

Miceli v Fifty Broad St., Inc.

2014 NY Slip Op 32966(U)

November 19, 2014

Supreme Court, New York County

Docket Number: 154480/2013

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

FREDERICA MICELI,

Plaintiff,

INDEX NO. 154480/2013

- v -

MOTION DATE _____

FIFTY BROAD STREET, INC, FIFTY NEW STREET, INC, CUSHMAN & WAKEFIELD, INC, AMERICAN CAPITAL MANAGEMENT, INC and TIME MOVING & STORAGE, INC.,

MOTION SEQ. NO. 2

Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answer — Affidavits — Exhibits _____

3

Replying Affidavits _____

4-5

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

Plaintiff Federica Miceli (“Plaintiff”) commenced this action to recover for personal injuries allegedly sustained on April 20, 2012 in the 16th floor hallway at 50 Broad Street, New York, New York, as a result of defendants’ negligence. Plaintiff alleges that her injuries were caused by the negligence of defendants, including that of defendant Time Moving & Storage, Inc. (“Defendant”) who was allegedly transferring fixtures and equipment and furnishings on the date of Plaintiff’s accident.

Plaintiff previously moved for and obtained a default judgment against Defendant, without opposition, by Order dated October 29, 2013. In connection with that motion, Plaintiff submitted the attorney affirmation of Joshua N. Stein, which annexed a copy of the Summons and Verified Complaint, an Affidavit of Service attesting to service of the Summons and Verified Complaint on Time Moving & Storage on May 24, 2013, and proof of additional mailing on July 25, 2013.

Defendant now moves for an Order vacating the Default Judgment pursuant to CPLR § 317 and § 5015(a)(1). Plaintiff opposes.

CPLR § 317 provides, in relevant part:

A person served with a summons other than by personal

delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

CPLR § 5015 permits the court which rendered a judgment or order to relieve a party from that judgment or order, upon such terms as may be just, if excusable default is shown.

“The distinction between moving under CPLR §§ 5015 and 317 is that, on a motion under CPLR § 317, the defendant does not have to come forward with a reasonable excuse for his default. All that he need demonstrate is that he did not personally receive notice of the pending lawsuit. On a motion under CPLR § 5015, by contrast, the defendant must show that his default was ‘excusable.’ In both cases the defendant must demonstrate a meritorious defense.” (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep’t 1992]). “On a motion to vacate a default, it is not necessary for a defendant to prove its defense, but only to set forth facts sufficient to make out a prima facie showing of a meritorious defense.” (*Aerovias De Mexico, S.A. v. Malerba*, 265 A.D.2d 214, 215 [1st Dep’t 1999]). “In order to demonstrate a meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts. The affidavit submitted from such individual must make sufficient factual allegations; it must do more than merely make conclusory allegations or ‘vague assertions.’” *Peacock v. Kalikow*, 239 A.D. 2d 188, 190 [1st Dept 1997]).

Service is complete once a summons and complaint are delivered to the Secretary of State, pursuant to BCL § 306, regardless of whether the defendant actually receives notice of the lawsuit. (*Associated Imports, Inc. v. Leon Amiel Publisher, Inc.*, 168 A.D.2d 354 [1st Dep’t 1990]). However, the Secretary of State is not considered a Rule 318 “agent,” and service on the Secretary of State, pursuant to BCL § 306, does not constitute personal delivery of service on Defendant’s designated agent under CPLR § 318, for purposes of CPLR § 317. (*See Eugene Di Lorenzo, Inc.*, 67 N.Y. 2d 138, 142 [1986]). If the corporation’s non-receipt of the summons was due to egregious behavior, relief under CPLR 317 may not be available. (*Rifenburg v. Liffiton Homes, Inc.*, 107 A.D. 2d 1015 [4th Dept 1985]). However, failure to update address alone does not constitute egregious behavior. *Ford v. 536 East 5th Street Equities, Inc.*, 304 A.D. 2d 615 [2d Dept 2003])(emphasis

added) (“Here, the plaintiffs effected service by serving a copy of the summons and complaint upon the Secretary of State pursuant to Business Corporation Law § 306. The defendant's address on file with the Secretary of State was an old address, and the defendant's president denied ever receiving a copy of the summons and complaint. *In addition, the defendant's moving papers sufficiently alleged the existence of a meritorious defense.*”)

Here, Defendant submits the attorney affirmation of Diane B. Carvell, which states that Defendant never received the Summons and Verified Complaint that had been forwarded by the Secretary of State because the Secretary of State did not have a current address for Defendant. Carvell alleges that Defendant first became aware of the lawsuit when it was contacted by counsel for American Capital Management, another defendant. In her affirmation, Carvell further states, “Defendant, Time Moving & Storage, Inc., has a meritorious defense to both liability and damages and should be given an opportunity to present them. See proposed Answer attached hereto as Exhibit ‘E.’” The proposed Answer, however, contains blanket denials of Plaintiff’s allegations and affirmative defenses, which are conclusory and not supported by specific factual allegations.


Here, Defendant’s motion depends on the affirmation of counsel, who lacks personal knowledge concerning the relevant issues. Defendant does not submit any affidavit of a person with a knowledge, or any documentary evidence, to support Defendant’s conclusory assertions that Defendant did not receive the Summons and Verified Complaint that had been forwarded by the Secretary of State because the Secretary of State did not have Defendant’s correct address, or even any facts to support their alleged meritorious defense. The Court notes that in reply to Plaintiff’s opposition wherein Plaintiff raises these deficiencies with respect to Defendant’s motion, Defendant submits another attorney affirmation from Carvell, which attaches an affidavit of James Dowse, Defendant’s CEO. However, “The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief.” *Allstate Ins. Co. v. Dawkins*, 52 A.D. 3d 826, 286-27 [2d Dept 2008]). Nonetheless, even if the Court were to accept Dowse’s affidavit, which provides factual allegations to support Defendant’s assertion that Defendant did not receive the Summons and Complaint in this matter from the Secretary of State due to its changed address, the affidavit submitted by Dowse fails to aver any facts concerning Defendant’s alleged meritorious defense in this action. Therefore, Defendant has failed to sufficiently allege the existence of a meritorious defense.

Wherefore it is hereby,

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

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: NOVEMBER 19, 2014



J.S.C.

HON. EILEEN A. RAKOWER