

Puccini v Prisma Cargo Solutions, LLC
2016 NY Slip Op 30575(U)
April 7, 2016
Supreme Court, New York County
Docket Number: 156850/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ISABELLA PUCCINI,
Plaintiff,
-against-

INDEX NO. 156850/2014
MOTION DATE 02-17-2016
MOTION SEQ. NO. 002

MOTION CAL. NO

PRISMA CARGO SOLUTIONS, LLC,
Defendant.

The following papers, numbered 1 to 10 were read on this motion to vacate a default judgment.

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

PAPERS NUMBERED	
1-4	_____
5-8	_____
9-10	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion by Order to Show Cause seeking vacatur of a default judgment with leave to file an answer to the complaint is granted.

Defendant is a domestic limited liability company formed in February 2010 in New York providing international moving services. (see Mot. Exh. C; see also Affidavit of Peimaneh Riahi attached to the instant motion). Plaintiff and defendant entered into a service agreement for defendant to pack, ship, deliver, and unpack plaintiff's personal items for her move from Pasadena, California to Milan, Italy in July 2013 for the price of \$11,500.00. (see Complaint attached as Mot. Exh. H P 1; see also service agreement attached as Mot. Exh. I). Per the service agreement, plaintiff purchased "full coverage" insurance to cover for loss and/or damage for the items being shipped for an additional cost of \$3,900.60, which was based upon the 2% estimated value of plaintiff's items. In order to purchase this additional coverage through defendant, plaintiff provided a list of the items being shipped and their total estimated value which was estimated at 150,000 euros. (see Complaint- Mot. Exh. H P 2).

Plaintiff alleges that upon receipt and unpacking of her personal belongings in Italy, on September 10, 2013, several items were discovered to be broken and damaged. (Id. at P 3). Plaintiff further claims that at this time it was also discovered that several items had not been packed properly by Defendant prior to shipping. (Id.) Plaintiff then "filed a claim with the 'full coverage insurance' carrier identified by Defendant." (Id.) Plaintiff's claim was denied by the insurance carrier on February 6, 2014. (Id.)

Plaintiff commenced this action by Summons and Complaint dated July 10, 2014 alleging (1) breach of contract for defendant's failure to obtain the promised full coverage insurance, failure to use due care in packing, shipping and handling, and failure to use proper wooden crating in the packing of plaintiff's items; (2) fraud for defendant's failure to obtain full coverage insurance for plaintiff's items after representing that full

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

coverage would be in place after plaintiff paid for said coverage; (3) negligence; and (4) unjust enrichment of defendant in taking plaintiff's money for the full insurance coverage but failing to provide such coverage. (see Complaint- Mot. Exh. H).

Defendant did not appear, answer, or plead in this action, and on May 11, 2015 plaintiff mailed to defendant a copy of plaintiff's Notice of Motion for Default. (see Sal Meli Aff. In Opp. P 5 and Exh. 8 attached thereto). On May 12, 2015, plaintiff also mailed a copy of the Request for Judicial Intervention form to be filed with the Court to defendant. (Id. and Exh. 9 attached thereto). This Court granted plaintiff's default motion on May 29, 2015. (see Exh. 1 attached to Sal Meli Aff. In Opp.) Plaintiff then mailed a copy of this Court's Order with Notice of Entry granting the default motion to defendant on June 18, 2015 (Id. PP 5-6 and Exh. 10 attached thereto).

The matter was set for an inquest hearing and according to defendant it wasn't until receiving notice from the Court that an inquest was being held that defendant became aware of the instant action. (see Riahi Aff. attached to the Mot. and copy of notice of the inquest hearing attached thereto as Exh. B).

Defendant moved by Order to Show Cause in November of 2015 seeking to: (1) vacate, pursuant to CPLR 317, this Court's May 29, 2015 Order granting a judgment on default, (2) stay the inquest for damages that was to be held on November 12, 2015, and; (3) grant defendant leave to serve an answer. The inquest was stayed and Oral argument was held on the motion on February 17, 2016.

Defendant claims that it was unaware of the instant action because the Summons and Complaint was never received through either the Secretary of State nor through plaintiff's separate mailing pursuant to CPLR 3215. Defendant contends that its address on file with the Secretary of State is 555 8th Avenue, Suite 1101, New York, New York, however, defendant moved in late 2012 from Suite 1101 to Suite 810 and failed to notify the Secretary of State of the Suite change. (see Aff. In Supp). Defendant claims that its failure to update the Suite number with the Secretary of State was "inadvertent and due to lack of knowledge of the importance of doing so." (Id.; see also Riahi Aff). Defendant also alleges that none of the mailings that plaintiff refers to were received by defendant because said mailings were all sent to defendant's old Suite number. (see Riahi Aff. P 3). Further, defendant maintains that though it moved only three floors down within the same building, delivery of mail is often an issue if the mail is not addressed properly with the correct Suite number. (see Aff. In Supp. and Riahi Aff.) The mailman will deliver the mail to the Suite number specified on the envelope no matter what company it is for. (see Riahi Aff. PP 2-3). Defendant also contends that plaintiff was aware of the correct mailing address with the updated Suite number of #810 as this new Suite number was listed in "several emails and at least one invoice" to plaintiff. (Riahi Aff. P 3).

In addition to claiming that notice of the summons and complaint was not received in time to defend, defendant also claims it has a meritorious defense. Defendant maintains that it is not liable to plaintiff for any of the damages claimed in her complaint based on the terms and conditions of the service agreement, and the fact that plaintiff accepted the sum of \$700 in payment for the damages. (Id. PP 3- 7).

Plaintiff, in opposition, argues that defendant had notice of the instant action for several reasons. Plaintiff served the summons and complaint by serving the Secretary of State of the State of New York on July 16, 2014. (see Affidavit of Service Mot. Exh. P). Additionally, plaintiff mailed a copy of the complaint to defendant pursuant to CPLR 3215. (see Aff. of Service attached as Exh. 7 to Aff. In Opp). Plaintiff's opposition papers provide, and the exhibits enclosed therewith confirm, that all of the mailings to defendant were made to the defendant at its old Suite number. (see Plaintiff's Opposition papers).

An affidavit of service from a process server stating that "defendant was served through the Secretary of State" raises a rebuttable presumption of effective service upon defendant. Gonzalez v. The City of New York, et al., 106 A.D.3d 436 [1st Dept. 2013]. Providing only conclusory affidavits denying receipt of the pleadings, without more, is "insufficient to rebut the presumption of service created by the process server's affidavit." Id., citing Grinshpun v. Borokhovich, 100 A.D.3d 551, 954 N.Y.S.2d 520 [1st Dept. 2012]. However, vacatur may be granted pursuant to CPLR 317 upon a showing that defendant lacked actual notice of the action in time to defend and that it had a meritorious defense (Diggs v. Karen Manor Assocs., LLC, 117 A.D.3d 401, 985 N.Y.S.2d 23 [1st Dept., 2014], citing to Olivaria v. Lin & Son Realty Corp., 84 AD3d 423, 922 NYS2d 337 [1st Dept 2011]; Arabesque Recs. LLC v. Capacity LLC, 45 AD3d 404, 846 NYS2d 43 [1st Dept 2007]).

CPLR 317 states that "[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."

Defendant has provided the Court with a reasonable excuse for its default and a meritorious defense. (see CPLR 5015(a)(1)).

Accordingly, it is ORDERED that defendant's motion by Order to Show Cause vacating a default judgment dated May 29, 2015, is granted, and it is further,

ORDERED that the default judgment dated May 29, 2015, is vacated, and it is further,

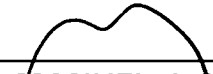
ORDERED, that defendant serve a copy of this Order with Notice of Entry upon plaintiff within 10 days from the date of entry of this Order, and it is further,

ORDERED, that, defendant is granted leave to answer the complaint within 20 days from the date of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that defendant serve a copy of this Order with Notice of Entry upon the General Clerk's Office, the intake clerk for trial support who is located in the General Clerk's Office (Room 119) and the County Clerk's Office (Room 141B) pursuant to e-filing protocol who are directed to mark their records accordingly.

Enter:

Dated: April 7, 2016



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
J.S.C.

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