SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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In the Matter of the Application of TNS MANAGEMENT SERVICES, INC., D/B/A TNS MANAGEMENT SERVICES, INC.,

Petitioner,

For a Judgment Pursuant to CPLR 5015(a)(1) and CPLR 317 vacating a Default Judgment,

- against -

CIT TECHNOLOGY FINANCING SERVICES, INC., AS ASSIGNEE OF TGI OFFICE AUTOMATION,

Respondent.

Index No.: 24958/2012

Motion Date: 01/24/13

Motion No.: 125

Motion Seq.: 1

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The following papers numbered 1 to 12 were read on this application by petitioner, TNS MANAGEMENT SERVICES, INC., for an order pursuant to CPLR 317 and CPLR 5015(a) vacating a judgment entered on default:

	Papers Numbered
Order to Show Cause-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 12

This is an action brought by special proceeding to vacate a default judgment obtained by the respondent against the petitioner in the amount of $43,664.68 and entered in Queens County on November 15, 2012. The underlying action was commenced by the respondent, CIT Technology Financing Services, Inc.(CIT) by the filing of a summons and complaint under Index No.

701957/2012 on September 6, 2012. The complaint asserted causes of action against petitioner, TNS Management Services, Inc.(TNS) for breach of contract, account stated, unjust enrichment, and replevin and sought to recover the outstanding balance due in the amount of $38,723.81 based upon an alleged breach of two separate equipment lease agreements. The leases executed in July 2010 called for monthly installment payments. CIT alleged that TNS defaulted in its payments under the lease agreements and failed to return the leased equipment.

The petitioner was purportedly served with a copy of the summons and complaint on September 14, 2012 at the Office of the Secretary of State in Albany, New York. According to the affidavit of process server Steven Avery, dated September 19, 2012, he served the summons and complaint on one, Donna Christie "clerk authorized to accept service." When the petitioner failed to appear or timely answer the summons and complaint, the respondent obtained a Clerk's Judgment as set forth above. Respondent thereupon served a restraining notice against the petitioner's business checking account at Chase Bank in Columbus, Ohio. Based upon the restraining notice, the bank put a hold on the account.

Petitioner now moves for an order pursuant to CPLR 5015(a) and CPLR 317 vacating the default judgment and the restraining notice on the ground of excusable default claiming that the summons and complaint were not properly served, that petitioner did not receive service of the summons and complaint in time to defend the action and that petitioner has a meritorious defense. In support of the motion the petitioner submits an affidavit from Arthur J. Spanarkel, President of TNS, dated December 17, 2012, stating that TNS never received a copy of the summons and complaint. In addition, Mr. Spanarkal submits a list of payments made by check and cashed by the respondent and states that the balance due on the account as of March 8, 2012 was $12,143.95 and not $38,723.81 as alleged in the complaint. In addition, Mr. Spanarkel states that respondent would not accept its tender of said amount and further neither petitioner nor its collection agent Dynamic Recovery provided details as to how the amount due was calculated and failed to provide a location for turning over the leased equipment.

Petitioner also submits an affirmation from attorney Norman D. Alvy, Esq. stating that his prior law firm, Alvy & Tablante LLP, was listed as the agent for service of process by the Secretary of State at their old address 1979 Marcus Avenue, Lake Success, New York. The Secretary of State mailed the summons and complaint to the old address and it was sent back to the

Secretary of State with the notation, "moved no forwarding address." Mr. Alvy states that he did in fact notify the post office of the new address in Suffolk County. Thus, Mr. Alvy states that because of a mix-up at the post office the summons and complaint mailed by the Secretary of State was not forwarded to his new address and therefore not received by the petitioner herein. Mr. Alvy did not update his new address with the Secretary of State. Counsel states that because they have a reasonable excuse for not answering the summons and complaint and a meritorious defense, the default judgment should be vacated. Mr. Alvy also states that the plaintiff sent the required affidavit and a copy of the summons and complaint by first class mail pursuant to CPLR 3215(g) and BCL § 306(B) to TNS Management at 6455 7th Avenue Glendale, New York rather that their correct address at 64-55 74th Avenue Glendale, New York.

Serphin R. Maltese, Esq. submits an undated affirmation stating that on March 8, 2012 he sent a letter to CIT and to the collection agency stating that he represented TNS requesting that CIT and Dynamic Recovery cease and desist contacting TNS and also requesting that CIT pick up their equipment as soon as possible. He states that on or about October 2012 he agreed to be designated by petitioner to accept service of process on behalf of TNS.

Counsel for petitioner, Kevin G. McMorrow, Esq. asserts that personal jurisdiction was not obtained over petitioner because proper service was not made pursuant to BCL §306(b). He states that petitioner never received a copy of the summons and complaint served on the Secretary of State, the 3215(g) affidavits were sent to the wrong address and that counsel Serphin Maltese was not served with a copy of the summons and complaint. Counsel asserts that it has provided a meritorious defense and excusable default in that did not receive the summons and complaint from the Secretary of State by mail, from the respondent or from its prior or current counsel.

Mr. McMorrow also states that the funds that have been restrained by Chase in the TNS business checking account are trust funds from general contractors and as such are not the property of TNS Management and therefore cannot the subject of a restraining notice.

In opposition to the motion, respondent's counsel, Anna E. Turner, Esq. states that petitioner was properly served with a copy of the summons and complaint pursuant to BCL § 306 by personally serving the Secretary of State on September 14, 2012 The Secretary of State then mailed a copy of the summons and

complaint to Mr. Alvy, the petitioner's agent designated to accept service at their Lake Success Office in September 2012 but as they had moved on March 1, 2012 the summons and complaint was returned to the Secretary of State. The Alvy address on file with the Secretary of State was no longer the firm's valid address. Citing Associated Imports, Inc. v Leon Amiel Publisher, Inc., 168 AD2d 354 [1st Dept. 1990], counsel asserts that service was complete and jurisdiction obtained over the petitioner when the Secretary of State was personally served and that the failure to keep a current address of an agent on file with the Secretary of State does not constitute a reasonable excuse for the default. In addition, counsel contends that the petitioner failed to demonstrate a potentially meritorious defense. Counsel claims that the amount of $38,723.81 is the correct accelerated amount due and owing to the respondent. In addition, counsel asserts that the petitioner's restrained account at Chase was not designated as a trust account but in fact based on documents submitted by the petitioner, is actually a business checking account.

Upon review and consideration of the petitioner's application and respondent's affirmation in opposition thereto, this court finds that the petitioner's application to vacate the default judgment entered under Index No. 701957/2012 is granted.

The Courts have held that pursuant to CPLR 317 "[a] person served with a summons other than by personal delivery to him [or her] or to his [or her] agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action" by seeking to vacate a default judgment within one year of learning of the judgment upon demonstrating a potentially meritorious defense" (Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc., 83 AD3d 1080 [2d Dept. 2011]; also see Maron v Crystal Bay Imports, Ltd., 99 AD3d 867 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v DaCosta, 97 AD3d 630 [2d Dept. 2012]; Wassertheil v Elburg, LLC, 94 AD3d 753 [2d Dept. 2d Dept. 2012]; Fleisher v Kaba, 78 AD3d 1118 [2d Dept. 2010]).

Counsel for petitioner maintains that because Mr. Alvy moved his office and changed his address without notifying the Secretary of State that the summons and complaint were not delivered to the petitioner. In addition, petitioner states it did not receive a copy of the summons and complaint as they were mailed to an incorrect address. Although the courts have held that under CPLR 5015(a) the defendant's failure to keep a current address on file with the Secretary of State does not constitute a reasonable excuse for its failure to appear or answer the

complaint (see Bontempts v Aude Constr. Corp., 98 AD3d 1071 [2d Dept. 2012]; Castle v Avanti, Ltd., 86 AD3d 531 [2d Dept. 2011]; Yellow Book of N.Y., Inc. v Weiss, 44 AD3d 755[2d Dept. 2007], the courts have also held that unless plaintiff can show that the defendant deliberately avoided service of process, the inadvertent failure to notify the Secretary of State of its change of address is not relevant to whether it is entitled to relief under CPLR 317 (see Cohen v. Michelle Tenants Corp., 63 AD3d 1097 [2d Dept. 2009][there was no evidence that the defendant was on notice that an old address was on file with the Secretary of State]; Tselikman v Marvin Court, Inc., 33 AD3d 908 [2d Dept. 2006][there was no evidence that the defendants were on notice of the failure to designate a new registered agent for service or that an old address was on file with the Secretary of State]).

Here, it is not disputed that the petitioner did not receive actual notice of the summons and complaint in time to defend the action. It is clear that the summons was personally served on the Secretary of State and that the Secretary of State did not have the present address of the agent designated to accept service on petitioner's behalf due to Mr. Alvy's failure to notify the Secretary of State of his change of address (see Brickhouse Masonry, LLC v. Windward Bldrs., Inc., 956 NYS2d 175 [2d Dept. 2012]; Cohen v Michelle Tenants Corp., 63 AD3d 1097 [2d Dept. 2009]; Girardo v 99-27 Realty, LLC, 62 AD3d 659 [2d Dept. 2009]). Further mail service of the summons and complaint pursuant to CPLR 3215(g)(4) and BCL § 306(b) was sent by respondent to the wrong address. In addition, respondent failed to show that the petitioner deliberately attempted to avoid notice of the action (see Tselikman v Marvin Ct., Inc., 33 AD3d 908 [2d dept. 2006]; Hon-Kuen Lo v Gong Park Realty Corp., 16 AD3d 553 [2d Dept. 2005]). Therefore, the petitioner is entitled to relief under CPLR 317 by demonstrating a potentially meritorious defense.

In light of the strong public policy of resolving controversies on the merits this court finds that Mr. Alvy's affirmation stating that he compared the list of checks paid by TNS and cashed by CIT and found that the amount owed on the contracts is substantially less than the amount set forth in the complaint, the petitioner has raised a question of fact as to the amount due the respondent on the lease and as such the petitioner has provided a potentially meritorious defense (see Franco Belli Plumbing & Heating & Sons, Inc. v. Imperial Dev. 45 AD3d 634 [2d Dept. 2007]).

Accordingly, based upon the foregoing, it is hereby,

ORDERED that the petitioner's application for an order vacating the default judgment in the amount of $43,664.68 entered by the Clerk on November 15, 2012 under Index No. 701957/2012 is vacated forthwith as is the restraining notice issued by the respondent pursuant to that judgment, and it is further,

ORDERED that petitioner shall serve its answer under Index No. 701957/2012 with a copy of this decision and order with notice of entry. Such service shall be made within 15 days of service of a copy of this order with notice of entry thereof.

Dated: February 19, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.