

Grabowiec v Nerve Contr. Co., Inc.

2014 NY Slip Op 32687(U)

October 7, 2014

Supreme Court, New York County

Docket Number: 650894/2012

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

MAREK GRABOWIEC and ALVA SMITH on behalf of themselves and on behalf of others similarly situated,

Index No.: 650894/2012

Motion Date: 10/07/14

Motion Seq. No.: 03

Plaintiffs,

- v -

NERVE CONTRACTING CO., INC., ROBERT ANAZAGASTI, ROBERT ANAZAGASTI, JR., ISABEL ROMAN,

Defendants.

The following papers, numbered 1 to 6 were read on this motion to vacate default judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1, 2, 3, 4, 5
6

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant defendants' motion to vacate their defaults in answering pursuant to CPLR 317.

Both the corporate defendant and the individual defendants set forth a meritorious defense that the subject work did not involve a government contract. With respect to defendant Robert Anazagasti, he alleges that he had no interest in the corporate defendant and therefore may not be cast in damages for any liability on the part of such corporation.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

There is no dispute here that the defendant corporation was served with process pursuant to BCL 306 (b). Defendants' affidavits state that the defendant corporation never received notice of the action via its authorized agent. Under such circumstances and with the plaintiff failing to demonstrate any prejudice by defendant corporation's default, the court shall exercise its discretion and excuse the default. See Wakerman Leather Co. v Irvin B. Foster Sportswear Co., 27 AD2d 767 (3d Dept 1967) ("the relief sought is within the scope of CPLR 317, as defendant was not served with the summons by personal delivery to him or to his agent for service designated under rule 318"); Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 142 (1986) ("It is also well established that service on a corporation through delivery of process to the Secretary of State is not 'personal delivery' to the corporation or to an agent designated under CPLR 318.").

Likewise, the individual defendants were served by suitable age and discretion" service pursuant to CPLR § 308, and therefore, none were served with the summons by personal delivery. Each individual defendant states under oath that he or she did not personally receive notice of the summons in time to defend.

The fact that defendant Roman states that she first learned of the lawsuit when she received a letter in the mail from a

court appointed referee for the hearing to determine damages, apparently at the address that plaintiffs designated for service, does not necessarily contradict her statement that she never received notice of the summons in time to defend. Defendant Roman also states that she was not in New York State and attaches airline ticket entries that evidences that she was in Puerto Rico at the time that service of process was made. She further states that another entity named Nerve, Inc., which is not a party to this lawsuit, also occupies space on the same floor as the corporate defendant, which is an entity separate and apart from the corporate defendant, where the process may have been delivered. The other individual defendants assert that they never received notice of the action until defendant Roman told them about the referee letter.

The papers on the motion do not demonstrate that any "defendant's failure to receive notice of the summons was the result of a deliberate attempt to avoid such notice" (Eugene Di Lorenzo, Inc. v AC Dutton Lbr Co, 67 AD2d 143, supra).

Defendants promptly moved for relief from the default after defendant Roman received the referee's letter.

Accordingly, it is

ORDERED that the defendants' motion to vacate the order dated April 14, 2014 of default is granted; and it is further

ORDERED that the defendants' time to serve and file (an) answers is extended pursuant to CPLR 3012 (d) for ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to attend a preliminary conference in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013, on November 13, 2014 at 9:30 A.M.

This is the decision and order of the court.

Dated: October 7, 2014

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES