Li Xian v Tat Lee Supplies Co., Inc.
2013 NY Slip Op 34226(U)
September 11, 2013
Supreme Court, Bronx County
Docket Number: 304347/09
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 Briganti-Hughes

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LI XIAN and ZONGYING REN a/k/a LILY REN,

Plaintiffs,

-against-

DECISION / ORDER
Index No. 304347/09

TAT LEE SUPPLIES, CO., INC.,
LORIMER DEVELOPMENT, LLC.,
and EIGHTH AVE. BUILDERS, CORP.,

Defendants.

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The following papers numbered 1 to 10 read on the below motions noticed on April 18, 2013 and April 22, 2013 and duly submitted on the Part IA15 Motion calendar of **June 3, 2013**:

Papers Submitted	Numbered
Def.'s Order to Show Cause, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Def.'s Aff. In Reply, Exhibits	5,6
Pl.'s Order to Show Cause against Tat Lee, Exhibits	7,8
Pl.'s Order to Show Cause against Kam, Exhibits	9,10

By way of Order to Show Cause, defendant Tat Lee Supplies Co., Inc. ("Tat Lee" or "Defendant") moves for an order (1) pursuant to CPLR 2221(e)(3) renewing its prior motion to vacate the default judgment rendered against it, and upon renewal, granting said motion, and (2) vacating the default, and thereafter, default judgment entered against the defendants on January 10, 2012, and (3) permitting defendants to file and serve an answer to the complaint dated June 2, 2009; and (4) vacating the contempt proceeds commenced against the defendants. Plaintiffs Li Xian and Zongying Ren a/k/a Lily Ren (collectively "Plaintiffs") oppose the motion. Separately, Plaintiffs move for civil contempt against Defendant Tat Lee as well as Siu Kei Kam ("Mr. Kam"), president of Defendant, for failure to appear for deposition on matters relevant to satisfaction of the judgment. The motions are consolidated and disposed of in the following Decision and Order.

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I. Background

This is an action for personal injuries allegedly sustained by plaintiffs Li Xian and Zongying Ren a/k/a Lily Ren (collectively "Plaintiffs") on or about January 4, 2008. According to the Verified Complaint, Defendant is the owner of a premises located at 169 Lorimer Street, Brooklyn, New York. On January 4, 2008, Plaintiffs were allegedly sub-tenants doing business at the premises when they were injured "as a result of structural disrepair of the building." The Complaint asserts that Plaintiffs were severely beaten, assaulted, and battered by assailants due to Defendant's failure to secure the doors of the premises. Defendant did not answer the summons and complaint served on June 2, 2009. Plaintiff's motion for a default judgment was granted against Defendant by order dated April 19, 2010. An inquest hearing was held on November 10, 2011, and Judgment of nearly $9,000,000 was entered against Defendant on January 10, 2012.

Initially, Defendant argues that the default judgment was obtained through Plaintiff's misconduct and misrepresentations, notably regarding the mandatory second mailing of the summons and complaint as required by CPLR 3215(g)(4)(i). Specifically, Plaintiff averred that he served the secondary mailing upon the defendant Tat Lee's "only known address" and his residential/place of employment were not known. The summons and complaint were mailed to "Tat Lee Supplies Corp." at 75 Eldridge St., New York, New York. Allegedly, this address had not been used by Defendant for years, and Defendant was not aware that the records maintained by the Secretary of State were inaccurate. Mr. Kam sets forth in an affidavit that he first became aware of the inaccurate records upon receipt of the Judicial Subpoena Duces Tecum and Information Subpoenas, dated January 10, 2012. Those subpoenas were delivered to Mr. Kam's residential address in Flushing, New York. Mr. Kam states that the Eldridge address hadn't been used since at least 1987. Moreover, no one from Tat Lee was aware that the Secretary of State records were incorrect. Their failure to correct the address was inadvertent.

In light of the foregoing, Defendant argues that the default judgment should be vacated pursuant to CPLR 5015(a)(3), since Plaintiff's additional notice affidavit contained misrepresentations, including (1) the fact that Plaintiff was aware of additional addresses where Defendant received mail as evinced by the lease agreement and (2) the fact that Plaintiffs were in

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regular contact with Kam, and yet never inquired as to an address for his residence or place of employment. Defendant also notes that their prior counsel did not raise the issue of fraud/misrepresentation in the original motion, and thus it may be addressed herein. Defendant argues that there is no express time limit for filing a motion under CPLR 5015(a)(3), and pursuant to CPLR 2004 and 2005, the Court has the inherent power to extend the time in instances such as this, where justice would be served by permitting the case to be decided on its merits.

In the alternative, Defendant argues that they should be permitted leave to renew the previous vacatur motion brought by prior counsel in the interest of justice. Defendant contends that it has both a "reasonable excuse" for the default, as well as a "meritorious defense" to the action (citing CPLR 317).

Defendants contend that it is appropriate for this Court to consider facts which were not previously disclosed by prior counsel. Mr. Kam, the president of Tat Lee, has personal knowledge of the proper addresses for service, and the Eldridge St. address had not been proper since 1987. Under the pertinent sublease, Plaintiffs alone were vested with the authority concerning who to admit or deny access to the premises– a fish market they operated. Further, there is evidence that Plaintiffs invited their assailant onto the premises, which would relieve Tat Lee from any claim of liability for failure to reasonably maintain the premises. Next, Plaintiffs' injuries were caused by an intervening third-party's criminal act, severing liability. At all relevant times, Tat Lee was an "out of possession" owner of the premises, and not responsible for non-structural repairs. On the previous motion, Kam's affidavit only made conclusory assertions. They also argue that this motion is timely given prior counsel's law office failure. Defendants argue that public policy is served by deciding this dispute on the merits. The motion is also timely because Note of Entry of the default judgment was not properly served.

In an affidavit, Mr. Kam states *inter alia* that Tate Lee never received the original summons and complaint, as they were mailed to the defunct Eldridge Street address. Tat Lee never evaded service of process, and rather, took steps to ensure that legal notices relating to the premises would be directed to its counsel. Further, at the time Plaintiffs commenced the action, they knew that Tat Lee had designated 100 Lafayette Street in New York, New York for

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acceptance of legal documents. Accordingly, Plaintiffs misrepresented the fact that they did not know of any other address besides Eldridge Street. Over a year earlier, Plaintiff Li Xian executed a sublease covering the warehouse portion of the premises, which expressly provided that notices under the sublease should be sent to Tat Lee at the Lafayette Street address. Further, Mr. Kam states that Plaintiffs were able to contact him via telephone and could have asked for his residential address or proper address for service of process, but failed to do so. With respect to a meritorious defense, Mr. Kam notes that the entire premises was occupied and controlled by the Plaintiff-tenants at the time of the incident. The lease provided that the tenants alone were vested with authority and control over whom to admit or deny access to the warehouse at the Premises. Moreover, Plaintiffs agreed to take the property in "as is" condition, and Defendants were not responsible for non-structural repairs such as maintaining the security of the doorways. Tat Lee was never advised that the doorways or any other portion of the premises were in need of repair. Finally, Mr. Kam asserts that there is evidence that this incident constituted an intervening criminal act, which was unforeseeable and thus Defendants have no liability.

Plaintiffs oppose the motion, and have two pending motions for civil contempt against both Defendant and Mr. Kam for failure to comply with Information Subpoenas relating to satisfaction of Plaintiffs' default judgment. Plaintiffs argue at the outset that the motion, fashioned as one to renew, must be denied as untimely (2221[d]). Moreover, any alleged "new facts" asserted in this motion were available at the time the original motion was made, and therefore cannot be relied upon now. Defendant has not provided a valid excuse for failing to submit the proposed "new facts" with their original application. Plaintiffs note that Defendant does not deny the "fundamental contention that the building was structurally defective" which contributed to Plaintiff's injuries and Defendant's liability. The press releases from the Kings County District Attorney constitute inadmissible hearsay that is insufficient to warrant vacatur. With respect to alleged excusable default, the Defendant's president has, *inter alia*, failed to state when it vacated the Eldridge Street address and failing to allege that they no longer do business at that address. Plaintiffs also contend that Defendant's "law office failure" excuse is concluory and insufficient to warrant the relief sought.

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II. Applicable Law and Analysis

Upon careful review of the submissions, and for the following reasons, Defendant has demonstrated entitlement to both renewal of its previously-denied motion to vacate, and upon renewal, vacatur of the default judgment.

It is true, as Plaintiff argues, that the motion is untimely as it was not made within the time frame proscribed by the CPLR. However, "[r]egardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (*Profita v. Diaz*, 100 A.D.3d 481 [1st Dept. 2012], quoting *Liss v. Trans Auto Sys.*, 68 N.Y.2d 15, 20 [1986]). Here, considering the fact that Defendant's president was out of the country at the time the previous order was entered, that Note of Entry may not have been properly served, and given the substantial default judgment award, this Court exercises its discretion to consider the untimely motion.

Plaintiff also argues that the motion must be denied since it is not based on "new facts," but rather based on facts known to the defendants prior to submission of the original motion.

Under CPLR 2221(e), a motion for leave to renew: (2) shall be based on new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present new facts on the prior motion. "Renewal is granted sparingly ...; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Henry v. Peguero*, 72 A.D.3d 600, 602 [1st Dept. 2010], citing *Matter of Beiny*, 132 A.D.2d 190 [1st Dept. 1987], *lv dism'd*, 71 N.Y.2d [1988]). The statutory prescription to present new evidence, however, is flexible, and "even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to 'defeat substantive fairness'" (*Tishman Const. Corp. v. City of New York*, 280 A.D.2d 374, 376-77 [1st Dept. 2001][internal citations omitted]).

First Department cases further suggest that the requirement of a movant to provide a "reasonable justification" for failing to submit the evidence in the first instance is flexible "in the interests of justice." (*Mejia v Nanni*, 307 AD2d 870, 871 [2003]; *Security Pacific Nat.Bank v. Evans*, 31 A.D.3d 278 [1st Dept. 2006]; *Vega v. Restani Const. Corp.*, 98 A.D.3d 425 [1st Dept.

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2012].) In *Mejia*, the Appellate Division reversed the trial court and granted renewal of the defendants' original motion to change venue, which had been denied since it was not supported by any affidavits or documentary evidence establishing residence in Westchester County. Defendants' motion to renew, which submitted said affidavits for the first time, was denied by the trial court. In granting renewal, and granting change of venue, the First Department reasoned that courts have discretion to grant such motions "in the interests of justice" and renewal was appropriate here since the "only competent evidence" supported the original motion that venue in Westchester County was appropriate. (*Id.*)

Here, Defendants' prior counsel has admitted certain law office failures in bringing the prior motion, including *inter alia* the failure to adequately present the facts and legal arguments in the original motion, or thereafter advise his client of the necessary steps to seek relief from the denial of the original motion. Under these circumstances, this court finds that Defendant has demonstrated excusable law office failure, to permit consideration of the renewal motion on its merits, in the interest of justice (CPLR 2005; *Castillo v. Garzon-Ruiz*, 290 A.D.2d 288 [1st Dept. 2002]).

Upon renewal, defendants submit a more in-depth affidavit of Mr. Kam, president of Tat Lee. With respect to reasonable excuse for default, Mr. Kam explains that Tat Lee has not used the Eldridge Street address in years, and has not been trying to evade process by failing to keep its records current. Mr. Kam states that the sublease itself contained a Lafayette Street address where his attorney could be served. Reasonable excuse for a default has been established 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 (*Newman v. Old Glory Real Estate Corp.*, 89 A.D.3d 599 (1st Dept. 2011); CPLR 317., 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]). Here, unlike in the original motion papers, Mr. Kam's affidavit explains that he was not the founder of Tat Lee Supplies and was unaware that the Secretary of State had an inaccurate address. Further, the lease and sublease contained addresses of counsel wherein Defendant would have received legal papers. Even if service on Defendant's attorney would have been a nullity, these facts refute Plaintiffs' argument

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that Defendant was intentionally evading notice of this action (*see Tselikman v. Marvin Ct., Inc.*, 33 A.D.3d 908 [2nd Dept. 2006]).

With respect to a meritorious defense, Mr. Kam notes that the sublease provides that the tenant-Plaintiffs were responsible for all non-structural repairs to the premises, and Defendant was not aware of any security issues with the points of entry. Defendant also submits press releases from the Kings County District Attorney's office which note that Plaintiffs' assailant was invited onto the premises. The release also states that on December 22, 2009, the assailant was sentenced to 65 years in prison for attempted murder. While the press release may constitute hearsay evidence insufficient by itself to warrant vacatur, (*see e.g. Castillo v. Garzon-Ruiz*, 290 A.D.2d 288 [1st Dept. 2002]), the totality of Defendant's submissions demonstrate a potentially meritorious defense to this action (*Mitchell v. Mid-Hudson Medical Assoc. P.C.*, 213 A.D.2d 932 [3rd Dept. 1995]). It is true that the duty of reasonable care owed by an landowner or possessor may include protecting individuals against injury caused by the conduct of third persons on the premises (*Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544 [1998]; *Foreman v. B&L Properties, Co.*, 261 A.D.2d 301 [1st Dept. 1999]). The owner or possessor must take minimal precautionary measures to secure the premises if it has notice of a likelihood of criminal intrusions which pose a threat to safety and may be held liable to an individual who is injured in a reasonably foreseeable criminal encounter that was proximately caused by the absence of adequate security (*Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875 [2001]). However, there can be no recovery for injuries resulting from a criminal attack unless the attack was foreseeable or preventable in the normal course of events (*Gross v. Empire State Building Assoc.*, 4 A.D.3d 45 [1st Dept. 2004]). Here, the provisions in the sublease, statements of Mr. Kam, and the press releases at the very least create an issue of fact as to whether Defendant is liable for Plaintiffs' injuries (*see Crooks v. Lear Taxi Corp.*, 136 A.D.2d 452 [1st Dept. 1988]).

Finally, the Court grants vacatur of the default judgment because strong public policy favors resolution of cases on their merits (*Arrington v. Bronx Jean Co., Inc.*, 76 A.D.3d 461 [1st Dept. 2010]), especially where the default results from law office failure of which the client may be unaware (*Espaillat v. Greenpath, Inc.*, 9 Misc.3d 132[A] (App. Term., 1st Dept. 2005][internal citations omitted]).

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In light of the foregoing determination, Plaintiff's motions for civil contempt are denied.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion to renew is granted, and it is further,

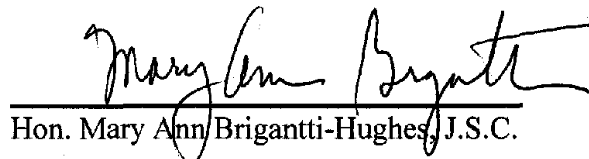
ORDERED, that upon renewal, Defendant's motion to vacate the previously-entered default and default judgment against Defendant is granted, and said default judgment is hereby vacated, and it is further,

ORDERED, that Defendant is directed to serve an answer in accordance with the CPLR within ten (10) days after service of a copy of this Order with Note of Entry via certified mail, return receipt requested, and it is further,

ORDERED, that Plaintiff's motions for civil contempt are denied.

This constitutes the Decision and Order of this Court.

Dated: 9/11, 2013



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