

Beys Specialty, Inc. v Key Cast Stone Co., Inc.

2014 NY Slip Op 33209(U)

November 21, 2014

Sup Ct, NY County

Docket Number: 652443/2011

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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BEYS SPECIALTY, INC.,

Index No. 652443/2011

Plaintiff

- against -

DECISION AND ORDER

KEY CAST STONE COMPANY, INC., and
M.A.C. DESIGN CORPORATION,

Defendants

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LUCY BILLINGS, J.S.C.:

I. THE HEARING

In this action where a default judgment was entered against one of the two defendants, Key Cast Stone, Inc., the court held a hearing on whether Key Cast Stone did not "receive notice of the summons in time to defend," so that, having shown a potentially meritorious defense, this defendant "may be allowed to defend the action." C.P.L.R. § 317. See Gonzalez v. City of New York, 106 A.D.3d 346, 346 (1st Dep't 2013). Plaintiff served this defendant, a corporation, by serving the New York Secretary of State September 26, 2011. C.P.L.R. § 311(a)(1); N.Y. Bus. Corp. Law (BCL) § 306(b)(1). Key Cast Stone has made no showing that this service failed to comply with C.P.L.R. § 311(a)(1) or New York Business Corporation Law (BCL) § 306(b)(1), so as to vacate the default judgment pursuant to C.P.L.R. § 5015(a)(4) based on lack of personal jurisdiction rather than on nonreceipt of the pleadings. Tribeca Lending Corp. v. Bartlett, 121 A.D.3d 613, 613 (1st Dep't 2014); Sterling Natl. Bank v. Polyseal Packaging

Corp., 104 A.D.3d 466, 467 (1st Dep't 2013). See Bezoza v. Bezoza, 83 A.D.3d 578, 579 (1st Dep't 2011); U.S. Bank v. Tate, 102 A.D.3d 859, 859 (2d Dep't 2013); Bank of New York v. Espejo, 92 A.D.3d 707, 708 (2d Dep't 2012); US Natl. Bank Assn v. Melton, 90 A.D.3d 742, 743 (2d Dep't 2011).

Where service on a defendant is pursuant to C.P.L.R. § 308(2), by delivering the pleadings to a person of suitable age and discretion at the defendant's residence or business, or § 308(4), by affixing them to the door of the defendant's residence or business, the defendant is in a position to know the facts that would rebut an affidavit of such service. The defendant knows, for example, whether the address served was the defendant's residence or business or the person served was at the defendant's residence or business. 342 E. 67 Realty LLC v. Jacobs, 106 A.D.3d 610, 611 (1st Dep't 2013); Kasowitz, Benson, Torres & Friedman, LLP v. Cao, 105 A.D.3d 521, 521 (1st Dep't 2013); Finkelstein Newman Ferrara LLP v. Manning, 67 A.D.3d 538, 539 (1st Dep't 2009).

Where service on a corporate defendant, as here, was pursuant to C.P.L.R. § 311(a)(1) and BCL § 306(b)(1): "Service of process on such corporation shall be complete when the secretary of state is so served." BCL § 306(b)(1). Plaintiff bears no burden to show anything more. When the Secretary of State is served, however, the Secretary:

shall promptly send one of . . . copies by certified mail, return receipt requested, to such corporation, at the post office address on file in the department of state, specified for the purpose. If a . . . corporation has no such address

on file in the department of state, the secretary of state shall so mail such copy . . . in care of any director named in its certificate of incorporation at the director's address stated therein

Id. While plaintiff bears no burden to show that the Secretary of State carried out this duty upon receiving service, to forward the process served to a corporate address or a corporation director's address, neither is the corporate defendant in a position to know the facts that would rebut performance of this duty or even rebut plaintiff's affidavit of service on the Secretary. The corporation may be in a position to offer little more than a denial of receipt.

A bare denial may not warrant a hearing on the defendant's receipt of pleadings where service was pursuant to C.P.L.R. § 308(2) or (4). Sharbat v. Law Offs. of Michael B. Wolk, P.C., 121 A.D.3d 426, 427 (1st Dep't 2014); Perilla v. Carchi, 100 A.D.3d 429, 430 (1st Dep't 2012); Chinese Consol. Benevolent Assn. v. Tsang, 254 A.D.2d 222, 223 (1st Dep't 1998); Stevens v. Charles, 102 A.D.3d 763, 764-65 (2d Dep't 2013). Here, where service on Key Cast Stone was through the Secretary of State, the corporation's Treasurer, John M. Gonzales, who was responsible for the corporation's daily operations, did offer more than a conclusory denial of receipt. See Gonzalez v. City of New York, 106 A.D.3d at 346; Pina v. Jobar U.S.A. LLC, 104 A.D.3d 544, 545 (1st Dep't 2013). He attested that neither he nor any officer or agent of Key Cast Stone ever was served with or received plaintiff's summons and complaint; that the corporation first became aware of plaintiff's action through its enforcement of its

judgment; and that, since October 2012, the corporation has been conducting business in Amityville, New York, which is not where plaintiff effected service. Critically, he did not indicate how he would have had personal knowledge of service on or receipt by other officers or agents of Key Cast Stone, Chinese Consol. Benevolent Assn. v. Tsang, 254 A.D.2d at 223; Granite Mgt. & Disposition v. Sun, 221 A.D.2d 186, 187 (1st Dep't 1995); see Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 254 (1st Dep't 2011); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Dorsey v. Les Sans Culottes, 43 A.D.3d 261 (1st Dep't 2007), or where it was located before October 2012, in September 2011 or the months following.

Although his explanation lacked necessary details, Key Cast Stone, as set forth above, may not have been in a position to offer much explanation for nonreceipt of the pleadings. Plaintiff, on the other hand, did not supplement its process server's affidavit of service on the Secretary of State with any further evidence that the process served was forwarded to Key Cast Stone's corporate address or a corporation director's address. BCL § 306(b)(1). Where plaintiff itself relies only on a process server's affidavit that also is barren of the details surrounding the corporation's actual receipt, a corporate officer's sworn denial of receipt and of any corporate presence at the address where process was forwarded may be enough to rebut the process server and warrant a hearing. Chichester v. Alal-

Amin Grocery & Halal Meat, 100 A.D.3d 820, 820-21 (2d Dep't 2012). See Rosario v. NES Med. Servs. of N.Y., P.C., 105 A.D.3d 831, 832 (2d Dep't 2013); Indymac Fed. Bank FSB v. Quattrochi, 99 A.D.3d 763, 764 (2d Dep't 2012).

Moreover, while Gonzalez's affidavit lacks relevant details, the witness does not indicate that he lacks recollection of those details, so that a hearing would be pointless. See US Natl. Bank Assn v. Melton, 90 A.D.3d at 743. If his affidavit is vague because he is hiding the details that would show Key Cast Stone did "receive notice of the summons in time to defend," C.P.L.R. § 317; Gonzalez v. City of New York, 106 A.D.3d at 346, a hearing will uncover those details. If the hearing reveals details that support Key Cast Stone's nonreceipt of the pleadings in time to defend, then an opportunity for Key Cast Stone to interpose a potentially meritorious defense is warranted. C.P.L.R. § 317. For all these reasons, under the circumstances presented here, Key Cast Stone's denial was sufficient at least to warrant a hearing, where plaintiff might cross-examine Key Cast Stone's witness and other evidence and offer plaintiff's own evidence indicating Key Cast Stone's likely receipt of the pleadings in time to avoid its default. Kasowitz, Benson, Torres & Friedman, LLP v. Cao, 105 A.D.3d at 521; Finkelstein Newman Ferrara LLP v. Manning, 67 A.D.3d at 539. See 342 E. 67 Realty LLC v. Jacobs, 106 A.D.3d at 611.

II. FINDINGS OF FACT

John M. Gonzales was one of Key Cast Stone's founders, has been its Treasurer since its inception in 1992, and since then has never been employed by any other business. In 2011, when plaintiff commenced this action and served Key Cast Stone, Gonzales was one of five co-owners of the corporation, and it employed approximately 20 employees. As the Treasurer, Gonzales is responsible for the corporation's daily operations.

Until at least 2008, Key Cast Stone conducted business at 35-01 Vernon Boulevard, Long Island City, New York, the "address on file in the department of state," BCL § 306(b)(1), and where plaintiff mailed its pleadings November 15, 2011, C.P.L.R. § 3215(g)(4), and served its motion for default judgment. By then, however, until October 2012, Key Cast Stone maintained its address at 38-42 Wyandanch Avenue, Wyandanch, New York.

Nevertheless, when Key Cast Stone changed its address to Wyandanch, the corporation notified the postal service of the change and received mail forwarded from 35-01 Vernon Boulevard, Long Island City. Key Cast Stone encountered no problems with its mail being forwarded, except that accumulations of mail were sent in bulk, rather than always in a daily stream.

In 2011, when plaintiff served Key Cast Stone, Gonzales was the corporate owner and officer who picked up the corporation's mail from its mailbox "[m]ost of the time," [f]or the most part," Transcript of Proceedings at 10 (July 2, 2013), but "[a]ny of the partners" among the corporation's five co-owners and officers,

id. at 11, accessed the mailbox and exercised responsibility for picking up and handling its mail. When Gonzales was not at Key Cast Stone's office or was late arriving there, "someone else," whether one of his co-owners and co-officers or one of the 15 to 20 employees, "picked up the mail." Id. at 47. All of the five owners worked at the corporate location. None of Key Cast Stone's four other owners and officers or 15 to 20 employees during 2011 testified that they never received plaintiff's summons and complaint in this action.

While Key Cast Stone may not have maintained its corporate location at 35-01 Vernon Boulevard, Long Island City, in 2011, Key Cast Stone's five co-owners were the members and managers of a real estate holding limited liability company (LLC), 35th Avenue LLC, that held the building at that address at least through 2012. When Key Cast Stone itself was operating at that address, Key Cast Stone operated in the building as a tenant of 35th Avenue LLC pursuant to a lease that was not terminated until June 28, 2012. Gonzalez insisted that this termination agreement was prepared after Key Cast Stone left the premises, but he never indicated how long after or explained why there might have been a delay between Key Cast Stone's departure and termination of its substantial obligations under the lease. In fact the termination agreement provides that the lease was terminated as of when it was executed June 28, 2012, and as of that date Key Cast Stone had "its principal office" at 35-01 Vernon Boulevard, Long Island City. Ex. 2, at 2. The lease similarly provided that all

communications to Key Cast Stone were to be mailed to it at that address.

Key Cast Stone's connection to 35-01 Vernon Boulevard did not end with the lease. Further strengthening and extending its ties to the premises are its commercial liability and property insurance policies covering "Key Cast Stone Co., Inc.," "c/o John Gonzales 35-01 Vernon Blvd. Long Island City," from 2010 to October 12, 2013. Ex. 7, at 1. The policies provide that the insured is both a building owner and a manufacturer of precast concrete products, products that form the basis for plaintiff's claims. Significantly, this coverage was extended twice after September 2011, to October 12, 2012, and again in 2012 to October 12, 2013.

Key Cast Stone offered no other leases or insurance policies and no deeds, utility bills, governmental records, or other evidence corroborating Gonzales's bare denial of Key Cast Stone's presence at 35-01 Vernon Boulevard, Long Island City, in 2011 or corroborating its presence in Wyandanch in 2011. A large sign on the front of the building at 35-01 Vernon Boulevard, Long Island City, displayed Key Cast Stone physical operations there in 2011 and remained there in 2012.

During Key Cast Stone's operations in the building at 35-01 Vernon Boulevard, Key Cast Stone moved from the front to the back of the building, and another tenant occupied the front. The sign directing visitors to Key Cast Stone around to the back of the building and announcing Key Cast Stone's location there was still

in place in July 2013.

Finally, whether for Key Cast Stone's business or for 35th Avenue Holding LLC's business, Gonzalez himself maintained a regular presence at 35-01 Vernon Boulevard, Long Island City. In particular, he was there to address a stop work order issued by the New York City Department of Buildings (DOB), to address an illegal door lock and other violations cited by DOB, and eventually for the sale of the building in 2012.

III. CONCLUSIONS

Key Cast Stone offered no evidence to support nonreceipt of plaintiff's summons and complaint either at 35-01 Vernon Boulevard, Long Island City, through the presence there of 35th Avenue Holding LLC's managers and members, all of whom were owners and officers of Key Cast Stone, or at 38-42 Wyandanch Avenue, Wyandanch, through mail regularly forwarded there from the prior address. Nothing other than Gonzales's bare denial indicates that Key Cast Stone was not operating at 35-01 Vernon Boulevard, Long Island City, in 2011. Nothing corroborates Key Cast Stone's operations at any other address, other than Gonzalez simply providing that address. E.g., Sharbat v. Law Offs. of Michael B. Wolk, P.C., 121 A.D.3d at 427; Granite Mgt. & Disposition v. Sun, 221 A.D.2d at 187.

In sum, if and when Key Cast Stone moved from Long Island City, Key Cast Stone changed its mailing address with the postal service and confirmed that its mail was continuously forwarded from there. Key Cast Stone did not indicate that its mail was no

longer forwarded at any time or that Key Cast Stone's officers did not visit their LLC's Long Island City building regularly, at least until the entire building was transferred in 2012. In fact plaintiff showed that Gonzales, at least, did visit the building for significant purposes and that Key Cast Stone itself maintained its tenancy at that building through June 2012 and insurance for the corporation itself, giving its address as 35-01 Vernon Boulevard, Long Island City, to its insurer, until October 2013.

Key Cast Stone has been provided three opportunities to show that it did not "receive notice of the summons in time to defend" this action, so as to "be allowed to defend the action."

C.P.L.R. § 317. The first opportunity was in support of the motion to vacate the default judgment against Key Cast Stone. The second was in reply to plaintiff's opposition to the motion. The third, full blown opportunity was through the only witness offered at the hearing, Key Cast Stone's Treasurer, and any other witnesses Key Cast Stone chose to offer, which were none.

Through all the evidence considered above, Key Cast Stone has shown nothing demonstrating its absence from the address where plaintiff served the pleadings or nonreceipt of mail addressed there. Since this defendant presents no excuse for defaulting other than the conclusory nonreceipt of the pleadings, the court denies the motion by Key Cast Stone Company, Inc., to vacate the default judgment against this defendant and vacates the temporary

stay against enforcement of that judgment. C.P.L.R. §§ 317,
5015(a)(1).

DATED: November 21, 2014



LUCY BILLINGS, J.S.C.

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