Hyman v 400 W. 152nd St. Hous. Dev. Fund Corp.
2017 NY Slip Op 31660(U)
August 4, 2017
Supreme Court, New York County
Docket Number: 154435/15
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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MIRIAM A. HYMAN,

Plaintiff,

-against-

400 WEST 152nd STREET HOUSING DEVELOPMENT FUND CORPORATION,

Defendant.

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Index No. 154435/15
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendant 400 West 152nd Street Housing Development Fund Corporation (Defendant) moves pursuant to CPLR 5015(a)(1)[1] and CPLR 317[2] for an order vacating the judgment against it in favor of plaintiff Miriam Hyman (Plaintiff) and permitting it to interpose an answer in this case. Defendant further moves for an order pursuant to CPLR 5015(d)[3] directing Plaintiff to make restitution of any funds already collected through enforcement proceedings. For the reasons set forth below, the motion is denied.

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[1] CPLR 5015(a)(1) provides that "the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry."

[2] CPLR 317 provides in relevant part 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. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal."

[3] CPLR 5015(d) provides that "[w]here a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal."

Plaintiff commenced this personal injury action on May 4, 2015. The complaint alleges that on December 15, 2013, Ms. Hyman was walking on the sidewalk in front of the building located at 400 West 152nd Street in Manhattan (Building) when she slipped and broke her ankle. By order dated October 13, 2015, the Hon. Joan Kenney of this court granted Plaintiff's motion for a default judgment against Defendant and directed that an inquest be held on the issue of damages. The inquest was assigned to the Hon. Ira Gammerman of this court on May 31, 2016. During the inquest Plaintiff testified in relevant part as follows (Defendant's exhibit D, pp. 2-3):

THE COURT:	. . . According to the complaint, on December 15, 2013, you sustained an injury; is that correct?
THE WITNESS:	Yes, sir.
THE COURT:	What time of day was that?
THE WITNESS:	10:30 in the morning.
THE COURT:	Okay. And where did the accident happen?
THE WITNESS:	The accident occurred at the corner of 152nd and St. Nicholas.
THE COURT:	In front of a building at 400 West 152nd Street?
THE WITNESS:	Yes, sir.
THE COURT:	And what caused the accident?
THE WITNESS:	Well, I slipped on ice that was in front of the building and I broke my ankle.

At the end of the hearing the court awarded Plaintiff $250,000 for her injuries. A judgment for $269,434.93, which represented the $250,000 awarded by Judge Gammerman plus costs, disbursements, and interest, was entered by the County Clerk on March 22, 2017. A copy of the judgment with notice of entry was served upon Defendant by mail on April 28, 2017.

John Brown, the Defendant corporation's president, avers that he first learned of the judgment on May 24, 2017 when he received a phone call from a City Marshall informing him that he would be enforcing same. "Simultaneously with that telephone call, [he] found an envelope addressed from plaintiff's attorney on the floor of the entrance to the building" which

contained a copy of the judgment.[4] According to Mr. Brown none of the Defendant's officers or employees ever received the summons and complaint or any other documents related to this matter. The Defendant's treasurer, Cynthia Hodge, confirms that she was unaware of this lawsuit or that an accident had even occurred on the premises until Mr. Brown found the judgment.[5] She claims that mail addressed to the Building has been getting lost for years and that the Building is not responsible for the area where Plaintiff claims she fell (Hodge Affidavit, ¶¶ 5, 7):

> The mail addressed to our building has been getting lost for years. I have spoken to the postman about this matter to no avail. I have gone to the post office and reported the failure of the building to receive its mail and the building receiving mail addressed to other buildings bearing the similar number "400". . . .
>
> Mr. Brown informed your affiant that the plaintiff testified she fell on the corner of W. 152nd Street; our building does not extend to the corner.

Defendant argues that its motion should be granted because it never received any documents in this case until May 24, 2017 and because "the Court testif[ied] on behalf of the Plaintiff" during the inquest. Defendant also argues that it maintains insurance for premises liability cases such as this one and that if any of its officers received correspondence regarding this case they would have forwarded it to their insurer rather than expose the Defendant to a judgment.

CPLR 5015(a)(1) authorizes a court to relieve a party from a judgment upon a showing of a reasonable excuse and a meritorious defense to the underlying action so long as the application is brought within one year after service of a copy of the judgment with notice of entry.[6] *See*

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[4] Mr. Brown's affidavit, sworn to May 25, 2017, is annexed to the moving papers (Brown Affidavit).

[5] Ms. Hodge's affidavit, sworn to May 25, 2017, is annexed to the moving papers (Hodge Affidavit).

[6] This motion is timely, having been filed within one year of being served with notice of entry of the judgment.

Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141 (1986); *Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431, 431 (1st Dept 2017). "Whether an excuse is reasonable is a determination within the sound discretion of the court." *Matter of Hye-Young Chon v Country-Wide Ins. Co.*, 22 AD3d 849, 849 (2d Dept 2005).

The court is not persuaded by the Defendant's claimed excuse for not appearing in this case. As a New York corporation, the Defendant appointed the New York Secretary of State as its agent for receiving service. According to the printout from the Secretary of State website,[7] the address to which the Department of State mails legal documents accepted on behalf of the Defendant is 400 West 152nd Street Housing Development Fund Corporation, 400 West 152nd Street, New York, NY 10031. The Defendant does not allege that this address is incorrect. More importantly, Plaintiff has submitted documentation with affidavits of service showing that it served the Defendant with correspondence concerning this case over the course of several years at this address, as follows (exhibits A-I):

1. May 14, 2015 - Service of process upon the Secretary of State
2. April 4, 2015 – Claim Letter
3. November 21, 2015 – Additional service of process
4. August 11, 2015 – Notice of motion for default
5. October 22, 2015 – Order with notice of entry
6. October 19, 2015 – Note of issue, by mail
7. February 23, 2017 – Judgment with notice of settlement
8. April 28, 2017 – Judgment with notice of entry

The Defendant's claim that it never received any of these documents until the moment Mr. Brown received a phone call from the City Marshall is difficult to accept. Assuming Plaintiff mailed the signed judgment to the Defendant on April 28, 2017 it would have been

[7] Plaintiff's exhibit A.

received in a few days. Yet, as previously stated, Mr. Brown claims he first saw the judgment lying on the floor of the Building's lobby for the first time a month later right after receiving a call from the City Marshall. The court does not find this account to be credible.

The court also finds that the Defendant's purported efforts towards resolving the alleged mail situation are unsubstantiated and perfunctory. There is no documentary proof that the Defendant contacted the post office, i.e., letters to the United States Postal Service, complaint reports, or call logs. And if in fact the Building was not receiving mail on a regular basis the Defendant could have taken steps to obtain a P.O. Box and designate a specific individual as its agent for service of process. In any event, Plaintiff's April 4, 2014 claim letter was personally served upon "J.R. as Authorized Agent for 400 West 152nd Street Housing Development Fund Corporation", rather than by mail.[8]

In terms of a meritorious defense, the Defendant claims that Ms. Hyman merely acquiesced when asked whether she fell in front of 400 West 152nd Street. The court disagrees. Ms. Hyman clearly testified that she was injured when she slipped on ice on the corner of 152nd Street and St. Nicholas and confirmed the address of the building upon questioning by Judge Gammerman. The court rejects Defendant's contention that Plaintiff's testimony is ambiguous because she did not state whether she fell on St. Nicholas Avenue or St. Nicholas Place. This argument is defective since it was made for the first time in reply (*Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 2006]), but it is also immaterial since the Building abuts

[8] Defendant claims that it currently has only employee, its superintendent, and that he is not the person described as "J.R." However, Defendant did not identify the superintendent by name or provide the court with any information as to who worked for Defendant on the date the claim letter was allegedly served.

both the southeast corner of West 152nd Street and St. Nicholas Avenue and the southwest corner of West 152nd Street and St. Nicolas Place.[9]

With respect to the Defendant's claim that it would have forwarded the summons and complaint to its insurance carrier if it had actually received same, it is worth noting that Plaintiff's opposition papers contain a June 6, 2017 letter from York Risk Services Group, Inc. to the Defendant which provides that the Defendant's insurer disclaimed coverage relating to Plaintiff's accident because its general liability policy was not in effect on the date thereof. The Defendant does not address much less dispute the content of the letter, further casting doubt on its arguments herein.

In light of the foregoing, it is hereby

ORDERED that Defendant's motion is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 8.4.17

SHERRY KLEIN HEITLER, J.S.C.

[9] *See Maynard v Harrah's Entm't, Inc.*, 2010 US Dist. LEXIS 45888 (EDNY May 10, 2010) (taking judicial notice of location using Google Maps).