, New York, New York, which includes the subject premises. Service was made upon defendant on February 1, 2006 by delivery of two copies of the summons and complaint to the Secretary of State.

By motion to the Court, plaintiff obtained a default judgment against defendant, which was entered on July 28, 2006. The default judgment referred the issue of the assessment of damages to JHO Gammerman.¹ On January 29, 2007, defendant's managing agent, Orsid Realty

¹ The order directed that the assessment of damages take place before August 3, 2006. According to defendant, however, when plaintiff failed to appear for the assessment of damages, the action was remanded to the

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Corp. ("Orsid") received a letter, dated January 23, 2007, from plaintiff's attorney addressed to defendant. The Letter indicated that a default judgment was entered against defendant on July 28, 2006, and that a conference was scheduled for February 2, 2007. The Letter also included plaintiff's June 12, 2007 motion for default judgment, an affidavit of service against the defendant, and January 3, 2007 Notice of Entry of the default judgment, and January 3, 2007 note of Issue for Inquest.

In support of its motion to vacate said default judgment, defendant argues that under CPLR 317, defendant may be permitted to defend the action if (1) defendant moves to vacate the default within one year of its entry, (2) the summons was not personally delivered to defendant, (3) defendant did not receive actual notice of the summons in time to defend the action, and (4) defendant has a meritorious defense. Defendant contends that its motion is timely. Further, the summons was not personally delivered to the defendant, given that service was made by delivery to the Secretary of State. Defendant also points out that plaintiff failed to comply with CPLR 3215(4)(i), by failing to submit an affidavit that additional service of the summons was made upon defendant at its last known address at least 20 days before the entry of judgment. Defendant also argues that it did not receive actual notice of the summons in time to defend this action, in that it never received the summons and complaint purported served on the Secretary of State. Rather, the first notification defendant received regarding this action was on February 1, 2007, through the aforementioned Letter. And, the reason that defendant did not receive the Summons and Complaint is because the defendant inadvertently failed to update the address for service of process listed with Secretary of State. Defendant also contends that plaintiff did not serve the July 14, 2004 order prior to the Assessment of Damages.

Defendant also argues it has a meritorious defense to the Complaint. Defendant contends that the Complaint fails to state a cause of action against it in that the Complaint fails to allege any act of the defendant which proximately caused plaintiff's alleged injuries. The Complaint does not allege that any dangerous or defective condition in or on the sidewalk caused plaintiff's injuries, that defendant created a special use for the sidewalk that caused plaintiff to fall, or that defendant violated Administrative Code 7-210 by failing to maintain the sidewalk. Further, at the time of the alleged accident, it was not in possession of and did not control the subject premises. Rather, pursuant to a Master Lease, lessee, 400 West 58th Street Properties Corp., ("Lessee") a nonparty to this action, has the right and obligation to control, lease, and maintain the location of plaintiff's accident. The Master Lease defines the "leased premises" as including all "the area occupied by the stores located in the building, together with the storefronts thereof and the separate entrances for each, located on Ninth Avenue." The Lessee is also obligated to provide and maintain general liability insurance for the leased premises, naming the defendant as an additional insured. And, pursuant to the Master Lease, the Lessee agreed to make necessary repairs to the lease premises. Further, upon information and belief, on October 13, 2004, Lessee sub-leased the first-floor of commercial spaces on Ninth Avenue to multiple, separate entities.

footnote 1 cont'd.

Court. The next appearance in this action was scheduled for a conference with JHO Gammerman on February 2, 2007.

Defendant also argues that alternatively, the Court should vacate the default judgment pursuant to CPLR 5015, given that it has a reasonable excuse for failing to respond to the Complaint and that a meritorious defense to the Complaint.

Finally, defendant argues that it is entitled to costs, given that it requested that plaintiff consent to the relief sought on nine occasions to no avail.

In opposition, plaintiff argues that plaintiff notified defendant by mail at its actual business address of the of the scheduled inquest date and serve copies of the summons, complaint, motion and order. Unlike CPLR 5015, which refers to judgments and orders, CPLR 317 only applies to a case where a judgment has been entered. Since a judgment has not been entered, and defendant had actual notice of the scheduled assessment of damages prior to the inquest, defendant's reliance on CPLR 317 is misplaced. Defendant has the right to defend this matter on the issue of damages. Thus, vacatur of the default is not available to defendant under CPLR 317.

Further, defendant failed to present a reasonable excuse and meritorious defense to the action. A corporation is obliged to keep its current address on file with the Secretary of State, and courts have held that such failure so comply does not constitute a reasonable excuse for relief under CPLR 5015. Defendant admits that it did not keep its current business address on file with the Secretary of State and defendant has not presented any excuse for that failure.

Moreover, plaintiff's claim of liability against defendant is based on Administrative Code 7-210, which states that the *owner* of real property abutting any sidewalk has the responsibility to maintain the sidewalk and is liable for any injuries resulting from its negligent failure to do so. It is undisputed that defendant is the owner of the real estate abutting the subject sidewalk. There is nothing in the Master Lease or lease modification that requires a tenant or lessee to maintain or have any responsibility for the abutting sidewalk or that makes the abutting sidewalk part of the "leased premises." Further, there is no indication that the abutting sidewalk was regularly inspected and found to be free from negligent conditions.

Analysis

CPLR 317 provides that:

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. . . .

Unlike CPLR 5015, CPLR 317 does not require a reasonable excuse (*Lopez v. 592-600 Union Ave. Corp.*, 292 A.D.2d 262, 739 N.Y.S.2d 80 [1st Dept 2002]) provided the application for relief is made within one year (as it was here) of acquiring actual knowledge of the judgment. Thus, that defendant failed to update its address with the Secretary of State for approximately ten years is not dispositive on its application. However, defendant must sufficiently allege a

meritorious defense to the action (*Lopez v. 592-600 Union Ave. Corp.*, 292 A.D.2d 262, citing *Peacock v. Kalikow*, 239 A.D.2d 188, 189-190, 658 N.Y.S.2d 7).

Here, defendant has demonstrated a meritorious defense to plaintiff's negligence action. "In any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party" (*Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895 [1978]). When the duty to maintain and repair public sidewalks rested with the City of New York, a plaintiff seeking to recover damages based on the City's breach thereof was obligated to establish actual or constructive notice in accordance with Admin. Code 7-201(c)(2) (*DeSilva v City of New York*, 15 AD3d 252, 790 NYS2d 87 [1st Dept 2005] [summary judgment was properly granted the City inasmuch as there is no evidence that the City had notice of the alleged condition as required by Administrative Code of the City of New York § 7-201(c)(2)]). Likewise, under premises liability line of cases, the plaintiff must establish notice (*see, Zuk v Great Atlantic & Pacific Tea Co., Inc.*, 799 N.Y.S.2d 504 [1st Dept 2005] [stating "in order to recover damages for a breach of the landowner's duty to maintain its premises in a reasonably safe condition, a party must establish that the landlord created, or had actual or constructive notice of the hazardous condition which precipitated the injury"]; *see also Mejia v New York City Tr. Auth.*, 291 AD2d 225, 226, 737 NYS2d 350 [2002]). Therefore, in order for plaintiff to recover for the injuries alleged herein under §7-210, he must establish that defendant created, or had actual or constructive notice of the alleged dangerous condition that proximately caused his injuries. Plaintiff's citation of § 7-210 alone, without any other evidentiary showing, falls short of making a *prima facie* showing that she is entitled to a judgment as a matter of law. The sole evidentiary proof offered by plaintiff is a conclusory allegation that plaintiff's fall "occurred due to the negligence of defendant . . ." There is no allegation concerning any defective or dangerous condition, or that defendant had knowledge of any allegedly dangerous or defective condition of the subject sidewalk. Regardless of whether defendant has a duty to maintain the sidewalk as the provision dictates, plaintiff offers no evidence that defendant had notice of the alleged defective condition, failed to properly maintain the sidewalk, and that defendant proximately caused plaintiff's injuries. While § 7-210 likely places a duty on landowners such as defendant, defendant is entitled to challenge plaintiff's ability to establish the remaining elements of negligence.

As defendant established the remaining elements under CPLR 317, in that the summons was served other than by personal delivery to defendant or its agent and that defendant did not receive notice of the summons in time to defend this action, vacatur of the default judgment is warranted under the circumstances. Furthermore, courts favor a determination of an action on the merit (*Price v Polisner*, 172 AD2d 422 [1st Dept 1990], quoting *Lang v French & Co.*, 48 AD2d 641). Thus, defendant is entitled to vacatur of the default judgment.

Contrary to plaintiff's contention, CPLR 317 is not rendered unavailable by virtue of the fact that a "judgment" has not been entered. The default judgment on the issue of liability was entered in this matter. Further, plaintiff has cited no caselaw to support his contention that CPLR 317 is only available under circumstances where a party has obtained judgment after the assessment of damages.

The Court does not reach the merits of defendant's application to vacate the default

judgment pursuant to CPLR 5015.

Defendant's application for leave to answer, move or otherwise respond to the Complaint is granted.

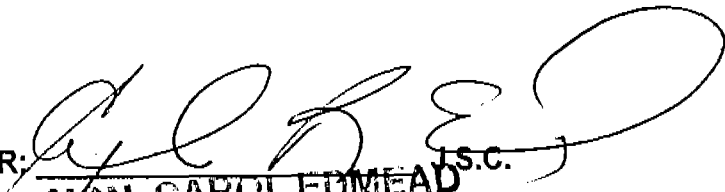
Based on the foregoing, it is hereby

ORDERED that defendant's order to show cause for an order vacating the default judgment entered in favor of plaintiff, Terrence Boyle, and against defendant on July 28, 2006, and upon vacatur, for costs associated with the making of defendant's order to show cause and for leave to answer, move or otherwise respond to the complaint is granted solely to the extent the order entered on July 29, 2006 is vacated and defendant shall serve and file its answer or otherwise move within 20 days of the date of this order.

This constitutes the decision and order of the Court.

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated 5/15/07

ENTER: 
HON. CAROL EDMOND, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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