

<b>C&amp;L Concrete Corp. v Mich-Kat Enters. Ltd.</b>
2011 NY Slip Op 31924(U)
June 30, 2011
Supreme Court, Nassau County
Docket Number: 601660/09
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

C&L CONCRETE CORP.,

TRIAL/IAS PART 32  
NASSAU COUNTY

Plaintiff,

Index No.: 601660/09

- against -

Motion Seq. No.: 03

Motion Date: 05/11/11

**XXX**

MICH-KAT ENTERPRISES LTD. d/b/a KAM  
CONSTRUCTION SERVICES, IMC REALTY CORP.  
and "JOHN DOE 1" through "JOHN DOE 10," said parties  
being lienors who have yet to perfect their liens and being  
fictitious and unknown to Plaintiff,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Order to Show Cause, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant "I.M.C. Realty Corp." moves, pursuant to CPLR § 5015(a), for an order vacating the judgment entered herein, against it, on or about the 19<sup>th</sup> day of January 2011, upon the grounds that it was sued incorrectly as "IMC Realty" when its true name is "I.M.C. Realty Corp." and therefore did not receive notice of plaintiff's cause of action since said action was not properly filed. Plaintiff opposes the motion.

Defendant "I.M.C. Realty Corp." submits that "IMC Realty Corp." (with no periods between the first three letters) was incorporated in the New York State Department of State's

Office on March 5, 1987. The address for service of process for “IMC Realty Corp.” is c/o Howard Kurtzberg, Esq., 375 Park Ave., Suite 1709, New York, NY 10152. “I.M.C. Realty Corp.” (with periods between the first three letters) was incorporated in the New York State Department of State’s Office on September 29, 1999. The address for service of process for I.M.C. Realty Corp. is c/o Nicholas Capriotti, 2755 Brian Street, Oceanside, NY 11572.

Despite the fact that “IMC Realty Corp.” is the name contained on all of the legal documents pertaining to the premises that is the subject of this litigation, “I.M.C. Realty Corp.” is the true name of the defendant in this action. Defendant “I.M.C. Realty Corp.” claims the first time it received notice of the subject action was on April 5, 2011, when it received a phone call from Michael Tuck, mortgage broker of I.M.C. Realty Corp. Mr. Tuck advised “I.M.C. Realty Corp.” that he just had received in the mail what appeared to be legal papers for “I.M.C. Realty Corp.” Said legal papers consisted of a copy of the default judgment, along with a letter from plaintiff’s counsel.

Defendant “I.M.C. Realty Corp.” therefore submits that its reasonable excuse for the default was the fact that it had no knowledge of the action since it was never served, but rather “IMC Realty Corp.” was the entity served.

Defendant “I.M.C. Realty Corp.” further submits that the subject premises are under a triple net lease with Walgreens and that defendant “I.M.C. Realty Corp.” vacated said premises on or about a day in November, 2005 and did not conduct any business of any nature or kind at said premises from that date forward. Defendant “I.M.C. Realty Corp.” claims that it had no involvement with the construction on said premises, including, but not limited to, involvement with Walgreens, their contractors and/or subcontractors. Defendant “I.M.C. Realty Corp.” adds

that the terms and provisions of its lease with Walgreens provide for Walgreens to indemnify and hold harmless defendant "I.M.C. Realty Corp." from actions of this nature and kind.

Defendant "I.M.C. Realty Corp." argues that, had it been properly served, it would have notified Walgreens to defend "I.M.C. Realty Corp." in the within action and/or sought to have Walgreens substituted in the within action as the "owner" of the premises consistent with New York State Lien Law. It adds that it did not know of plaintiff's labor and materials and that plaintiff expected payment thereof.

Defendant "I.M.C. Realty Corp." submitted an Affidavit in Support of the instant motion by Nicholas Capriotti, the sole officer, shareholder and director of "I.M.C. Realty Corp." Said Affidavit states, "[s]o as not to unduly burden the Court with a repetition of the facts and circumstances of the within matter I would respectfully request that the Court rely on the Affirmation in Support of this Motion made by my attorney Glenn A. Krebs. Esq."

The Court notes that defendant "I.M.C. Realty Corp." failed to include a copy of a proposed Verified Answer as an exhibit to its moving papers.

In opposition to the motion by defendant "I.M.C. Realty Corp.," plaintiff argues that said motion should be denied since defendant "I.M.C. Realty Corp." has failed to submit an Affidavit of Merit from an individual with personal knowledge, and, as such, has completely and utterly failed to present this Court with anything that could even resemble a meritorious defense. Plaintiff adds that defendant "I.M.C. Realty Corp." has also failed to offer a reasonable excuse for its default.

Plaintiff argues, "[i]t is well settled that a 'court may not grant relief from a default in the absence of an affidavit of merit containing evidentiary facts attested to by an individual with

personal knowledge of the facts.’ *Yovannone v. Sibley’s Dept. Store*, 476 N.Y.S.2d 680 (4<sup>th</sup> Dep’t 1984). *See also Ferreri v. Winston Mall, Inc.*, 388 N.Y.S.2d 675 (2d Dep’t 1976)(holding that ‘Plaintiff also failed to submit an affidavit of merits in opposition to the motion [and that] [t]he affirmation of plaintiff’s attorney, submitted in lieu thereof, is unacceptable’); *Nassau County v. Cedric Const. Corp.*, 474 N.Y.S.2d 549, 553 (2d Dep’t 1984)(denying a motion to vacate where the defaulting defendant ‘did not provide an affidavit of merit which would indicate a possible meritorious defense to [plaintiff’s] claims’).” Plaintiff contends that the affidavit submitted by defendant “I.M.C. Realty Corp.” in support of the instant motion is completely devoid of even a reference to a possible meritorious defense.

Plaintiff adds that, even if the Court were to entertain the attorney affirmation of defendant “I.M.C. Realty Corp.,” the same result would be reached. Said affirmation offers as its meritorious defense the alleged lease agreement by and between Walgreens and defendant “I.M.C. Realty Corp.” which required Walgreens to indemnify and hold harmless defendant “I.M.C. Realty Corp.” from actions of this nature and kind. Plaintiff argues, “C&L is not a party to the indemnification agreement and the indemnification agreement in no way relates to the labor and materials supplied by C&L in connection with the subject project and property nor does I.M.C. set forth a single piece of evidence to contradict C&L’s evidence that it performed work and provided materials for which it was not compensated. While an indemnification agreement may allow I.M.C. to seek compensation from Walgreens for losses arising out of this action, it certainly cannot be characterized as a ‘meritorious defense’ as it in no way constitutes a defense to C&L’s allegations that C&L performed work and provided materials at the subject property, yet was not fully compensated.”

Plaintiff further argues that “[a]s I.M.C. claims as its ‘reasonable excuse’ a deed error

contained in a deed prepared by I.M.C.'s counsel nearly nine (9) years ago- a deed that can no longer be timely reformed - I.M.C. has failed to offer a reasonable excuse for its default and its motion to vacate the default judgment must be denied.”

Relief under CPLR § 5015(a) is available where the defendant can demonstrate a reasonable excuse for the default *and* a showing of a meritorious defense (emphasis added). *See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986); *Szilaski v. Aphrodite Const. Co., Inc.*, 247 A.D.2d 532, 669 N.Y.S.2d 297 (2d Dept. 1998). The requirements are not alternative requirements and both requirements must be met in order to vacate the default judgment.

The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. *See Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

When viewing the moving papers in their best light, the Court finds that defendant “I.M.C. Realty Corp.” failed to demonstrate a meritorious cause of action. Plaintiff failed to provide either a proposed Verified Answer to the Verified Complaint or an Affidavit of Merit from an individual with personal knowledge of the facts. The affirmation of plaintiff’s counsel, who lacks personal knowledge of the facts, has no probative value. Furthermore, the Court agrees with plaintiff’s argument that, “[w]hile an indemnification agreement may allow I.M.C. to seek compensation from Walgreens for losses arising out of this action, it certainly cannot be characterized as a ‘meritorious defense’ as it in no way constitutes a defense to C&L’s allegations that C&L performed work and provided materials at the subject property, yet was not

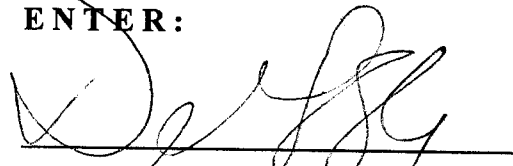
[\* 6]  
fully compensated.”

Accordingly, the motion of defendant “I.M.C. Realty Corp.” is hereby **DENIED**.

All temporary stays that were granted by the Court in the Order to Show Cause are hereby lifted.

This constitutes the Decision and Order of this Court.

ENTER:



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DENISE L. SHER, A.J.S.C.  
XXX

Dated: Mineola, New York  
June 30, 2011

**ENTERED**  
JUL 05 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE