

**Caeser v Harlem USA Stores, Inc.**

2016 NY Slip Op 30722(U)

April 18, 2016

Supreme Court, New York County

Docket Number: 157852/2013

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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FRANK CAESER,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.  
157852/2013

HARLEM USA STORES, INC.,

Defendant.

-----X

HON. ANIL C. SINGH, J.:

Defendant moves by order to show cause for an order: 1) restraining plaintiff and the marshal from withdrawing any funds from defendant's bank accounts to satisfy the judgment; 2) vacating the default judgment pursuant to CPLR 5015; and 3) restoring all amounts removed from defendant's accounts or, in the alternative, placing the funds into escrow until final determination of this matter. Plaintiff opposes the motion.

Plaintiff Frank Caesar commenced the instant personal injury action against Harlem USA Stores, Inc. The verified complaint alleges that defendant owns and operates commercial premises located at 2309 Frederick Douglass Boulevard in Manhattan; plaintiff fell down stairs inside the premises on October 1, 2011; and plaintiff sustained injuries.

The affidavit of service states that the summons and verified complaint were served on defendant on October 2, 2013, by leaving two copies with an agent in the Office of the Secretary of State pursuant to Business Corporation Law section 306(b). Defendant's Certificate of Incorporation designating the Secretary of State as defendant's agent states that the Secretary of State is to mail a copy of any summons and complaint to "c/o Leon Ellis, 1330 Fifth Avenue, New York, New York 10029" (Opp., exhibit C, p. 4, para. fifth).

Subsequently, plaintiff obtained a default judgment; an inquest was held; a judgment was entered; and plaintiff executed on the judgment.

#### Discussion

A defendant against whom a default judgment is taken may move to vacate the judgment within a year (CPLR 5015). "CPLR 317 is applicable to the nonpersonal service of process made through the Secretary of State, and if the defendant did not receive actual notice of the action in time to answer the complaint, then the defendant need show no excuse for the default, as long as the defendant has a meritorious defense" (Wharton v. 241 Corp., 99 A.D.2d 979, 980 [1<sup>st</sup> Dept., 1984]). If the defendant makes the default vacatur application under CPLR 5015, it can be treated in appropriate circumstances as having been made under CPLR 317 (Di Lorenzo v. A.C. Dutton Lumber Co., 67 N.Y.2d 138 [1986]).

In opposition to the instant motion, plaintiff's counsel contends that defendant was properly served with a summons and verified complaint by serving process on the Secretary of State.

In reply, defendant asserts that the address listed on the Certificate of Incorporation was a mistake that was a result of law office failure by its attorney in 1998. To corroborate this contention, defendant exhibits a Certificate of Assumed Name bearing the signature of Leon Ellis in his capacity as president of the corporation, which lists defendant's principal place of business as "2027 Fifth Avenue, New York, New York 10029" (Order to Show Cause, exhibit B). By contrast, the Certificate of Incorporation – a document that did not require the signature of a principal of the corporation – states that service shall be made upon "c/o Leon Ellis, 1330 Fifth Avenue, New York, New York 10029" (Opp., exhibit C, p. 4, para. fifth).

Defendant exhibits the sworn affidavit of Leon Ellis, who states that he is the president and sole shareholder of defendant. Mr. Ellis states that defendant was unaware of any action pending against it prior to December 29, 2015, and defendant received no service of any action from the plaintiff, its counsel or the Secretary of State. Mr. Ellis states further that: 1) defendant Harlem USA Stores, Inc., never owned or operated a business at the address where the incident

allegedly occurred; 2) the name of the business where the incident allegedly occurred is different than the name of defendant's business; 3) plaintiff alleges that he was injured when he fell down stairs, but there are no stairs at defendant's premises, which are on the ground floor; and 4) plaintiff alleges that he was injured in October 2011; however, defendant's Frederick Douglass Boulevard premises did not open to the public until August 2012.

The Court finds that defendant has sufficiently shown that it did not receive actual notice of the action in time to answer the complaint based upon the sworn affidavit of Leon Ellis and the documentary evidence that defendant's principal place of business is 2027 Fifth Avenue and not 1330 Fifth Avenue.<sup>1</sup>

Accordingly, it is

ORDERED that plaintiff and the marshal are enjoined and restrained from withdrawing any funds from defendant's bank accounts to satisfy the judgment; and it is further

ORDERED that plaintiff and the marshal are directed to place any funds that have already been withdrawn or debited from defendant's bank accounts into

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<sup>1</sup>Defendant has also established excusable default and a meritorious defense under CPLR 5015. The default was excusable as it did not receive notice of the action. A meritorious defense is stated based on the sworn affidavit of Mr. Ellis that the commercial premises is on the ground floor without stairs.

an escrow account until further order of the Court; and it is further

ORDERED that defendant's motion to vacate its default is granted on condition that defendant serve and file an answer to the complaint, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 158); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, on May 24, 2016, at 10:00 AM.

The foregoing constitutes the decision and order of the court.

Date: April 18, 2016  
New York, New York

  
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Anil C. Singh