

Beaulieu v Jay Realty Corp.

2013 NY Slip Op 33669(U)

April 22, 2013

Sup Ct, Bronx County

Docket Number: 307415/11

Judge: Mary Ann Brigantti-Hughes

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti-Hughes

MICHELE BEAULIEU,

Plaintiff,

DECISION/ORDER

Index No.:307415/11

-against-

JAY REALTY CORPORATION,

Defendant

The following papers numbered 1 to 14 read on the motion for summary judgment noticed on , **January 25, 2013 and January 31, 2013**, and submitted on the motion calendar of **February 20, 2013** in Part IA-15:

<u>Papers submitted</u>	<u>Numbered</u>
Def's OSC to vacate default, Affirmation, & Exhibits,	1,2,3
Affirmation in Opposition, Exh., Memo of Law,	4,5,6
Reply Affirmation	7
Def's OSC to compel, Affirmation & Exhibits,	8,9,10
Affirmation in Opposition, Exh., Memo of Law,	11,12,13
Reply Affirmation	14

By way of order to show cause, the defendant Jay Realty Corporation ("Defendant") (1) moves to vacate and set aside a default judgment pursuant to CPLR 5015 and 317, and (2) in a later filed order to show cause, Defendant moves to stay the pending inquest hearing and compel certain medical, employment, and insurance related authorizations from the plaintiff Michelle Beaulieu ("Plaintiff"). Plaintiff opposes both motions. In the interest of judicial economy, the motions are consolidated and disposed of in the following Decision and Order.

Motion to Vacate the Default Judgment

In her complaint, Plaintiff alleges that on Octobe 16, 2010, she was caused to fall and sustain injuries due to a defective condition on the walkway and sidewalk located at Defendant's

premises, 1275 Third Avenue, New York, New York.

On or around September 20, 2011, Plaintiff served the Secretary of State with process pursuant to §306 of Business Corporation Law. That same date, the Secretary of State forwarded the summons and complaint to Samuel Jaeger, 39 West 46th Street, New York, New York 10036. Defendant states that it has not been located at this address for “years” and therefore the summons and complaint were never forwarded to Jay Realty’s corporate offices. The failure to make the address change was not intentional, and Defendant states that it has never attempted to hide its address to avoid service of process. Defendant does not state specifically when its address for service of process changed.

After the default, on January 27, 2012, counsel for Plaintiff wrote to Defendant’s insurer, Tower Group, and to attorneys representing Jay Realty in a different action, notifying the claims department of the instant matter and requesting an answer to the summons and complaint. In August 2012, Defendant’s corporate attorney learned of this action and contacted Plaintiff’s counsel. Plaintiff’s counsel forwarded to him a copy of the summons and complaint.

Defendant’s affirmation of counsel alleges that its corporate counsel thereafter contacted Tower Group, but they informed him that the policy had been cancelled for non-payment. Meanwhile, on September 7, 2012, Plaintiff moved for a default judgment. After receiving a copy of the motion, corporate counsel for Defendant contacted Tower Group regarding coverage for this action, and copied Plaintiff’s counsel on that correspondence. However, they did not oppose the motion and on October 31, 2012, this court granted Plaintiff’s motion for a default judgment.

Eventually, Tower Group learned that it had made a mistake in disclaiming coverage for this action, and retracted said disclaimer on December 12, 2012. In an affidavit, a claims adjuster from Tower notes that it received Plaintiff’s counsel’s January 27, 2012 letter, but thereafter mistakenly took no action on it.

Defendant now moves to vacate the entry of default judgment. It argues, *inter alia*, that under CPLR 317, it is entitled to vacatur since it was not served by personal delivery and has moved to vacate the default within one year. Defendant also argues that insurance carrier failure to act timely does not preclude the defendant from vacating an unintentional default (*Price v.*

Boston Road Dev. Corp., 56 A.D.3d 336 [1st Dept. 2008]). Regarding a meritorious defense, Defendant argues that Plaintiff has offered inconsistent factual recitations of the accident. Moreover, photographs of the accident location show that the area is painted bright yellow. At a minimum, Defendant argues that there are factual issues as to whether Plaintiff was comparatively negligent.

Plaintiff opposes the motion. Plaintiff argues, *inter alia*, that Defendant was validly served with process, and thereafter acquired actual knowledge of the service in time to avoid the default, but did not act to successfully avoid it. Defendant has not offered a reasonable excuse for failing to update their address for service with the Secretary of State, since 1946, and this is an intentional course of conduct designed to avoid process. Moreover, Defendant has not demonstrated a meritorious defense, as they have not submitted an affidavit from someone with personal knowledge of the incident.

Plaintiff notes that Defendant's counsel had actual knowledge of this action prior to entry of default. In both January 2012, and August 2012, Plaintiff would have accepted late service of an answer. Defendant, however, did not interpose an answer.

Under *CPLR* 5015, a court may vacate an Order where there is excusable default, where such motion is made within one year of service of a copy of the judgment or order upon the moving party. A default may not be vacated without the demonstration of a reasonable excuse for the failure to respond and a meritorious cause of action (*Qrt Associates, Inc. v. Mouzouris*, 40 A.D.3d 326 [1st Dept. 2007]). The determination whether to vacate a default is generally left to the sound discretion of the motion court, and will not be disturbed if the record supports such a determination (*White v. Incorporated Village of Hempstead*, 41 A.D.3d 709 [2nd Dept. 2007]).

The defendant may demonstrate a "reasonable excuse" for default if it "did not receive personal notice of the summons in time to defend..." (*Newman v. Old Glory Real Estate Corp.*, 89 A.D.3d 599 [1st Dept. 2011]). Reasonable excuse has been established, for example, where process was served on the Secretary of State and sent to the wrong address, and there is no evidence that Defendant engaged in a deliberate attempt to avoid notice by failing to update its address with that department. (*Id.*, citing *Eugene DiLorenzo, Inc. v. A.C.Dutton Lbr. Co.*, 67 N.Y.2d 138 [1986]; *Raiola v. 1944 Holding Ltd.*, 1 A.D.3d 296 [1st Dept. 2003]).

Both CPLR 5015 and 317 require that a defendant demonstrate that it has a meritorious defense to an action in order to successfully vacate a default judgment (*Peacock v. Kalikow*, 239 A.D.2d 188 [1st Dept. 1997]). In order to demonstrate such a meritorious defense to warrant vacatur, a defendant must provide an affidavit from an individual with personal knowledge of the facts. The affidavit must make sufficient factual allegations and must do more than merely make conclusory allegations or vague assertions (*Id.*)

In this matter, it is undisputed that Defendant failed to keep a current address on file with the Secretary of State, as required by Business Corporation Law, over a matter of decades. This failure does not constitute a “reasonable excuse” for its default, and therefore Defendant is not entitled to vacatur of the default judgment pursuant to CPLR 5015 (*Baez v. Ende Realty Corp.*, 78 A.D.3d 576 [1st Dept. 2010]).

It is true that, unlike a vacatur motion under CPLR 5015(a)(1), it is unnecessary for a defendant seeking relief under CPLR 317 to demonstrate a reasonable excuse for his default (*Simon & Schuster, Inc. v. Howe Plastics & Chemicals Co., Inc.*, 105 A.D.2d 604 [1st Dept. 1984]). However, a defendant may only avail itself to CPLR 317 if (1) the motion is made within a year of the default judgment, (2) the defendant makes a showing that it did not personally receive notice of the summons in time to defend, and (3) the defendant has a meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C.Dutton Lbr. Co.*, 67 N.Y.2d 138 [1986]). In this matter, Defendant’s own motion notes that it’s insurer received a letter, along with the summons and complaint, from Plaintiff’s counsel dated January 27, 2012. Later, in August 2012, Defendant’s corporate attorney was apprised of this action, and was forwarded another copy of Plaintiff’s papers. On September 7, 2012, Plaintiff served its motion for a default judgment, including the summons and complaint, on all parties, including Defendant’s corporate attorney and insurance carrier. Nevertheless, Defendant did not respond to the complaint, and did not oppose the motion for a default judgment, which was granted on October 31, 2012. In Plaintiff’s affirmation in opposition, counsel adds that after sending the January 2012 letter, he was contacted by Defendant’s corporate attorney, and spoke to him on numerous occasions regarding the action. Plaintiff’s counsel advised that no answer had been received on behalf of Defendant, and without an answer, Plaintiff would file a motion for a default judgment.

Plaintiff's counsel's office followed up with Defendant's corporate counsel on August 27, 2012, again requesting his position about submitting a late answer to the summons and complaint. Defendant does not dispute that these communications took place.

In light of the foregoing, Defendant has not made the required showing that it lacked notice of this action to warrant vacatur under CPLR 317 (*Baez v. Ende Realty Corp., supra*); *Sanchez v. Avuben Realty LLC*, 78 A.D.3d 589 [1st Dept. 2010]). The statute does not specify that the "personal notice" of the summons equates to formal service in accordance with the CPLR. Moreover, under these circumstances, where the defendant's insurer was explicitly notified of the action and provided papers in January 2012, and defendant's corporate attorney had knowledge of the action for several months before entry of a default judgment, Defendant cannot be heard to argue that it did not obtain personal notice of the action in time to defend (*see Allstate Ins. Co. a/s/o John J. Keogh, Jr. v. Lake Three Inc.*, 15 Misc.3d 127[A] [App. Term., 1st Dept. 2007]). Defendant's various issues resolving a coverage dispute with its insurance carrier likewise does not constitute a reasonable excuse for default warranting vacatur of the default (*Sanchez v. Avuben Realty, LLC., supra, citing Klien v. Actors & Directors Lab*, 95 A.D.2d 757 [1st Dept. 1983], *lv. dismissed*, 60 N.Y.2d 559 [1983]; *Lemberger v. Congregation Yetev Lev D'Satmar, Inc.*, 33 A.D.3d 671, 672 [2nd Dept. 2006]).

Defendant's motion to vacate the default judgment is therefore denied.

Defendant's Motion to Compel

In a separate order to show cause, Defendant moves for an order compelling Plaintiff to produce trial authorizations for release of her medical, employment, and insurance records, and to stay the inquest hearing pending production of those records, and until Defendant has had an opportunity to retain an expert to evaluate them.

Note of Issue was filed in this matter on November 30, 2012. Under letters dated December 21, 2012 and December 28, 2012, Plaintiff's counsel provided some medical records and "select" authorizations to Defendant's counsel. The records revealed the Plaintiff sought treatment from several other providers as a result of this accident, but those records and authorizations were not provided. The records also revealed that Plaintiff had multiple surgeries

to her right shoulder, but only limited surgical records were provided. Moreover, Defendants discovered that Plaintiff was involved in two prior accidents involving injuries to similar body parts. Defendants argue that Plaintiff should be required to produce authorizations for the release of those medical records and her claim/litigation files from counsel. Defendant, therefore, seeks various medical, employment, and litigation records from Plaintiff, and an opportunity to review those records, prior to the inquest hearing (citing, *inter alia*, *Singh v. Friedson*, 36 A.D.3d 605 [2nd Dept. 2007]).

Plaintiff opposes the motion, arguing that the defaulting Defendant is not entitled to such pre-inquest discovery. Plaintiff notes that the disclosure sought is “overly broad” and a subpoena duces tecum may not be used “to ascertain the existence of evidence.” Plaintiff argues that Defendant’s demand amounts to “discovery” or “pre-trial discovery” and not a permitted marshaling of the evidence before inquest.

A defaulting defendant is entitled to contest the plaintiff’s damages, and to offer proof thereon (*Toure v. Harrison*, 6 A.D.3d 270 [1st Dept. 2004][internal citations omitted]). CPLR 3215 has been construed to afford a defendant with “five days” notice of the application [subd f.], as well as a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages (*Yeboah v. Gaines Serv. Leasing*, 250 A.D.2d 453 [1st Dept. 1998], citing *Reynolds Sec. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 572 [1978]). However, the pursuit of discovery on the question of damages is “exclusively the prerogative of the plaintiff because, as a result of his default, the defendant has now forfeited his right to take the plaintiff’s deposition.” (*Id. See also Minicozzi v. Gerbino*, 301 A.D.2d 580 [2nd Dept. 2003]). The First Department has held that a defaulting defendant is not entitled to pursue discovery in preparation for an inquest hearing (*Gray v. Jaeger, D.O.*, 57 A.D.3d 303 [1st Dept. 2008]). The Second Department has distinguished impermissible attempted pre-trial discovery from a defendant’s attempt to “marshal evidence for trial” by the use of a subpoena duces tecum (*Singh v. Friedson*, 36 A.D.3d 605 [2nd Dept. 2007]).

The First Department has not elaborated on this distinction between proper “marshaling the evidence” before an inquest, and improper “pre-trial discovery.” Rather, the Appellate Division’s decisions on point, as cited above, more plainly state that a defendant cannot obtain

discovery from the plaintiff before inquest, including a physical examination or oral deposition (*Yeboah v. Gaines, supra.*, and *Gray v. Jaeger, supra.*, [defendant is foreclosed from pursuing discovery in preparation for the inquest, *including* a physical examination of plaintiff][emphasis added]); *Hall v. Penas*, 5 A.D.3d 549 [1st Dept. 2004][defaulting defendant “is not entitled to any further discovery”]; also see, to the same effect, *Servais v. Silk Nail Corp.*, 96 A.D.3d 546 [1st Dept. 2012], and *Langer v. Miller*, 305 A.D.2d 270 [1st Dept. 2003]). It has further been stated that a defendant may not use a subpoena duces tecum “as a substitute for pre-trial discovery.” (*Soho Generation of N.Y. v. Tri-City Ins. Brokers*, 236 A.D.2d 276 [1st Dept. 1997]).

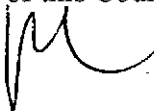
Here, the defendant lists several items of disclosure, including medical authorizations for fourteen (14) different alleged health providers (including Dr. David Capiola, whose authorization and records have already been supplied by Plaintiff); “any and all” records of prior treatment to the injured body parts; facilities that may have provided treatment prior to the incident; Plaintiff’s health insurance carrier who provided coverage for her health care, including health care administered prior to the accident; Plaintiff’s previous employment records; authorizations for release of MVAIC records; authorizations for the release of non-privileged portions of Plaintiff’s litigation file for a previous matter; authorizations for her no-fault records related to alleged 1994 and 2002 automobile accidents; and authorizations for the release of all records and films where Plaintiff received treatment as a result of those alleged accidents. Defendant also seeks an indefinite stay of the pending inquest to retain a medical expert to review the records sought. These discovery demands amount to improper pre-trial discovery that Defendant is foreclosed from pursuing by virtue of its default (*Yeboah v. Gaines Service Leasing, supra.*, and *Reynolds Sec. v. Underwriters Bank & Trust Co., supra.*).

Accordingly, Defendant’s motion to compel is denied.

This constitutes the Decision and Order of this Court.

Dated:

4/22/13



Hon. Mary Ann Brigantti-Hughes, J.S.C.