

**Voyd v 8th Ave. Discount Liquors, Inc.**

2007 NY Slip Op 32873(U)

September 11, 2007

Supreme Court, New York County

Docket Number: 0117301/2005

Judge: Walter Tolub

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

PRESENT: TOLUB  
Justice

PART 15

VOYD, BOBBY, ETAL.

INDEX NO.

117301/05

MOTION DATE

MOTION SEQ. NO.

04

MOTION CAL. NO.

- v -  
8TH AVENUE DISCOUNT LIQUORS, INC.,  
ETAL

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**

SEP 14 2007

IN ACCORDANCE WITH COUNTY CLERK'S OFFICE  
NEW YORK

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DECISION

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

Dated: 9/14/07

WALTER B. TOLUB J.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
BOBBY VOYD and LOUVENIA VOYD

Plaintiffs,

Index No. 117301/05  
Mtn Seq. 004

-against-

8<sup>TH</sup> AVENUE DISCOUNT LIQUORS, INC., and  
301 W. 151 REALTY CORP.,

Defendants.

-----x  
8<sup>TH</sup> AVENUE DISCOUNT LIQUORS, INC.,

Third-Party Plaintiff,

-against-

301 W. 151 REALTY CORP., d/b/a  
301 REALTY CORP and 301 REALTY CORP

Third-Party Defendants.

-----x  
**WALTER B. TOLUB, J.:**

Defendant 301 W. 151 Realty Corp., and third-party Defendant  
301 W. 151 Realty Corp., d/b/a 301 Realty Corp and 301 Realty  
Corp. (Collectively "301 Realty") seeks an order pursuant to CPLR  
317 and 5015(a) vacating the Orders of this court dated: (1)  
January 12, 2007 which granted a default and an inquest against  
301 realty for failure to appear and answer Plaintiffs' summons  
and complaint, (2) May 18, 2007, and (3) July 23, 2007, which  
granted default and inquest against 301 Realty for failure to  
appear and answer the third-party summons and complaint of 8<sup>th</sup>  
Avenue Liquors. 301 Realty's motion is conditionally granted.

**FILED**  
SEP 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

### Facts

This is a personal injury action claimed to have occurred on August 28, 2004. Plaintiff claims that the incident happened on the sidewalk near the entrance of the liquor store known as 8<sup>th</sup> Avenue Liquors.

The Summons and Verified Complaint were served upon 301 Realty pursuant to Business Corporation Law §306, delivering the documents to an agent in the office of the Secretary of State. 301 Realty claims that it did not receive notice of the Summons and Complaint.

The address for service of process registered by 301 Realty with the Secretary of State as of the date of service was George S. Goldberg, 11 Park Place, New York, NY 10007. To date, this remains the address that 301 Realty has registered with the Secretary of State. However, George S. Goldberg is deceased. In addition, pleadings, motion papers and notices of default judgments were also the Summons and Complaint was mailed to 301 Realty Corp., P.O. Box 700, Closter NJ, the address listed by Mr. Longo, the president of 301 Realty, on the lease in question. None of the documents sent to either address were ever returned. However, 301 Realty claims to have never received any information regarding this lawsuit at that address or any other.

### Discussion

A motion to vacate a default judgment requires a meritorious

defense and a reasonable excuse for the delay and default. (CPLR 5015(a); Polir Construction Inc., v. Etingin, 297 AD2d 509 [1<sup>st</sup> Dept 2002]). A determination of what constitutes a reasonable default lies within the sound discretion of the court. (38 Holding Corp. v City of New York, 179 AD2d 486 [1<sup>st</sup> Dept 1992]). Also, under CPLR §317, if the party has proven that they were not served with process then they need only establish a meritorious defense.

301 Realty was properly served in the sense that service on the Secretary of State for a corporation is valid service. Here, 301 Realty failed to notify the Secretary of the of a change of address for the purpose of service of process. (Union Indemnity Insurance Company of New York v. 1001 50<sup>th</sup> Avenue Realty Corp., 102 AD2d 272 [1<sup>st</sup> Dept 1984]; Detelich v. Mayo's R&A, 62 Misc.2d 788 [NY Co. Ct. 1970]).

301 Realty argues that the death of the designated agent George S. Goldberg excuses their default. However, service was effected on the Secretary of Sate and the Secretary of State forwarded the papers to the address and contact provided.

It is this court's determination that 301 Realty's failure to receive the summons and complaint is attributable to its failure to notify the Secretary of State of Mr. Golberg's death and any change in address. However, 301 Realty moved to vacate the default orders within a reasonable time. Plaintiff and

Defendant 8<sup>th</sup> Avenue Liquors have not been prejudiced but have been inconvenienced by 301 Realty's irresponsibility through their expenditure of time and money and accordingly will be reimbursed for same. It must also be noted that 301 Realty has a meritorious cause of action, that 8<sup>th</sup> Avenue Liquors was obligated to maintain the entrance to the premises and is obligated by the Lease to hold 301 Realty harmless. It follows that this is a proper case in which to invoke CPLR §317, which permits one who did not personally receive notice of the summons to be relieved of any default and defend its meritorious defense. (Perez v. Jordan, 37 AD3d 200 [1<sup>st</sup> Dept 2007]). Furthermore, CPLR §5015 (a) provides that an order may be vacated upon such terms as may be just.

Accordingly it is

ORDERED that 301 Realty pay Plaintiff and Defendant 8<sup>th</sup> Avenue liquors \$250 dollars each for each of the default judgments; and it is further

ORDERED that 301 Realty shall pay Plaintiff \$750; and it is further

ORDERED that 301 Realty shall pay 8<sup>th</sup> Avenue Liquors \$750; and it is further

ORDERED that written proof of such payment be provided to the Clerk of Part 15 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is

further

ORDERED that upon the failure of 301 Realty to make such payments, Plaintiff and 8<sup>th</sup> Avenue Liquors may apply ex parte for the entry of a money judgment in said amount; and it is further

ORDERED that 301 Realty's motion is granted and the defaults dated January 12, 2007, May 18, 2007 and July 23, 2007 are to be vacated upon payment of th \$1,500 and the action then restored to the calendar; and it is further


ORDERED that the Clerk of the directed to enter judgment accordingly.

Counsel for all parties are directed to appear as scheduled on September 21, 2007 for a conference, at 11:00 am in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/14/07

**FILED**  
SEP 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
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HON. WALTER B. TOLUB, J.S.C.