

Thompson v 9 Dover Realty Corp.

2009 NY Slip Op 32028(U)

August 27, 2009

Supreme Court, Suffolk County

Docket Number: 31634/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 31634/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 EILEEN THOMPSON,

Plaintiff,

-against-

9 DOVER REALTY CORP., DPA
 MANAGEMENT CORP., and ANGELO
 AMENDOLIA,

Defendants.

ORIG. RETURN DATE: APRIL 23, 2009
 FINAL SUBMISSION DATE: MAY 7, 2009
 MTN. SEQ. #: 002
 MOTION: MOT D RRH

PLTF'S/PET'S ATTORNEYS:
 ROSENBERG & GLUCK, LLP
 1176 PORTION ROAD
 HOLTSVILLE, NEW YORK 11742
 631-451-7900

DEFT'S/RESP ATTORNEYS:
 AHERN & AHERN
 ONE MAIN STREET
 KINGS PARK, NEW YORK 11754
 631-269-9500

Upon the following papers numbered 1 to 7 read on this motion _____
TO VACATE ORDER OF DEFAULT

Order to Show Cause and supporting papers 1-3; Answering Affirmation and supporting papers 4, 5; Replying Affidavit and supporting papers 6, 7; it is,

ORDERED that this motion by defendants 9 DOVER REALTY CORP., DPA MANAGEMENT CORP., and ANGELO AMENDOLIA for an Order vacating the default Order of this Court dated December 29, 2008, which granted plaintiff leave to enter a judgment on default in favor of plaintiff and against the defendants herein, and set the matter down for an assessment of damages against defendants, is hereby **GRANTED** solely to the extent provided hereinafter.

This action was commenced on October 11, 2007, to recover damages for personal injuries allegedly sustained by plaintiff on or about January 18, 2007, as a result of a trip and fall that occurred at residential premises commonly known as 9 Dover Place, Mastic, New York. Plaintiff alleges that she sustained significant injuries, including a fracture and tear of her right shoulder.

By Order dated December 29, 2008 ("default Order"), this Court granted a motion by plaintiff for leave to enter a default judgment against all defendants herein based upon defendants' non-appearance. Plaintiff had alleged that on October 16, 2007, she served the corporate defendants with the summons and complaint by serving the Secretary of State of the State of New York, pursuant to BCL 306. In addition, plaintiff had alleged that a supplemental summons and amended complaint was filed and served upon ANGELO AMENDOLIA, pursuant to CPLR 308 (2), adding Mr. Amendolia as a defendant. Plaintiff had alleged that the defendants failed to appear or respond to the complaint and the amended complaint, and the time to do so had expired. The Court had not received opposition to that application. The Court granted the application and set the matter down for an Inquest on February 19, 2009, which was then adjourned to April 9, 2009. On April 8, 2009, defendants filed the instant application by Order to Show Cause, seeking to vacate the default Order. Accordingly, the Inquest was adjourned by the parties pending the Court's decision on the motion to vacate, and is currently scheduled for September 24, 2009.

Defendants now inform the Court that defendant ANGELO AMENDOLIA is the sole shareholder and officer of defendants 9 DOVER REALTY CORP. and DPA MANAGEMENT CORP. The corporate address for both corporations is 20 Oak Hill Road, Kings Park, New York, which the Court notes is the address used to serve Mr. Amendolia with the supplemental summons as well as the notice of motion for a default judgment. Mr. Amendolia claims that he has not lived at that address since August of 2006, when he moved to 820 Nicolls Street, Reading, Pennsylvania. Mr. Amendolia indicates that his estranged wife continues to occupy the Kings Park address and does not forward any mail received there to him. Mr. Amendolia alleges that he uses P.O. Box 607 in Kings Park, New York to receive mail, including the rental payments from the plaintiff/tenant for the subject premises. Mr. Amendolia further alleges that on the date of the incident, defendant 9 DOVER REALTY CORP. was the owner of the subject premises, and that defendant DPA MANAGEMENT CORP. maintained the premises.

As for a meritorious defense, Mr. Amendolia alleges that he is unaware of any condition existing at the premises that would cause injury to plaintiff. Moreover, Mr. Amendolia argues that he cannot be sued individually, as he did not own the property on the date of the incident. In support thereof, Mr. Amendolia has submitted a copy of a deed, dated September 22, 2003 and

recorded with the Clerk of Suffolk County on October 29, 2003, transferring ownership of 9 Dover Place from Mr. Amendolia to 9 DOVER REALTY CORP. He avers that the first time he became aware of the incident was when his estranged wife gave him a copy of the default Order of this Court. As such, Mr. Amendolia relies upon CPLR 317 and CPLR 5015 (a) (4) to vacate the default against him, arguing lack of personal jurisdiction (CPLR 5015 [a] [4]), and that he did not personally receive notice of the supplemental summons in time to defend and has a meritorious defense (CPLR 317).

In addition, the corporate defendants seek vacatur pursuant to CPLR 5015 (a) (1), in that the corporate defendants allege that the default was excusable. Defendants allege that the address on file with the Secretary of State for service of process was 20 Oak Hill Road, Kings Park, New York, and thus the corporate defendants similarly did not receive the summons and complaint. Further, defendants allege that the corporate defendants were not negligent in the ownership and management of the premises, and that they were not "aware" of any dangerous condition or defects on the property. Finally, defendants contend that plaintiff improperly served a supplemental summons without leave of court, in violation of CPLR 305 and 1003.

In opposition, plaintiff argues that defendants failed to establish that they did not receive timely notice of the action; failed to demonstrate excusable neglect in failing to appear; and failed to demonstrate a meritorious defense. Plaintiff alleges that at all times relevant, Mr. Amendolia held himself out to be the landlord of the premises, including on an application for rent assistance filed with the Suffolk County Department of Social Services. Further, plaintiff informs the Court that the Berks County Sheriff's Office in Pennsylvania was employed to serve the supplemental summons upon Mr. Amendolia, after plaintiff discovered his Pennsylvania address. However, according to the affidavit of service of the deputy sheriff, he was unable to find Mr. Amendolia at 820 Nicolls Street, Reading, Pennsylvania. Instead, the deputy sheriff indicated that "per resident, the defendant is his landlord and lives in New York." Thus, plaintiff argues that she properly served the supplemental summons upon Mr. Amendolia at his last known residence, to wit: 20 Oak Hill Road, Kings Park, New York, pursuant to CPLR 308 (2). Moreover, regarding the corporate defendants, plaintiff argues that they were properly served pursuant to BCL 306.

In addition, plaintiff argues that defendants have failed to demonstrate a meritorious defense herein. Plaintiff alleges that defendants

merely state that “the rental property is in good condition,” but do not corroborate such statement. In opposition, plaintiff has submitted photographs which allegedly depict the “deplorable” condition of the driveway at the premises. Furthermore, plaintiff informs the Court that rental payments were made payable to Mr. Amendolia and addressed to 20 Oak Hill Road, Kings Park, New York, after he claims he moved to Pennsylvania, and despite Mr. Amendolia’s contention that he utilizes a post office box to receive the rental payments. Lastly, plaintiff argues that the supplemental summons and amended complaint were properly served within the time period set forth in CPLR 1003.

A motion to vacate a default judgment or order may be made upon a showing of a reasonable excuse and a meritorious defense within one year after service of a copy of the order with written notice of its entry, pursuant to CPLR 5015 (a) (1) (see e.g. *Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O’Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (see CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). A party may also move to vacate a default judgment or order, pursuant to CPLR 5015 (a) (4), by arguing that the court lacked jurisdiction to render the judgment or order (see CPLR 5015 [a] [4]). In addition, a defendant served with a summons other than by personal delivery may obtain relief pursuant to CPLR 317, upon a showing that it did not receive notice of the summons in time to defend, and has a meritorious defense (see CPLR 317; *Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138 [1986]; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 968 [2006]). The motion 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 therefor (see *I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

Initially, the Court finds that the corporate defendants have not proffered a reasonable excuse for their default. Plaintiff has filed duly executed affidavits of service which constitute *prima facie* evidence of proper service of process upon both corporate defendants pursuant to BCL 306 (see e.g. *Wells Fargo Bank, N.A. v McGloster*, 48 AD3d 457 [2008]; *Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343 [2003]; *Genway Corp. v Elgut*, 177 AD2d 467 [1991]). Although defendants argue that the Kings Park address remained on file with the Secretary of State for service of process despite Mr. Amendolia having moved from there in August of 2006, an entity’s failure to keep its mailing address

and status up-to-date with the Secretary of State does not constitute a reasonable excuse to vacate a default judgment or order (see *Yellow Book of N.Y., Inc. v Weiss*, 44 AD3d 755 [2d Dept 2007]; *Baker v E. W. Howell Co.*, 216 AD2d 242 [1st Dept 1995]; *Paul Conte Cadillac, Inc. v C.A.R.S. Purchasing Service, Inc.*, 126 AD2d 621 [2d Dept 1987]).

However, the Court finds that the corporate defendants have asserted a potentially meritorious defense to this action. Mr. Amendolia, as sole shareholder of both corporations, avers that “the rental property is in good condition,” and that he is “unaware of any condition existing at the premises that would cause injury to plaintiff.” As discussed hereinabove, plaintiff has submitted photographs allegedly depicting the “deplorable” condition of the driveway at the premises. Although Mr. Amendolia’s averments lack specificity, the Court notes that the allegations in plaintiff’s complaint similarly lack specificity with respect to a defective condition which allegedly existed at the premises. Therefore, at this early stage of the litigation, the corporate defendants have proffered a potentially meritorious defense, and CPLR 317 is available to them.

With respect to the individual defendant, Mr. Amendolia, a defendant can rebut a process server’s affidavit by a detailed and specific contradiction of the allegations in a process server’s affidavit (see *Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343, *supra*). Here, Mr. Amendolia alleges that he moved to Pennsylvania in August of 2006, and that his estranged wife did not forward any mail that he received at the Kings Park address after that date. In support thereof, Mr. Amendolia has submitted his own affidavit, as well as a copy of his Pennsylvania driver’s license indicating an issue date of May 5, 2006. However, plaintiff has submitted an affidavit of service of a deputy sheriff in Berks County, Pennsylvania, which states he was unable to locate Mr. Amendolia thereat. The Court notes that Mr. Amendolia has also indicated he still maintains a P.O. Box in Kings Park, New York. As such, the Court finds that questions of fact exist as to Mr. Amendolia’s dwelling place or usual place of abode on March 15, 2008, the date of service of process herein (see CPLR 308 [2]), sufficient to warrant a traverse hearing with respect to Mr. Amendolia. Additionally, the Court finds that Mr. Amendolia has proffered a potentially meritorious defense to this action, to wit: that he was not the owner of the premises on the date of the incident. As discussed hereinabove, Mr. Amendolia has submitted a copy of a deed, dated September 22, 2003, transferring ownership of the subject premises from Mr. Amendolia to 9 DOVER REALTY CORP.

Regarding the propriety of the service of the supplemental summons and amended complaint adding Mr. Amendolia as a party defendant, CPLR 1003

provides in pertinent part, “[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires *or within twenty days after service of a pleading responding to it*” (CPLR 1003 [emphasis supplied]). As no defendant had interposed an answer to the complaint when plaintiff served an amended complaint, the Court finds that plaintiff was still within the time period to amend as of right to add an additional party (*see generally Jones v Bill*, 10 NY3d 550 [2008]). The Court is also mindful that leave to amend a pleading shall be freely given upon such terms as may be just, absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court’s discretion, the exercise of which will not be lightly disturbed (CPLR 3025 [b]; *Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]). The Court finds that Mr. Amendolia cannot claim surprise or prejudice from the delay, as he is the sole shareholder of both corporate defendants, and failed to interpose an answer to the original complaint on behalf of the corporate defendants.

In view of the foregoing, and in view of the strong public policy in New York to resolve disputes on the merits (*see e.g. 2M Realty Corp. v Boehm*, 13 AD3d 361 [2004]; *Johnson v N.Y.C.H.A. Law Dep’t*, 23 Misc 3d 1109[A] [Sup Ct, Kings County 2009]), this application to vacate the default Order is **GRANTED** to the extent that the default Order is vacated with respect to the corporate defendants, 9 DOVER REALTY CORP. and DPA MANAGEMENT CORP., and a traverse hearing shall be held with respect to the propriety of service of process of the supplemental summons and amended complaint upon defendant ANGELO AMENDOLIA.

Accordingly, the Inquest now scheduled for **September 24, 2009, at 10:30 a.m., in Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead**, is cancelled, and instead a traverse hearing shall be conducted on that date and time on the issue of service of process upon defendant ANGELO AMENDOLIA.

The foregoing constitutes the decision and Order of the Court.

Dated: August 27, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court