

Supple v Brockbilt Homes LLC
2007 NY Slip Op 34340(U)
December 31, 2007
Supreme Court, Suffolk County
Docket Number: 0029714/2006
Judge: Peter Fox Cohalan
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INDEX # 29714-06
 RETURN DATE: 5-23-07
 MOT. SEQ. # 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----X
 JAMES SUPPLE,

CALENDAR DATE: September 12, 2007
 MNEMONIC: Mot. D.

Plaintiff,

PLTF'S/PET'S ATTORNEY:

KUSHNICK & ASSOCIATES
 445 Broad Hollow Road
 Melville, NY 11747

-against-

BROCKBILT HOMES LLC d/b/a BROCK
 ENTERPRISES CONSTRUCTION and MARTIN
 BROCK d/b/a BROCK ENTERPRISES
 CONSTRUCTION,

DEFT'S/RESP ATTORNEY:

SCOTT LOCKWOOD, ESQ.
 1600 Deer Park Avenue
 Deer Park, NY 11729

Defendants

-----X

Upon the following papers numbered 1 to 30 read on this motion to vacate default judgment _____;
 Notice of Motion/Order to Show Cause and supporting papers 1-10 _____; Notice of Cross-Motion and
 supporting papers _____; Answering Affidavits and supporting papers 11-24 _____; Replying Affidavits
 and supporting papers 25-28 _____; Other 29-30 _____; and after hearing counsel in support of and opposed
 to the motion it is,

ORDERED that this motion by the defendants to vacate their default in appearance and the judgment granted on April 18, 2007 on liability only is hereby granted. It is conditioned on the defendants posting a surety bond in the amount of \$85,000.00 within twenty (20) days of service of a copy of this order on the defendants with notice of entry thereon. In the event the defendants fail to post the surety bond as required by this order, the judgment will stand as to the individual defendant Martin Brock (hereinafter M.B.) and will be subject to a traverse hearing to be held and this case will be set down for an inquest upon request of the plaintiff.

The plaintiff, James Supple, instituted this action against the defendants for damages associated with a contract to construct his home at 43 Bailey Road in Southampton, Suffolk County on Long Island, New York for the agreed upon amount of \$379,000.00. The plaintiff claims that periodic payments were made but there were serious defects in the quality and construction of the residence. Notwithstanding communications with the defendants to remedy the problems which included, inter alia, failing to follow the blueprints, leaks, unburied cable and phone lines, unsupplied or improperly installed screens and grills and exterior and interior painting that was not completed, the defendants have ignored the repairs requested by the plaintiff. The plaintiff filed a complaint with the Suffolk County Department of Consumer Affairs on April 14, 2006 and as a result of the defendants' inaction, the plaintiff was required to have the repairs remedied by others. This lawsuit then ensued.

The plaintiff thereafter moved for a default judgment and, without opposition, this Court granted the default in a decision and order, dated April 18, 2007, on liability only and the Court calendared this case for an inquest. Thereafter, the defendants, prior to inquest, moved to vacate their default pursuant to CPLR §5015 (a)(1) arguing that there was a jurisdictional defect with regard to service of process and also there was an excusable default.

For the following reasons, the defendants' motion to vacate their default pursuant to CPLR §5015 (a)(1) is hereby granted conditioned on the posting of a surety bond in the amount of \$85,000 to secure the judgment. This security bond will be posted with the Suffolk County Treasurer within twenty (20) days of service of a copy of this order on the defendants with notice of entry thereon. In the event the defendants fail to post the surety bond, as required by this order, the judgment will stand as to the individual defendant M.B. and will be subject to the traverse hearing as to the Limited Liability Company (hereinafter LLC). The inquest previously scheduled in this matter will be held in abeyance pending further order of this Court.

A party seeking to vacate a default judgment must demonstrate (1) a reasonable excuse for the delay; (2) the absence of wilfulness, and (3) a prima facie showing of legal merit. Generally, whether these criteria have been satisfied rests within the sound discretion of the court. **County Asphalt, Inc. v. North Rockland Underground Corp.**, 96 AD2d 570, 465 NYS2d 257 (2nd Dept. 1983); **Picotte Realty, Inc. v. Aragona**, 87 AD2d 955, 451 NYS2d 220 (3rd Dept. 1982).

A motion to be relieved of a default pursuant to CPLR §5015 (a)(1) is addressed to the sound discretion of the Court, and the exercise of such discretion will generally not be disturbed if there is support in the record. In exercising such discretion, courts should undertake a balanced consideration of all relevant factors, including the merit or lack of merit in the action, the seriousness of the injury, the extent of the delay, the excuse for the delay, prejudice or lack of prejudice to the opposing party, and intent or lack of intent to deliberately default or abandon the action. **I.J. Handa, P.C. v. Imperato**, 159 AD2d 484, 552 NYS2d 356 (2nd Dept. 1990).

Furthermore, it is well settled that as a matter of policy in the courts of this state, a disposition of actions on their merits is strongly favored. **Krystofic v. Rapisardi**, 112 AD2d 180, 491 NYS2d 70 (2nd Dept. 1985). In view of this strong public policy in favor of resolving cases on the merits, it is proper to vacate a default where the papers establish the merits of the action, the absence of any wilful intent to abandon the case and a lack of prejudice. **Balinti v. Marine Midland Bank**, 112 AD2d 1023 (2nd Dept. 1985). After a review of the merits and the papers submitted in support of the motion as well as the opposition, the Court, as a matter of discretion and fairness, grants the defendants' application to vacate their default in appearance and directs that the answer served to the complaint and attached as exhibit C to the movant's papers be deemed served upon service of a copy of this order and the posting of the surety bond as called for within this decision and order.

Here, in the case at bar, the defendants raise the issue of service of process on Iris Brock, the wife of M.B. d/b/a/ Brockbilt Homes LLC and Brock Enterprises. This service occurred at his home and the defendants' claim she is not authorized to accept service of process. This issue will require a traverse hearing to determine whether the service upon Iris Brock constitutes service on the LLC. The service requirements on a LLC are clearly set forth within the constraints of CPLR §311-a which requires service of process by personally delivering process to "any member of the limited liability company" or "any manager," "any agent" or "any other person designated by the limited liability company to receive process." See, ***Stuyvesant Fuel Service Corp. V. 99-105 3rd Avenue Realty LLC.***, 192 Misc2d 104, 745 NYS2d 680 (2002). The plaintiff, in opposition, suggests that service on Iris Brock was proper because service on a member of the LLC is sufficient and therefore substituted service on a member through his wife is proper.

However, in ***2505 Victory Boulevard, LLC v. Victory Holding, LLC***, 18 Misc3d 279, NYS2d , (2007), the Court citing to ***Roseetti v. Werther***, 6 Misc3d 1040(A) noted that:

"It is this court's position that since an LLC has the attributes of a voluntary association with corporate limited protection, this court will treat an LLC as an entity which is a cross between an association and a corporation."

Further in ***Michael Reilly Design, Inc. V. Houraney***, 40 AD3d 592, 835 NYS2d 640 (2nd Dept 2007) the Court found that a member may not appear pro se as counsel for a limited liability company and is subject to CPLR §321 requiring counsel and went on to state that:

"An LLC, like a corporation or voluntary association is created to shield its members from liability and once formed is a legal entity distinct from its members."

There is a paucity of cases referable to service of process on LLCs and in particular the service of process on a designated member of the LLC by substituted service. The Court hereby finds that the plaintiff's attempt to "save" service by claiming substituted service on the wife of a member is deemed service on the LLC is unavailing and without legal merit.

In reaching this conclusion, the Court finds persuasive the cases cited stressing that a LLC is an entity much like a corporation and not an individual and service by substituted service is improper on a corporation. This issue was discussed at length in ***Perez v. Garcia***, 8 Misc3d 1002 (A) [2005] WL 1397438 wherein the Court stated:

"Service on a corporation may not be made in accordance with the substitute methods of service

authorized for the personal service of process on individuals. Service under CPLR §308 (2) is applicable only to actions against natural persons and is inapplicable to actions against corporations, for which personal service must be made pursuant to CPLR §311 (1). **Lakeside Concrete Corp. V. Pine Hollow Bldg. Corp.**, 104 AD2d 551 (2nd Dept. 1984), aff'd 65 NY2d 865 (1985); see also, **Faravelli v. Bankers Trust Co.**, 85 AD2d 335 (1st Dept. 1982) aff'd 59 NY2d 615 (1983). The service envisioned under CPLR §311(1) upon a corporate officer is in-hand service upon the specified officer. Substitute service under CPLR §308 (2) and (4) is available only against individual defendants, and not corporations. **Lakeside Concrete Corp. V. Pine Hollow Bldg. Corp.**, 104 AD2d 551 (2nd Dept. 1984), aff'd 65 NY2d 865 (1985); **Strong v. Bi-Lo Wholesalers**, 265 AD2d 745 (3rd Dept. 1999); **DeZego v. Bruhn**, 99 AD2d 823 (2nd Dept. 1984); McLaughlin, Practice Commentaries to CPLR §311 at page 379. Thus, the "leave and mail" method cannot be used to effect valid service of process on a corporation.

The Appellate Division, Second Department addressed this very issue in **Lakeside Concrete Corp. V. Pine Hollow Bldg. Corp.**, 104 AD2d 551 (2nd Dept. 1984), aff'd 65 NY2d 865 (1985), where the plaintiff sued the corporation, as well as the corporate officer individually. Service upon the individual was made pursuant to CPLR §308 (2). While sustaining service on the individual, the Court ruled that such service was only available for service upon a natural person and that jurisdiction over a corporation could only be acquired by personal service pursuant to CPLR §311(1).

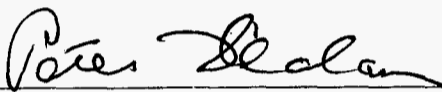
In this case, service upon Iris Brock as to the individual defendant, M.B. d/b/a Brock Enterprises Construction is clearly sufficient since she is a person of suitable age and discretion so as to accept service on behalf of her husband. However, there is a question as to whether she is a "designated person" for purposes of receiving service on behalf of the LLC defendant, Brockbilt Homes LLC.. This necessitates a traverse hearing and testimony from the principals in this case about her authority, if any, to accept service on behalf of the LLC. The plaintiff's claim that the defendant corporation "was properly served by service [on] Brockbilt's managing member, M.B. via suitable age and discretion service" [plaintiff's aff in opp. Paragraph 15] is without legal merit in light of the discussion heretofore set forth. Therefore, the plaintiff must establish Iris Brock as one who comes within the constraints of CPLR §311-a which requires service of process by personally delivering process to "any

member of the limited liability company” or “any manager,” “any agent” or “any other person designated by the limited liability company to receive process.” See, **Stuyvesant Fuel Service Corp. V. 99-105 3rd Avenue Realty LLC.**, supra.

The defendant M.B. has alleged a meritorious defense that the work contracted for and provided to the plaintiff was on behalf of his LLC, and that he was a disclosed principal. Accordingly, the defendants’ motion to vacate the default judgment pursuant to CPLR §5015 (a)(1) is hereby granted as to both defendants conditioned on the posting of a surety bond with the Suffolk County Treasurer in the amount of \$85,000 to secure the judgment. The case will be set down for a traverse hearing on the question of jurisdiction on March 3, 2008 at 11:30am. Iris Brock’s authority or apparent authority for the purpose of receiving service of process as a designated or un-designated agent, member or manager for the LLC will be addressed at that time. [See, **Katims v. DaimlerChrysler Corp.**, 9 Misc3d 503 (2005)]. See, **Fashion Page, LTD. v. Zurich Insurance Co.**, 50 NY2d 265, 428 NYS2d 890 (1980); **Schieb v. Curran**, 227 AD2d 328, 643 NYS2d 64 (1st Dept. 1996).

The foregoing constitutes the decision of the Court.

Dated: December 31, 2007



J.S.C.