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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY as Subrogee of JOHN P. DEGUARDI,

Plaintiff,

- against -

RPM PERFORMANCE INC.,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 4454/09
Motion Seq. No.: 02
Motion Date: 07/21/11
XXX

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affidavit, Affirmation and Exhibits	**1**
Affirmation in Opposition and Exhibits	**2**
Affirmation in Reply	**3**

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

Defendant moves for an order staying the execution of the Judgement to be levied on defendant which was entered in the office of the Nassau County Clerk on June 25, 2010, pending the determination of defendant's application to vacate the Order of the Court dated June 7, 2010 which granted judgment against defendant in favor of plaintiff; and moves, pursuant to CPLR § 5015(a), for an order vacating the judgment entered herein, against it, on or about the 25th day of June, 2010. Plaintiff opposes the motion.

In support of its motion, defendant submits the affidavit of George Schmitz, president of defendant RPM Performance Inc. Mr. Schmitz states, "I received a letter from the office of the sheriff of Suffolk County, State of New York, indicating that the sheriff had been directed to enforce a judgment against RPM. On June 29, 2011, a sheriff appeared at RPM and announced

his intention to execute upon the inventory of RPM to satisfy a judgment. The sheriff left without executing upon the inventory, but announced his intention to return on July 1, 2011 to execute upon the inventory. At no time did I receive personal service of the summons and complaint, or notice of the entry of judgment, or service by any other means. Service of the notice of entry does not appear to have been made in compliance with CPLR § 306 or 311. RPM shares a mailing address with another company, a gas station. It is possible that a representative from the gas station received documentation served upon RPM, but did not forward said documentation to RPM. The gas station is not authorized to accept service on behalf of RPM."

Defendant further submits that the Summons in the instant action states that venue is based upon plaintiff's place of business, listed as 60 Charles Lindbergh Blvd., Uniondale, New York, which is in Nassau County. However, plaintiff's attorney verified the Complaint by attorney affirmation stating, "[a]ffirmant further states that the reason this Verification is made by deponent and not by plaintiff is that plaintiff does not maintain its place of business in the County in which affiant maintains his office." The Summons indicated that plaintiff's counsel's office is located in Mineola, which is in Nassau County. The Judgment, which was entered with the Nassau County Clerk on June 25, 2010, lists plaintiff's address as 75-20 Astoria Boulevard, East Elmhurst, New York, 11370, which is in Queens County. Defendant's place of business is located in Suffolk County. Defendant therefore argues that, if plaintiff's place of business at the time this action was commenced was in Queens County, venue for this action was improper pursuant to CPLR § 503(a). If plaintiff's place of business was located in Nassau County at the time when this action was commenced, then the verification of the Complaint by plaintiff's counsel is not authorized pursuant to CPLR § 3020(d)(3).

Finally, defendant contends that, as the car that is the subject of the law suit, was out of defendant's control at the time the alleged damage complained of in the Complaint occurred, and defendant was not the cause of such damage (as the time the tow truck left defendant with plaintiff's Subaru, the batter was secure to the battery cable), defendant is not responsible for the damage.

The Court notes that defendant failed to include a copy of a proposed Verified Answer as an exhibit to its moving papers.

In opposition to the motion by defendant, plaintiff argues that said motion should be denied since defendant has failed to set forth a reasonable excuse for its default and a meritorious defense to the underlying action.

Plaintiff submits that it commenced the instant action more than two years ago, on March 11, 2009, and that service of the Summons and Verified Complaint was pursuant to New York State Business Corporations Law ("BCL") § 306 and was done by personal service. Plaintiff claims that, prior to its service pursuant to BCL § 306, it checked with the New York State Department of State Division of Corporations to determine if the defendant was an active domestic business corporation. Plaintiff did indeed determine that defendant was an active domestic business corporation with an address for service of process at 225 Higbie Lane, West Islip, New York 11795-2810. Plaintiff states that defendant was served in accordance with the BCL. *See* Plaintiff's Affirmation in Opposition Exhibit B. Plaintiff adds that, notwithstanding the fact that the defendant was personally served at the address listed with the Division of Corporations, numerous other documents were sent to defendant at the same address and it did not respond.

Plaintiff adds that defendant has also failed to set forth a meritorious defense. Plaintiff argues that, based upon the documentation provided in support of its original motion for default judgment, it has submitted extensive and a professional opinion as to how the subject incident occurred while defendant merely submits conclusory allegations and denials, which are insufficient to demonstrate a meritorious defense. Vague and conclusory allegations, baron of any factual support whatsoever, are insufficient for vacatur.

Plaintiff further argues that defendant's attempt to claim that the Complaint was not verified appropriately is a non-issue at this point since the case law is clear that such rejection of an unverified or improperly verified pleading must be immediate. The failure to promptly notify an adversary that a pleading is being rejected is a waiver of any defect in the verification.

In reply, defendant admits that presently, and at all times applicable to the instant action, its address for service of process is and has been 225 Higbie Lane, West Islip, New York, 11795-2810. However, defendant denied receiving any of the documentation alleged to have been sent to it at this address by plaintiff. Defendant maintains that it did not receive any type of

notice of the instant action prior to being contacted by the sheriff's office and, as such, defendant has a reasonable excuse for failing to respond to this action sooner. Defendant further argues that it is not necessary for it to establish the validity of its defense as a matter of law in order to obtain vacatur of its default in answering, but rather it has the burden of demonstrating a potentially meritorious defense. Defendant claims, as it has denied being the cause of the subject fire and that the subject vehicle was out of its control when the damage to said vehicle took place, it has demonstrated, at least, a potentially meritorious defense. Defendant adds, that under the instant circumstances, as it was unaware of the instant action until recently, it has claimed with due diligence that the Complaint was not properly verified.

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 failed to demonstrate both a reasonable excuse for his default and a meritorious cause of action.

Mere denials of receipt are insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service. *See De La Barrera v. Handler*, 290 A.D.2d 476, 736 N.Y.S.2d 249 (2d Dept. 2002); *Udell v. Alcamo Supply & Contracting Corporation*, 275 A.D.2d 453, 713 N.Y.S.2d 77 (2d Dept. 2000); *Morales v. Yaghoobian*, 13 A.D.3d 424, 786 N.Y.S.2d 562 (2d Dept. 2004). Plaintiff has provided an Affidavit of Service by the Secretary of State indicating that service upon defendant was made pursuant to Section 306 of the Business Corporations Law. *See* Plaintiff's Affirmation in Opposition Exhibit B.

The Affirmation of Service that additional copies of the Summons and Complaint had been mailed to defendant's business address raises a presumption that a proper mailing occurred

and defendant's mere denial of receipt is not sufficient, by itself, to rebut the presumption. *See* Plaintiff's Affirmation in Opposition Exhibit C. *See also Udell v. Alcamo Supply & Contracting Corporation, supra*; *Cavalry Portfolio Services, LLC v. Reisman*, 55 A.D.3d 524, 865 N.Y.S.2d 286 (2d Dept. 2008).

Additionally, defendant has not demonstrated a meritorious cause of action. Defendant's statements, "[a]t the time the tow truck left RPM with Subaru, the battery was secure to the battery cable. As the car was out of RPM's control at the time the alleged damage complained of in the complaint occurred, and RPM was not the cause of such damage, RPM is not responsible for the damage" constitute vague and conclusory denials. Said denials are insufficient to demonstrate a meritorious defense. Furthermore, as previously stated, defendant failed to provide a proposed Verified Answer as an exhibit to its moving papers.

Accordingly, the motion of defendant is hereby **DENIED** in its entirety.

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:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
August 26, 2011