SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

- - - - - - - - - - - - - - - - - - - - x

ANNETTE WALSH,

Plaintiff,

- against -

DOUBLE N EQUIPMENT RENTAL CORP., SHANTI PRASAD and HRIDAYESHWER PRASAD,

Defendants

- - - - - - - - - - - - - - - - - - - - x

Index No.: 10572/2010

Motion Date: 11/19/14

Motion Nos.: 178 and 192

Motion Seq.: **3 and 4**

The following papers numbered 1 to 12 were read on this motion by the defendant DOUBLE N EQUIPMENT RENTAL CORP., for an order pursuant to CPLR 5015(a)(1) vacating a money judgment in the amount of $529,371.16 granted on default:

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits-Memo of Law | 1 - 4 |
| Affirmation in Opposition-Affidavits-Exhibits | 5 - 9 |
| Reply Affirmation | 10 - 12 |

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This is a personal injury action in which plaintiff, Annette Walsh, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on December 10, 2007, at the intersection of 35th Avenue and 162nd Street, Queens County, New York.

At the time of the accident, the plaintiff's vehicle was proceeding through the intersection, which was controlled by a traffic light, when her vehicle was hit by the vehicle owned by defendant Hridayeshwer Prasad and Operated by Defendant Shanti Prasad. Plaintiff claims that the light was green in her favor. Defendant concedes that she proceeded through a red light but did so at the direction of a flagperson, employed by defendant Double N Equipment Rental Corporation, who was performing construction

work at the intersection. As a result of the collision, the plaintiff allegedly injured her cervical spine and lumbar spine.

Plaintiff commenced an action against the defendants by filing a summons and complaint on April 28, 2010. Issue was joined by service of defendant Prasad's answer dated May 26, 2010. Co-defendant Double N Equipment Rental Corp., failed to answer the summons and complaint, and by decision dated October 6, 2010, this Court granted a default judgment in favor of the plaintiff on the issue of liability and set the matter down for an assessment of damages at the time of the trial of the remaining defendants.

By decision and order dated April 20, 2012, this Court granted the motion of the Prasad defendants for summary judgment on the issue of liability and dismissed the complaint against them. This Court held that the evidence submitted in support of the motion demonstrated that the motor vehicle accident was not proximately caused by any negligence on the part of Ms. Prasad. The Court held that the plaintiff entered the intersection with a green light in her favor and the defendant entered the intersection against a red light but did so as a result of the flagperson employed by Double N Equipment Rental Company, improperly directing the flow of traffic.

Pursuant to the order of this Court dated May 21, 2012, the matter as to Double N was scheduled for a trial on damages only. On July 19, 2012, an inquest was held before this Court and on March 6, 2013 a money judgment was entered in favor of the plaintiff and against Double N in the amount of $529,371.16.

On October 2, 2014, the defendant was notified by the New York City Marshall that his property and business was to be sold at a public auction on October 7, 2014 in order to satisfy the money judgment.

On October 6, 2014, the parties entered into a stipulation staying all further enforcement proceedings against defendant Double N pending a determination of the instant motion.

Defendant now moves for an order pursuant to CPLR 501(a)(1) vacating the default judgment and seeking leave to serve an answer to the plaintiff's complaint. In support of the motion, the defendant submits an affidavit from Charles Zehradka dated September 8, 2014, stating that he is the President of Double N Equipment Rental Corp. He states that the office address of the company is 863 Washington Street, Franklin Square, New York. He states that his company had no employees, contractors,

subcontractors or others at the scene of the accident and the surrounding area on December 10, 2007. He states that it is physically impossible for the flagman, whose actions allegedly caused the accident, to have been an employee of his company. He states that the previous administrator and project manager Edward Janda was laid off on September 5, 2010 and died in December 2012. He states that Janda operated the company at a different location than the present location. He states that he did not receive service of process during the time of the action and he asserts that he has a meritorious defense.

Defendant's counsel, Robert E. Seaman III, Esq., asserts that pursuant to CPLR 5015(a) a judgment granted on default may be vacated on the ground of excusable default if the motion is made within one year after service of a copy of the judgment upon the moving party. Counsel asserts that Double N was not represented by counsel and had no knowledge of the pending litigation.

In opposition, plaintiff, by counsel, Barbara E. Manes, Esq. submits that service of the summons and complaint was made upon Double N via the Secretary of State. The affidavit of service dated May 11, 2010 states that Double N was served pursuant to BCL § 306 by personal service at the Office of the Secretary of State on May 11, 2010. In addition, counsel asserts that copies of the pleadings and motions were served at the address of the company listed with the New York State Department of State. Counsel asserts that the motion is untimely as the default judgment was entered on October 21, 2010 and the defendant did not seek to vacate the default for four years. Counsel asserts that defendant has failed to offer a reasonable excuse for the default as service was properly made and failed to offer a meritorious defense offering no supporting documentation for its claim that no employee of the company was working as a flagman at the time of the accident.

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and defendant's reply thereto, this court finds that the motion to vacate the default judgment is denied.

A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (see Wells Fargo Bank v Malave, 107 AD3d 880 [2d Dept. 2013]; Schenk v Staten Is. Univ. Hosp., 108 AD3d 661 [2d Dept. 2013]; Smyth v Getty Petroleum Mktg., Inc., 103 AD3d 790 [2d Dept. 2013]). Whether a proffered excuse is reasonable is a determination to be made by the court based on all relevant factors, including the

extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (see Fried v Jacob Holding, Inc., 110 AD3d 56 [2d Dept. 2013]).

Here, the affidavit of service submitted by plaintiff showing proper service on the corporation by service of the summons and complaint on the Secretary of State constitutes prima facie evidence of proper service pursuant to BCL § 306 (see Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896 [2d Dept. [2d Dept. 2013]; Matter of Nieto, 70 AD3d 831 [2d Dept. 2010]; Argent Mtge. Co., LLC v Vlahos, 66 AD3d 721 [2d Dept. 2009]; 425 E. 26th St. Owners Corp. v Beaton, 50 AD3d 845 [2d Dept. 2008]; Mauro v Mauro, 13 AD3d 345 [2d Dept. 2004]). The defendant's bare and unsubstantiated denial of receipt four years after the entry of the default judgment is insufficient to dispute the veracity and content of the affidavit, and therefore, does not rebut the presumption of proper service created by the affidavit of service (see Deutsche Bank Natl. Trust Co. v. Quinones, 114 AD3d 719 [2d Dept. 2014]; Irwin Mtge. Corp. v Devis, 72 AD3d 743 [2d Dept. 2010]; Mortgage Elec. Registration Sys., Inc. v Schotter, 50 AD3d 983 [2d Dept. 2008]; Beneficial Homeowner Service Corp. v Girault, 60 AD3d 984 [2d Dept. 2009]). "A court need not conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service" (Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner, 57 AD3d 732 [2d Dept. 2008]).

Here, the defendant's affidavit, which contains only a conclusory denial of receipt of the summons and complaint, is insufficient to rebut the presumption of proper service as defendants never denied the specific facts contained in the process server's affidavit (see Deutsche Bank Natl. Trust Co. v Dixon, 93 AD3d 630 [2d Dept. 2012]; U.S. Natl. Bank Assn. v Melton, 90 AD3d 742, [2d Dept. 2011]; City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]).

Further, the defendant failed to establish the existence of a potentially meritorious defense (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138 [1986]). The defendant's affidavit merely asserting that none of his employees worked as a flagman on the date of the accident without any evidentiary support to buttress the claim is insufficient to establish a potentially meritorious defense (see Wells Fargo Bank, N.A. v Cean Owens, LLC, 110 AD3d 872 [2d Dept. 2013])

Accordingly, for all of the above stated reasons the motion by defendant DOUBLE N EQUIPMENT RENTAL CORP. to vacate a money

judgment entered on default is denied, and it is further,

ORDERED, that the stay of enforcement contained in the order to show cause dated October 8, 2014 is vacated.

Dated: Long Island City, N.Y.
December 10, 2014

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ROBERT J. MCDONALD
J.S.C.