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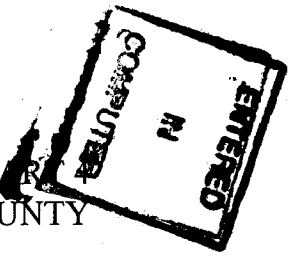
SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice



TRIAL/IAS, PART
NASSAU COUNTY

METRO REALTY SERVICES, LLC and AIRECOREALESTATE CORP.,

Plaintiffs,

INDEX No. 019549/05

MOTION DATE: May 8, 2008
Motion Sequence # 003

-against-

OLD COUNTRY REALTY CORP. and DAVID ZHANG,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by defendant David Zhang, for an order vacating the default granted herein against defendant on July 16, 2006 in reference to plaintiffs' motion pursuant to CPLR § 3215(a), vacating the Clerk's Judgment, entered on August 15, 2006, awarding $110,974.05 in favor of plaintiffs' by default and, upon vacatur of the default, denying plaintiffs' motion for default judgment under CPLR 3215(a), allowing defendants to file its answer and counterclaims in defending this action, within thirty days from the date of decision of this motion, and granting such other and further relief as the Court may deem just and proper under the circumstances, is determined and hereinafter set forth.

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FACTS

The plaintiff, Aireco Real Estate Corp. (hereinafter as "Aireco"), and defendants, Old Country Realty Corp., (hereinafter as "Old Country") and its sole shareholder David Zhang (hereinafter as "Zhang") entered into an Exclusive Real Estate Agreement on June 6, 2005 for the sale of commercial property owned by Old Country. In said agreement Old Country granted Aireco an exclusive right to sell its property from date of execution until October 5, 2005, and in return Aireco would receive a commission based upon a specified fee schedule.

In September, 2005, plaintiff and Aireco's co-broker, Metro Realty Services, L.L.C (hereinafter as "Metro"), procured a purchaser, A. Joseph Realty Corporation. A Contract of Sale was prepared by Zhang's attorneys; however, the property was not sold to the aforementioned purchaser. In the interim, the Exclusive Real Estate Agreement expired.

On December 8, 2005 plaintiffs commenced the instant action alleging that defendants breached the Exclusive Real Estate Agreement by failing to pay Aireco a sales commission for procuring a ready, willing and able purchaser notwithstanding a sale of the property. The defendants did not appear for the instant action, and as a result, this court, on July 16, 2006, granted plaintiffs' motion pursuant to CPLR 3215(a), and entered a default judgment on August 15, 2006 awarding plaintiffs monetary damages.

DEFENDANTS' CONTENTION

Counsel for Zhang contends that this court pursuant to CPLR § 5015(a), or alternatively pursuant to CPLR § 317, should vacate the default judgment. Zhang claims that he was not properly served pursuant to CPLR § 308, and did not learn of the instant action until he received a Restraining Notice to Judgment Debtor and the Information Subpoena from Aireco's attorney about two weeks before submitting the instant Order to Show Cause on April 1, 2008. Additionally, the plaintiffs are not entitled to a commission because a willing and able purchaser was never procured. According to correspondence received by Zhang's attorney for the real estate transaction, the prospective purchaser terminated his offer. Therefore, Zhang has meritorious defenses against the plaintiffs.

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PLAINTIFFS' CONTENTION

Counsel for Aireco contends that Zhang has not met the standards prescribed by CPLR §5015 or CPLR § 317, and therefore, the judgment should not be vacated. Counsel claims that Zhang is not afforded relief pursuant to CPLR § 317 since the defendants were made aware of the default judgment in August, 2006, and had a year from that point to move to vacate. Moreover, the alleged improper service on Zhang is not a reasonable excuse for defaulting, as the evidence suggests that Zhang purposely evaded service. Aireco's attorney claims that proper service was effectuated pursuant to CPLR § 308(2) by serving the pleadings upon a person of suitable age at Zhang's residence. Additionally, numerous attempts were made subsequently to serve Zhang at his residence and his place of business. Furthermore, Zhang's defenses against Aireco are not meritorious because Aireco is entitled to a commission for procuring a willing purchaser, pursuant to the terms of the agreement. Counsel for Aireco alleges that Zhang knowingly attempted to evade the contract in order to avoid paying Aireco a commission.

DECISION

It is well settled that setting aside a default judgment is within the sound discretion of the court, and public policy strongly favors adjudication of matters on the merits. (**See Ahmad v. Aniolowiski**, 28 AD3d 692, 814 NYS2d 666, 2nd Dept., 2006). As such, an intensive examination of the record as presented to the court, including pleadings, affidavits, and other relevant proof was warranted in order to prevent any prejudice or harm from ensuing against the defaulting party in this matter.

In the instant case, Zhang's failure to answer plaintiff's claims is allegedly due to improper service of process. Therefore, it is necessary to first address whether vacatur is warranted pursuant to CPLR § 317.

In order to vacate a default judgment, CPLR § 317 requires that the moving party did not personally receive the pleadings so as to defend in a timely matter and that party must establish meritorious defenses. (**CPLR § 317; Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co, Inc.**, 67 NY2d 138, 141-42, 501 NYS2d 8, 1986). A motion to vacate must be made within one year from the time the defendant obtains knowledge of the entry of judgment. (**CPLR § 317**).

At bar, Zhang was the sole shareholder of co-defendant Old Country, and in

such capacity used his primary residence as the address of record with the Secretary of State for the corporation. The company has been inactive since October 2005, and was dissolved in March 2007. Zhang moved from his residence in October, 2005. He alleges in his Affidavit that he filed a timely change of address with the Secretary of State. However, he submitted a dissolution certificate that was filed on March 19, 2007, and a corporate status report showing a change of address for Old Country; all of which suggests that at the time the instant suit was commenced a current address was not on file with the Secretary of State. Nonetheless, it has been established that service on a corporation through service of process upon the Secretary of State is not "personal delivery" to the corporation or its agent, and as such relief has been obtained by defaulting parties when the Secretary of State had an incorrect address on file, and the corporation as a result did not receive notice of the action. (**Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co, Inc., supra**).

With respect to personal service upon Zhang, he claims that he never received notice of the instant action until he received a Restraining Notice to Judgment Debtor and the Information Subpoena from Aireco's attorney about two weeks before submitting the instant Order to Show Cause on April 1, 2008. Therefore, he avers, his motion is timely under the statute. In his supporting Affidavit, he purports that the Affidavit of Service dated January 11, 2006 which shows that service was effectuated by leaving the pleadings with a person of suitable age at his place of residence is false. The Affidavit of Service notes that the process server tendered the pleadings to an individual identified as "Jane Zhang", an alleged relative of Zhang. Zhang claims that he does have such a relative, and at the time he had not been living at the residence for about two months. Additionally, he never received the pleadings in the mail.

To the contrary, Aireco claims that Zhang was properly served pursuant to CPLR § 308. Aireco's attorney purports that the Affidavit of Service is valid, and was not falsely generated. Moreover, the pleadings were mailed to Zhang's corporate address and home address, and were never returned as undeliverable.

It is well established that when "there is a sworn denial of service by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing." **Skyline Agency v. Ambrose Coppetelli, Inc.**, 117 AD2d 135, 139, 502 NYS2d 479 (2d. Dept. 1986).

Accordingly, a hearing is required to determine the issue of service. This matter is

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referred to the Calendar Control Part (CCP), for a hearing on the issue of service to be held on July 24, 2008 at 9:30 a.m.. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated JUN 27 2008

Stephen A. Bucaria
J.S.C.

ENTERED

JUL 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE