

**Akkoc v 12-14 E. 37th Dev. Corp.**

2011 NY Slip Op 30477(U)

January 19, 2011

Supreme Court, New York County

Docket Number: 107610/2005

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

NURI M. AKKOC

INDEX NO. 107610/2005

MOTION DATE \_\_\_\_\_

12-14 E. 37<sup>TH</sup> DEVELOPMENT CORP.

MOTION SEQ. NO. 006

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to vacate the default judgment

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3-4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that ~~this motion~~ :

*The court grants defendant 12-14 E. 37<sup>th</sup> Development Corp.'s motion to vacate the order granting a default judgment against this defendant entered 9/6/06 and the judgment entered 4/26/10, pursuant to the accompanying decision. C.P.L.R. § 317.*

**FILED**

MAR 03 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/19/11

Lucy Billings  
LUCY BILLINGS 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

NURI M. AKKOC,

Index No. 107610/2005

Plaintiff

-against-

DECISION AND ORDER

12-14 E. 37TH DEVELOPMENT CORP.,  
CAULDWELL-WINGATE CO. 'INC.,  
CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., CITY OF NEW YORK, and F.J.  
SCIAME CONSTRUCTION CO., INC.,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

**FILED**

**MAR 03 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

I. BACKGROUND

Plaintiff sues for personal injuries he sustained when he tripped over a metal plate in the sidewalk in front of 12-14 East 37th Street, in New York County. The only remaining defendant in this action, 12-14 E. 37th Development Corp., owned the premises adjacent to the sidewalk where he was injured. Plaintiff served his original summons and complaint on defendant by serving the New York State Secretary of State June 10, 2005. On August 12, 2005, plaintiff served a supplemental summons and amended complaint on defendant by the same means. After defendant failed to appear in the action, the court (Rakower, J.), in an order entered September 6, 2006, granted plaintiff's motion for a default judgment on defendant's liability. After an inquest on damages before Justice Figueroa, the court entered a judgment of \$650,000.00 plus interest against defendant April 26, 2010.

Defendant now moves to vacate the default judgment. C.P.L.R. § 317. After oral argument and attempts to settle the action, the court grants defendant 12-14 E. 37th Development Corp.'s motion to vacate the default judgment against defendant, for the reasons explained below.

## II. VACATUR OF THE JUDGMENT UNDER C.P.L.R. § 317

C.P.L.R. § 317 permits the vacatur of a default judgment when (1) defendant moves to vacate the judgment within one year after learning of the judgment and within five years after entry of the judgment, (2) the summons and complaint was not served by personal delivery to defendant or to its agent designated under C.P.L.R. § 318, and (3) defendant presents a meritorious defense. Caba v. Rai, 63 A.D.3d 578, 580 (1st Dep't 2009).

### A. Timeliness

Defendant's president, Yusuf Bildirichi, attests that he first learned of this action December 7, 2009, and never received the order granting a default judgment until his attorney searched the court file after Bildirichi learned of the action in December 2009. The order granting plaintiff's motion for default judgment on defendant's liability was entered September 6, 2006, but the judgment itself was not entered until April 26, 2010, after the inquest on damages. Defendant served its motion to vacate the judgment April 19, 2010, less than one year after defendant learned of the order granting a default judgment, less than five years after entry of that order, and even before entry of the judgment.

B. Personal Delivery of the Summons and Complaint

Plaintiff delivered the summons and complaint to the Secretary of State, an agent authorized by New York Business Corporation Law (BCL) § 306 to receive service on defendant corporation. C.P.L.R. § 311(a)(1). While that service qualified as personal service on defendant, that personal service did not satisfy C.P.L.R. § 317's requirement of personal delivery to defendant. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 N.Y.2d 138, 142 (1986); Shanker v. 119 E. 30th, Ltd, 63 A.D.3d 553, 554 (1st Dep't 2009); Calderon v. 163 Ocean Tenants Corp., 27 A.D.3d 410, 411 (2d Dep't 2006); Fleetwood Park Corp. v. Jerrick Waterproofing C., 203 A.D.2d 238, 239 (2d Dep't 1994). Nor does delivery to the Secretary of State qualify as service on an agent designated by defendant, rather than by BCL § 306, pursuant to an executed and acknowledged writing bearing the agent's endorsed consent and filed with the County Clerk according to C.P.L.R. § 318's strictures. Howard B. Spivak Architect, P.C. v. Zilberman, 59 A.D.3d 343, 344 (1st Dep't 2009); Bednarczyk v. Kiese, 188 A.D.2d 794, 795 (3d Dep't 1992); Mintz v. Grossman, 160 A.D.2d 913, 914 (2d Dep't 1990). In fact, plaintiff does not claim otherwise.

Given this service, defendant meets the second requirement for relief under C.P.L.R. § 317, as long as defendant itself never received the pleadings or other notice of the action in time to defend against the complaint. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 N.Y.2d at 142; Shanker v. 119 E. 30th,

Ltd, 63 A.D.3d at 554; Price v. Boston Rd. Dev. Corp., 56 A.D.3d 336 (1st Dep't 2008); Thakurdyal v. 341 Scholes St., LLC, 50 A.D.3d 889, 890 (2d Dep't 2008). See M.R. v. 2526 Valentine LLC, 58 A.D.3d 530, 531 (1st Dep't 2009); Coyle v. Mayer Realty Corp., 54 A.D.3d 713, 714 (2d Dep't 2008). Defendant itself did not receive any notice until December 2009 because defendant had not updated its forwarding address filed with the Secretary of State. Nevertheless, since C.P.L.R. § 317, in contrast to C.P.L.R. § 5015(a), does not require a reasonable excuse for defendant's failure to respond to the action, service on the Secretary of State still does not qualify as personal delivery to defendant or its agent even when its nonreceipt of the pleadings is due to its own failure to maintain a current address with the Secretary of State. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 N.Y.2d at 141-42; Shanker v. 119 E. 30th, Ltd, 63 A.D.3d at 554; Arabesque Recs. LLC v Capacity LLC, 45 A.D.3d 404 (1st Dep't 2007); Ferguson v. Shu Ham Lam, 59 A.D.3d 387, 388 (2d Dep't 2009). See Caba v. Rai, 63 A.D.3d at 580; Fleetwood Park Corp. v. Jerrick Waterproofing C., 203 A.D.2d at 239.

If defendant occasioned its nonreceipt of the pleadings or other notice of the action through more than neglect, if defendant intentionally hid from service or notice, for example, such deliberate avoidance might preclude relief under C.P.L.R. § 317. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 N.Y.2d at 143; Shanker v. 119 E. 30th, Ltd, 63 A.D.3d at 554; Ttselikman v. Marvin Ct., Inc., 33 A.D.3d 908, 909 (2d Dep't 2006); Calderon

v. 163 Ocean Tenants Corp., 27 A.D.3d at 411. No evidence suggests defendant knew its address with the Secretary of State was incorrect and intentionally failed to correct the address, however, nor does plaintiff make any such claim of deliberate avoidance. On the contrary, the evidence suggests that plaintiff knew defendant's correct, current address, as it is reflected in defendant's name, but nonetheless served defendant through the Secretary of State. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 N.Y.2d at 142; Pabone v. Jon-Bar Enters. Corp., 140 A.D.2d 872, 873-74 (3d Dep't 1988).

C. Meritorious Defense

To vacate a default judgment, defendant need not conclusively establish a defense, but must make only a prima facie showing, through admissible evidence, of a meritorious defense. Price v. Boston Rd. Dev. Corp., 56 A.D.3d 336; CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership, 25 A.D.3d 301, 302 (1st Dep't 2006); Figueroa v. Luna, 281 A.D.2d 204, 205-206 (1st Dep't 2001); Batra v. Office Furniture Serv., 275 A.D.2d 229, 231 (1st Dep't 2000). The standard for defendant's showing of a meritorious defense in support of a motion to vacate a default judgment is the same as the standard for opposing a motion for summary judgment: to set forth evidentiary facts in an affidavit on personal knowledge or another admissible form sufficient to establish material factual issues requiring a trial. Figueroa v. Luna, 281 A.D.2d at 205-206.

Defendant establishes a meritorious defense through the affidavit by defendant's superintendent of the building abutting the sidewalk injury site, attesting to his familiarity with the site's condition and his observations that the metal plate "did not make it difficult for people to walk on the sidewalk in front of the building" or otherwise create an unsafe condition. Aff. of Ceyhun Beyova ¶ 6. See Price v. Boston Rd. Dev. Corp., 56 A.D.3d 336; Ferguson v. Shu Ham Lam, 59 A.D.3d at 388; Ttselikman v. Marvin Ct., Inc., 33 A.D.3d at 909-10. Despite plaintiff's insistence to the contrary, nothing in the superintendent's affidavit is inconsistent with a prior affidavit by defendant's principal shareholder that defendant did not install, repair, or use the sidewalk or its appurtenances. While the prior affidavit may fall short of a complete defense, that affidavit does not undermine and only supplements the defense established by the superintendent. Aller v. City of New York, 72 A.D.3d 563, 564 (1st Dep't 2010); Raghu v. New York City Hous. Auth., 72 A.D.3d 480, 481-82 (1st Dep't 2010); Garcia v. Good Home Realty, 67 A.D.3d 424, 425 (1st Dep't 2009); Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 500 (1st Dep't 2008). See Rodriguez v. 705-7 E. 179th St. Hous. Dev. Fund Corp., 79 A.D.3d 518, 520-21 (1st Dep't 2010); Mitchell v. City of New York, 29 A.D.3d 372, 374 (1st Dep't 2006).

### III. CONCLUSION

As defendant 12-14 E. 37th Development Corp. meets each of the criteria under C.P.L.R. § 317 for vacatur of the default

judgment against defendant, the court grants defendant's motion to vacate both the order granting a default judgment entered September 6, 2006, and the judgment entered April 26, 2010. The court denies defendant's request for attorneys' fees because defendant did not request this relief in its notice of motion and in any event sets forth no statutory, regulatory, or contractual basis for the relief in the context of this motion. This decision constitutes the court's order.

DATED: January 19, 2011

*Lucy Billings*  
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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

**FILED**  
MAR 03 2011  
NEW YORK  
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