Jimenez v LQ 511 Corp.
2013 NY Slip Op 33781(U)
July 8, 2013
Supreme Court, Bronx County
Docket Number: 300462/2011
Judge: Alison Y. Tuitt
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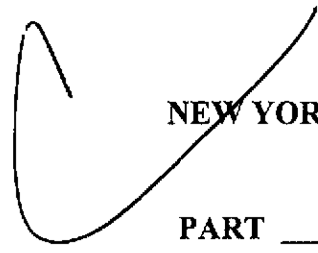


NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

JULIO JIMENEZ,

Plaintiff,

-against-

LQ 511 CORP., individually and d/b/a LATIN QUARTER,

Defendant.

INDEX NUMBER: **300462/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendant's Order to Show Cause to Vacate Default Judgment

On Calendar of **4/22/13**

Notice of Motion-Exhibits, Affirmation	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, defendant's motion to vacate a default judgment is denied for the reasons set forth herein.

Defendant brings the instant order to show seeking to vacate a default judgment Order entered on or about October 25, 2011 in which the Court granted plaintiff a default judgment against defendant. This is an action for personal injuries sustained by plaintiff on September 5, 2010 at defendant's establishment located at 511 Lexington Avenue in the City, County and State of New York. Plaintiff commenced the action by the filing of a summons and complaint on January 14, 2011. Plaintiff served defendant, pursuant to the Business Corporation Law §306 by delivering a copy of the summons and complaint to the Secretary of State on January 25, 2011. Plaintiff's affidavit of service of his process server, Steve Avery, also indicates that personal service was made on defendant by delivering a copy of the summons and complaint to "Carlos (Smith) Managing Agent

who refused true last name" on February 4, 2011, at defendant's premises located at 511 Lexington Avenue, New York, New York.

An Inquest on this matter was held on January 12, 2012 before the Honorable Lucindo Suarez where it was found that plaintiff sustained multiple injuries to his head after he was assaulted by another patron. Justice Suarez held that plaintiff met his burden of proof by establishing damages by a preponderance of the evidence through the presentation of credible and competent medical and documentary evidence. Justice Suarez awarded plaintiff $75,000.00 in damages. Plaintiff entered Judgment in favor of plaintiff and against defendant on October 19, 2012, in the amount of $75,000.00, plus interest from the date of the Inquest in the amount of $5,043.75, together with the amount of $1,185.00 in costs and disbursements, for a total Judgment in the sum of $81,228.75.

Defendant now moves to vacate the default judgment and all income executions and restraining notices pursuant to C.P.L.R. §§317 and 5015(a). Defendant argues that the default judgment should be vacated pursuant to C.P.L.R. §317 because it was not personally served with a notice of the summons and it has a meritorious defense to the action. Defendant further argues that the default judgment should be vacated pursuant to C.P.L.R. §5015(a) because its failure to appear constitutes excusable neglect.

C.P.L.R. §317 provides that a person served with summons, other than by personal delivery, may be allowed to defend an action within one year after he obtains knowledge of entry of judgment. In a motion pursuant to C.P.L.R. §317, defendant is not required to make a showing of a "reasonable excuse" for the delay. Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 N.Y.2d 138 (1986). Defendant must, however, show a meritorious defense. Pursuant to C.P.L.R. §317, defendant only need show that it was served with the summons other than by personal delivery, that it did not have actual notice of the process in time to defend the action, that the motion is brought within one year after it obtained knowledge of entry of judgment and that it has a meritorious defense to the action. The fact that defendant herein denies that it received the summons and complaint from the Secretary of State, while troublesome, does not bar vacatur of the default judgment. Delivery of a summons and complaint to the Secretary of State is not considered personal delivery to the corporation. See, Fleetwood Park Corp. v. Jerrick Waterproofing Co., 615 N.Y.S.2d 697 (2d Dept. 1994).

In order to prevail on a motion to vacate a prior order pursuant to C.P.L.R. §5015, the movant must make a showing of excusable default and a meritorious defense. See, Adefioye v. Volunteers of America,

FILED Jul 16 2013 Bronx County Clerk

Inc., 634 N.Y.S2d 696 (1st Dept. 1995)(Holding that a party seeking to vacate a default must not only show that there was a reasonable excuse for the default but must demonstrate that he or she has a meritorious cause of action by submitting an affidavit of merit by someone with personal knowledge of the facts). See also, Marks v. Vigo, 2003 WL 1499210 (1st Dept. 2003); Tejada v. 750 Gerard Properties Corp., 707 N.Y.S.2d 174(1st Dept 2000); Savannah River Area Resource Development Agency, Inc. v. White Eagle Intern, Inc. 488 N.Y.S.2d 201 (2d Dept. 1985); Raoul Charbonneau Custom Logging, Inc. v. Belanger, 489 N.Y.S.2d 648 (3rd Dept. 1985).

Defendant submits the affidavit of Maria Roman, a manger of defendant's establishment, who states that she has been the manager for defendant for about three and a half years and only learned of the action on or about November 15, 2012 when she received the Judgment and Bill of Costs. Ms. Roman states that she had never received any documents relating to this action prior to November 15, 2012. With respect to the affidavit of service for service of the summons and complaint on "Carlos", Ms. Roman states that she was employed by defendant at that time and that there was never an individual by the name of "Carlos" working at defendant's establishment. She further states that they had an employee named Juan Carrasco who went by the name of Carlos but he was a maintenance employee who only worked a limited number of hours. Ms. Roman believed it was Mr. Carrasco who received the summons and complaint as he was on duty at the time indicated in the affidavit of service. Ms. Roman states that she, nor any other employee, director or manager, ever gave Mr. Carrasco permission to accept service of process; Mr. Carrasco never forwarded the summons and complaint to her; and that she believes that Mr. Carrasco also received all further mail relating to this proceeding.

Defendant's motion to vacate the default judgment and all income executions and restraining notices is denied. Defendant failed to demonstrate that its default should be vacated under either C.P.L.R. §317 or §5015(a)(1). The record indicates that an affidavit of a process server stated that defendant was served through the Secretary of State. Under C.P.L.R. §317, defendant was required to demonstrate, inter alia, that it did not receive notice of the summons in time to defend, and that it had a meritorious defense. See, Gonzalez v. City of New York, 965 N.Y.S.2d 46 (1st Dept. 2013). However, defendant provided only a conclusory affidavit denying receipt of the pleadings and all other papers served in this action which was insufficient to rebut the presumption of service created by the process server's affidavit. Id. citing Grinshpun v. Borokhovich, 954 N.Y.S.2d 520 (1st Dept. 2012).

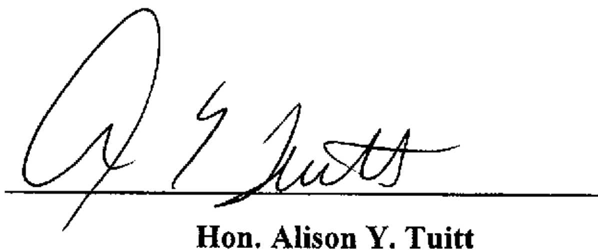
FILED Jul 16 2013 Bronx County Clerk

Defendant's claim that it had not notice of the instant action prior to November 15, 2012 is not credible. Before then, plaintiff mailed papers regarding this lawsuit to defendant at its last known address, 511 Lexington Avenue, New York, New York on at least seven different occasions and none of the documents were returned as undeliverable. Specifically, prior to June 30, 2011, plaintiff served defendant with all of the following at the aforementioned address: Summons and Verified Complaint on or about January 12, 2011; Request for Judicial Intervention on June 17, 2011; Motion for Default Judgment on or about June 8, 2011; Motion for a Default Judgment on or about August 18, 2011; Notice of Entry with Order granting Default Judgment on or about November 1, 2011; Notice of Inquest on or about November 1, 2011and Notice of Entry with Judgment on or about November 6, 2012. Defendant does not deny or dispute that 511 Lexington Avenue, New York, New York is and was defendant's correct address. See, Baez v. Ende Realty Corp., 911 N.Y.S.2d 68 (1st Dept. 2010). In Ende, the First Department held that vacatur pursuant to C.P.L.R. §317 was not warranted, given defendant's failure to make the required showing of lack of notice. "Defendant claimed that it had no knowledge of the personal injury action or the ensuing related fraudulent conveyance action because the postal service did not deliver mail to the address of its office, located on its premises. However, plaintiff demonstrated that during the years that the actions were pending his attorneys mailed papers related to the actions to defendant at its office on the premises on 27 occasions and that none of these mailings were returned to sender as undeliverable or otherwise. As the motion court found, the assertion by defendant's principal that she received none of these mailings was not credible". Id. citing Matter of Allstate Ins. Co. [Patrylo], 533 N.Y.S.2d 436 (1st Dept. 1988).

Defendant also failed to satisfy the requirements of C.P.L.R. §5015(a)(1) by failing to provide a reasonable excuse for its default. Gonzalez citing Rugieri v. Bannister, 7 N.Y.3d 742, 744 (2006).

This constitutes the decision and order of this Court.

Dated: 7/8/2013



Hon. Alison Y. Tuitt