

**Inta-Boro Acres, Inc. v Mattoo & Bhat Med. Assoc.,  
P.C.**

2013 NY Slip Op 32076(U)

July 24, 2013

Supreme Court, Queens County

Docket Number: 27331/11

Judge: Darrell Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

INTA-BORO ACRES, INC.,

Index No. 27331/11

Plaintiffs,

Motion

Date May 2, 2013

- against-

Motion

MATTOO & BHAT MEDICAL ASSOCIATES, P.C.  
d/b/a AV CARE, AMBULATORY VASCULAR  
MANAGEMENT, LLC a/k/a AMBULATORY  
VASCULAR CARE MANAGEMENT, LLC d/b/a  
AV CARTE, AV CARE PHYSICIANS PLLC,  
JODUMUTT G. BHAT, NIRMAL K. MATTOO  
and KEN SIMELS,

Cal. No. 65

Motion

Seq. No. 7

Defendant(s).

The following papers numbered 1 to 14 read on this motion by defendants, Mattoo & Bhat Medical Associates, P.C., (Medical Associates P.C.), Jodhumutt G. Bhat and Nirmal K. Mattoo, for an order vacating the default judgment of April 11, 2012, pursuant to CPLR 3102 (d) and 5015 (a), and permitting these defendants to appear in the action and serve an answer. Plaintiff cross-moves in opposition and seeks an order imposing sanctions and awarding costs, disbursements and legal fees.

Papers  
Numbered

Notice of Motion - Affirmation - Exhibits.....	1-6
Notice of Cross Motion - Affirmation - Exhibits.....	7-10
Reply Affirmation.....	11-14

Upon the foregoing papers, the motion and cross motion are determined as follows:

Plaintiff, Inter-Boro Acres, Inc. commenced this action on December 6, 2011, to recover damages for breach of contract, to recover in quantum meruit for services provided to the defendants, for attorneys' fees, and to recover monthly service charges for delinquent accounts. Plaintiff's motion for a default judgment was granted in an order dated March 19, 2012, and a judgment was docketed against the defendants on April 11, 2012, in the sum of \$78,513.66, together with interest of \$3,833.18, attorneys' fees of \$25,228.50, and costs and expenses of \$619.80, amounting to the sum of \$108,195.14.

Defendants, Medical Associates, P.C., Jodhumutt G. Bhat and Nirmal K. Mattoo, seek an order vacating the default judgment of April 11, 2012, pursuant to CPLR 3102 (d) and 5015 (a). Defendants, Bhat and Mattoo, licensed physicians are the principals of Medical Associates, P.C. Medical Associates, P.C. maintains an office at an address in Maspeth, New York, and an office at an address on East 59<sup>th</sup> Street, New York.

The Court of Appeals, in *Woodson v Mendon Leasing Corp.*, (100 NY2d 62 [2003]) stated that:

“Under CPLR 5015 (a), a court is empowered to vacate a default judgment for several reasons, including excusable neglect; newly discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur of a prior order. These categories represent a codification of the principal grounds upon which courts have traditionally vacated default judgments as part of their "inherent discretionary power" (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:11, at 476 [1992]). It thus follows that section 5015 (a) does not provide an exhaustive list as to when a default judgment may be vacated. Indeed, the drafters of that provision intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee (see *id.*; 3d Preliminary Report of Advisory Comm on Practice and Procedure, 1959 NY Legis Doc No. 17, at 204). In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice (*Ladd v Stevenson*, 112 NY 325 [1889]; see generally 10 Weinstein-Korn-Miller, NY Civ Prac ¶ 5015.01, at 50-299; ¶ 5015.12, at 50-338 [2002]).

A defendant seeking to vacate a default pursuant to CPLR 5015 (a) (1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (*Lane v Smith*, 84 AD3d 746 [2d Dept 2011]; *Bethune v Prioleau*, 82 AD3d 810 [2d Dept 2011]; *Giraldo v Weingarten*, 81 AD3d 885 [2d Dept 2011]; *NY SMS Waterproofing, Inc. v Congregation Machne Chaim, Inc.*, 81 AD3d 617 [2d Dept 2011]; *Simpson v Tommy Hilfiger U.S.A., Inc.*, 48 AD3d 389 [2d Dept 2008]; *Town House St., LLC v New Fellowship Full Gospel Baptist Church, Inc.*, 29 AD3d 893 [2d Dept 2006]).

To vacate a default pursuant to CPLR 317, a defendant who has not been served pursuant to CPLR 308 (1) does not have to establish a reasonable excuse for his or her default, but must show that he or she did not actually receive notice of the action in time to defend it, and must further show that he or she has a potentially meritorious defense (*Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d 138 [1986]; *Deutsche Bank Natl. Trust Co. v DaCosta*, 97 AD3d 630 [2d Dept 2012]; *Wassertheil v Elburg, LLC*, 94 AD3d 753 [2d Dept 2012]; *Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080 [2d Dept 2001]). The court may consider the applicability of CPLR 317 even if the defendant fails to specify such relief in its motion (*Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.*, *supra*). However, to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the

party “did not receive actual notice of the summons and complaint in time to defend the action” (393 *Lefferts Partners, LLC v New York Ave. at Lefferts, LLC*, 68 AD3d 976 [2d Dept 2009]; see CPLR 317; *Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d at 142; *Clover M. Barrett, P.C. v Gordon*, 90 AD3d 973 [2d Dept 2011]; *Marinoff v Natty Realty Corp.*, 17 AD3d 412 [2d Dept 2005]).

### **Medical Associates, P.C. :**

Plaintiff served defendant Medical Associates, P.C. with process on December 9, 2011, by serving the Secretary of State, pursuant to CPLR 311 and BCL 306 (b), at which time service was complete. Therefore, Medical Associates, P.C.’s time in which to serve an answer or otherwise appear expired 30 days later on January 8, 2012.

The process server’s affidavit of service on the Secretary of State constitutes *prima facie* evidence proper service (*Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831 [2d Dept 2013]; *Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763 [2d Dept 2012]; *C & H Import & Export, Inc. v MNA Global, Inc.*, 79 AD3d 784 [2d Dept 2010]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743 [2d Dept 2010]).

Defendants, Bhat and Mattoo, surmise that the mailing from the Secretary of State was improperly taken by a co-defendant, who purported to manage Medical Associates, P.C.’s East 59<sup>th</sup> Street office. Defendant, Bhat, in his reply affidavit states that the address it listed with the Secretary of State for the mailing of process is the Maspeth address, and asserts that no such mailing was received at that address. However, defendant, Medical Associates, P.C.’s mere denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by service upon the Secretary of State (CPLR 311 [a] [1]; BCL § 306; *Hidalgo v Cruiser Taxi Corp.*, 101 AD3d 950 [2d Dept 2012]; *Thas v Dayrich Trading Inc.*, 78 AD3d 1163 [2d Dept 2010]; *Gartner v Unified Windows, Doors & Siding, Inc.*, 71 AD3d 631 [2d Dept 2010]), and therefore is insufficient to demonstrate a reasonable excuse for the default under CPLR 5015 .

The court further finds that Medical Associates, P.C. has failed to demonstrate that it did not personally receive notice of the summons in time to defend the action, as required to obtain relief from a default judgment pursuant to CPLR 317 (*Taieb v Hilton Hotels Corp.*, 60 NY2d 725 [1983]; *Hidalgo v Cruiser Taxi Corp.*, 101 AD3d 950 [2d Dept 2012]; 393 *Lefferts Partners, LLC v New York Ave.*, 68 AD3d at 977). The affidavits submitted in support of Medical Associates, P.C.’s request to vacate the default judgment amount to nothing more than a mere denial of notice of this action prior to entry of the default judgment and are insufficient to establish lack of actual notice for the purpose of CPLR 317 (*Hidalgo v Cruiser Taxi Corp.*, 101 AD3d at 951, *Wassertheil v Elburg, LLC*, 94 AD3d at 754; *Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d at 1081-1082).

Finally, defendant, Medical Associates, P.C., asserts that plaintiff’s failure to comply

with CPLR 3215 (g) (4) (I) requires the vacatur of the default judgment. A default judgment may not be granted against a non-appearing corporate defendant without proof of compliance with the additional service requirement set forth in CPLR § 3215(g) (4) (I) (*Schilling v Maren Enters.*, 302 AD2d 375 [2d Dept 2003]; *Ocuto Blacktop & Paving Co., Inc. v Trataros Construction, Inc.*, 277 AD2d 919 [4th Dept 2000]; *Rafa Enterprises, Inc. v Pigand Management Corp.*, 184 AD2d 329 [1st Dept 1992]). However, as defendant Medical Associates P.C. has failed to demonstrate that it was entitled to vacatur of the subject order pursuant to CPLR 317 or 5015, plaintiff's alleged failure to comply with CPLR 3215 (g) (4) (I) does not constitute a fatal defect (*Castle v Avanti, Ltd.*, 86 AD3d 531 [2d Dept 2011]; *Peck v Dybo Realty Corp.*, 77 AD3d 640 [2d Dept 2010]; *Mauro v 1896 Stillwell Ave., Inc.*, 9 AD3d 506 [2d Dept 2007]). Therefore, that branch of the motion which seeks to vacate the default judgment as to Medical Associates, P.C., is denied.

**Jodumutt G. Bhat and Nirmal K. Mattoo :**

Plaintiff served defendant, Jodumutt G. Bhat, with a copy of the summons and verified complaint pursuant to CPLR 308 (2), by serving a co-worker, identified as a “John Doe” who refused to provide his name, at 750 Lexington Avenue Ste.1701, New York, NY 10022, on December 16, 2011, and by mailing a copy of the summons and verified complaint to said address on December 19,2011. The process server’s affidavit of service reciting these facts was filed on December 23, 2011.

Plaintiff also served defendant, Nirmal K. Mattoo, with a copy of the summons and verified complaint pursuant to CPLR 308 (2), by serving a co-worker, identified as a “John Doe” who refused to provide his name, at 750 Lexington Avenue Ste.1701, New York, NY 10022, on December 16, 2011, and by mailing a copy of the summons and verified complaint to said address on December 19, 2011. The process server’s affidavit of service reciting these facts was filed on December 23, 2011. Therefore, assuming arguendo that the service of process on these defendants was proper, their time in which to serve an answer or otherwise move expired on February 1, 2012 (CPLR 320, 308 [2]).

To the extent Mr. Bhat and Mr. Mattoo seek to vacate their default pursuant to CPLR 5015 (a) (4) on the grounds of lack of jurisdiction, the affidavit of plaintiff's process server constitutes *prima facie* evidence of proper service pursuant to CPLR 311(a) (1) (*Indymac Fed. Bank FSB v Quattrochi supra; Burekhovitch v Tatarchuk supra; C & H Import & Export, Inc. v MNA Global, Inc., supra; Irwin Mtge. Corp. v Devis, supra*).

Defendants, Bhat and Mattoo, however, deny receipt of service of the summons and verified complaint and that they never received a copy of the summons and complaint, and assert that the 750 Lexington Avenue address is not the address of the professional corporation; that they are not employed at that address; and have no “co-workers” at that address. Defendants, Bhat and Mattoo, that they have a license and management agreement with co-defendant, Ambulatory Vascular Management, LLC (AVM), and that AVM does business at

750 Lexington Avenue, Suite 1701, New York, New York.

Defendants, Mattoo and Bhat, assert that they were not aware of this action until they received a notice that their bank accounts had been restrained as a result of the default judgment; that neither they nor the professional corporation ever contracted with plaintiff, and that they did not authorize AVM or any other person, to enter into a contract on their behalf. Defendants further assert that the complaint incorrectly alleges that the professional corporation does business as AV Care, and that the professional corporation has never filed a certificate of assumed name with the Secretary of State. Defendants also assert that the complaint incorrectly alleges that they are part of an “enterprise” who entered into a contract with the plaintiff.

Plaintiff, in opposition, assert that at the time of service defendants, Mattoo and Bhat, held themselves out as doing business at the Lexington Avenue address, as they were both featured on the website of AV Care. Plaintiff has submitted a printout from said website which sets forth contact information for Ambulatory Vascular Care Management, LLC, at the Lexington Avenue address. However, said printout clearly states that AV Care’s locations were at 110 East 59<sup>th</sup> Street, Suite 10D, New York, New York , 65-19 Borden Avenue, Maspeth, New York and 3839 Flatlands Avenue, Brooklyn, New York. The documentary evidence submitted by the plaintiff, therefore is insufficient to demonstrate that Mattoo and Bhat were doing business at the Lexington Avenue address, or that they advertised that they were doing business at said address.

The court therefore finds that defendants, Bhat and Mattoo, sworn denial of the receipt of service, and their sworn statements as to specific facts contained in the affidavit of service are sufficient to rebuts the presumption of proper service and necessitates an evidentiary hearing (*Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135 [2d Dept 1986]), to determine whether the court had jurisdiction over the defendants. However, a hearing is not required at this juncture, as even assuming arguendo that these defendants were properly served with process, they were not in default at the time plaintiff served the motion for a default judgment on January 31, 2012. Therefore, vacatur of the default judgment as to these defendants is warranted.

### **Conclusion:**

In view of the foregoing, that branch of defendants’ motion which seeks to vacate the default judgment against defendant, Medical Associates, P.C. is denied, and that branch of the motion which seeks to vacate the default judgment as to defendants, Jodumutt G. Bhat and Nirmal K. Mattoo, is granted. Defendants, Bhat and Mattoo, are given leave to serve an answer, or other wise move, within 20 days after the service of a copy of this order, together with notice of entry. Plaintiff’s cross motion is denied in its entirety.

Dated: July 24, 2013

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DARRELL L. GAVRIN, J.S.C.