

Buksha v UHAB Hous. Dev. Fund Corp.
2018 NY Slip Op 30723(U)
April 4, 2018
Supreme Court, New York County
Docket Number: 160684/2016
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

LYNNE BUKSHA,

Plaintiff,

-against-

UHAB HOUSING DEVELOPMENT FUND CORPORATION and
DEL MAR MANAGEMENT SERVICES, INC.,

Defendants.

Index No.: 160684/2016
DECISION/ORDER
Motion Seq. No. 003

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's Del Mar Management Services, Inc. motion to vacate the default judgment.

Papers	NYSCEF Documents Numbered
Del Mar's Motion Papers, January 31, 2018,.....	17
Plaintiff's Opposition Papers, February 13, 2018, on Motion Seq. No. 003	18 & 19

Michael E. Zuller, New York, for plaintiff Lynne Buksha.
Law Office of Gerald Pigott, P.C., New York, for defendant Del Mar Management Services, Inc.

Gerald Lebovits, J.

Defendant Del Mar Management Services, Inc. (Del Mar), moves to vacate this court's default judgment from December 7, 2017 (NYSCEF Doc. #16) and to permit it to file a late answer in this matter (Motion Seq. No. 003). Plaintiff opposed this motion (NYSCEF Doc. #18 & 19).

BACKGROUND

On December 20, 2016 plaintiff, Lynne Buksha, commenced this action by electronic filing against defendants, UHAB Housing Development Fund Corporation (UHAB) and Del Mar. (NYSCEF Doc. #1.) The complaint appears to allege that plaintiff was injured on June 20, 2016, when she fell on a portion of the public sidewalk in front of a building owned by UHAB and operated, managed, maintained, and controlled by Del Mar. Plaintiff claims that defendants breached their duty to keep and maintain the public sidewalk in front of and alongside the property in reasonable, good, and safe condition. (Verified Complaint, at page 4-6, NYSCEF Doc. #1.) Plaintiff seeks recovery, claiming she was injured because defendants maintained the sidewalk negligently.

UHAB electronically filed an answer on May 4, 2017.

Plaintiff sent two letters to Del Mar: on July 20, 2016, putting Del Mar (and UHAB) on notice of plaintiff's claim, and on July 28, 2017, informing Del Mar about the filed lawsuit and its default in filing an answer on time. (Exhibit 1 of Plaintiff's opposition papers, NYSCEF Doc. #19.) After Del Mar did not file an answer, plaintiff moved for a default judgment (Motion Seq. No. 002) on September 20, 2017. This court granted plaintiff's unopposed motion on December 7, 2017, and awarded plaintiff a judgment on liability against Del Mar. (NYSCEF Doc. #16.)

DISCUSSION

Del Mar now moves to vacate the default judgment and to permit it to file a late answer. Del Mar argues that it was never served and that it has both a justifiable excuse for its default and a meritorious defense. Plaintiff opposes, arguing that Del Mar was served on January 11, 2017, by service of the Summons and Verified Complaint on Del Mar's general agent, "Carlos Smith," who allegedly refused to give his full name. (Affidavit of Service of Alfred Cowan, NYSCEF Doc. #14.)

1. Lack of Personal Jurisdiction

When a defendant seeking to vacate a default judgment raises a jurisdictional objection under CPLR 5015 (a) (4), the court must resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1). (*Roberts v Anka*, 45 AD3d 752, 753 [2d Dept 2007].) This is because the default judgment and the subsequent proceedings would be rendered null and void if the court did not have jurisdiction. (*McCord v Larsen*, 132 AD3d 1115, 1116 [3d Dept 2015].) In such a case, the movant need not demonstrate a reasonable excuse and a potentially meritorious defense. (*NYCTL 2012-A Trust v Cross Is. Reo, Inc.*, 2016 NY Slip Op 30278 [U], *2 [Sup Ct, Queens County 2016].)

Del Mar claims that it was never served with a Summons and Complaint and alleges that it never used any agent named Carlos Smith. But Del Mar admits that at the time of the alleged service, a man named Carlos Perez worked for it, but only as an "errand boy" and not as general agent. According to Del Mar, Perez is much younger (19 years and not 30 years) and smaller in stature than the person described in the process server's affidavit. (Affirmation of Pigott, at ¶ 18, NYSCEF Doc. #17.) Torres, one of Del Mar's employees, alleges that Perez is also "most certainly lighter and shorter." (Affirmation of Torres, at ¶ 10, NYSCEF Doc. #17.) But the person served at Del Mar's business address did not give his full name. It is unsurprising that the surname of the person served is not Smith. Del Mar submits an affidavit of only one of his employees, Gladys Torres, without stating what position she has or whether she personally knew Perez. Neither an affidavit of Del Mar's principal, Ellis Delvalle, nor an affidavit of Perez, whose residence is allegedly unknown to Del Mar, was submitted. Moreover, Del Mar does not provide any description of Perez.

An affidavit of service is prima facie evidence that defendant was properly served with the summons and complaint under CPLR 308 (2). (*Caba v Rai*, 63 AD3d 578, 582-583 [1st Dept 2009].) Generally, a sworn denial of receipt rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing if defendant states

specific facts to rebut the statements in the process server's affidavits. (*Deutsche Bank Natl. Trustee Co. v Singh*, 2017 NY Slip Op 30015 [U], *3 [Sup Ct, Queens County 2017].) To rebut an affidavit of service and test the process at a traverse hearing, a defendant must personally contest service. (*Walkes v Benoit*, 257 AD2d 508, 508 [1st Dept 1999].)

Del Mar's allegations do not rebut the prima facie evidence of the process server's affidavit. First, the person served and one of Del Mar's employees (at the time of service) share the same first name, Carlos. Second, Del Mar does not provide an affidavit showing that it was impossible to reach Perez. Third, Del Mar does not contest the possibility that Perez accepted the service and falsely claiming to be entitled to accept the papers on behalf of Del Mar, but only says that this is extremely suspect. (Affirmation of Pigott, at ¶ 20, NYSCEF Doc. #17.) Due to the alleged failure to contact Perez, Del Mar was unable "to determine whether he recollects having been served with any papers related to this proceeding." (Affirmation of Pigott, at ¶ 10, NYSCEF Doc. #17.) Fourth, Torres, according to counsel's affirmation a managing employee of Del Mar, does not allege that she personally knew Perez. Fifth, neither counsel nor Torres describe Perez. Sixth, counsel and Torres both highlight differences between Perez and Smith. But their affirmations do not match. Counsel alleges that Perez does not fit "Smith's" description as he does not look 30 years old and was much smaller in stature than described in the affidavit of service. (Affirmation of Pigott, at ¶ 18, NYSCEF Doc. #17.) According to Torres, Perez allegedly looked even younger than 19, and was lighter and shorter than "Smith." (Affirmation of Torres, at ¶ 10, NYSCEF Doc. #17.)

Del Mar does not raise an issue of fact about the chance that Carlos Perez received Summons and Complaint and (falsely) informed the process server that he was a general agent.

2. Justifiable Excuse and Meritorious Defense

The next question is whether Del Mar has a justifiable excuse for its default even though it might had been served properly (*e.g.*, in case Perez received but did not forward the documents) and a meritorious defense.

2.1. Justifiable Excuse

Del Mar claims that it did not receive the Summons and Complaint (in the event Perez was served) and found out about this action only in late December, when Adam Rodriguez, an insurance broker doing business with Del Mar, told Torres about it. (Affirmation of Pigott, at ¶ 12, NYSCEF Doc. #17; Affirmation of Torres, at ¶ 5, NYSCEF Doc. #17.) The mother of Del Mar's principal was sick and passed away; that led to a delay before Del Mar hired counsel and this motion was electronically filed on February 11, 2018. (Affirmation of Pigott, at ¶ 13, NYSCEF Doc. #17; Affirmation of Torres, at ¶ 5, NYSCEF Doc. #17.)

Moreover, Del Mar alleges – as a justifiable excuse and as a meritorious defense – that according to its contract with UHAB, UHAB is obligated to make sure that the premises are properly insured, UHAB must add Del Mar to the insurance contract (even though UHAB did not do so) and UHAB and not Del Mar is responsible for any injuries, legal representation, or compensation. (Affirmation of Pigott, at ¶ 3-8, NYSCEF Doc. #17; Affirmation of Torres, at ¶ 4

& 6, NYSCEF Doc. #17.) Therefore, Del Mar assumed it would be represented and found out only later that it was not included in UHAB's insurance policy and has been unrepresented until this point. (Affirmation of Pigott, at ¶ 8, NYSCEF Doc. #17; Affirmation of Torres, at ¶ 4, 6 & 7, NYSCEF Doc. #17.)

Plaintiff opposes, arguing that it served not only the Summons and Complaint but also sent its attorney two letters to Del Mar. (Exhibit 1 of Plaintiff's opposition papers, NYSCEF Doc. #19.)

Del Mar has a justifiable excuse for the delay. Given the possibility that service was proper, Del Mar did not know about the pending action before late December, when Rodrigues informed Torres about it. In the light of the alleged sickness and death of Delvalle's mother, Del Mar could not react more quickly than it did.

2.2. Meritorious Defense

As meritorious defenses, Del Mar claims through counsel and in conclusory way that "plaintiff's injuries in all or part were caused by her own culpable conduct. That plaintiff has failed to state a cause of action as against Del Mar. That by her actions plaintiff assumed the risk of her alleged injuries. In addition, as Del Mar is indemnified under its contract with UHAB, Del Mar has a valid cross-claim against its co-defendant." (Affirmation of Pigott, at ¶ 24, NYSCEF Doc. #17.)

Del Mar does not explain in counsel's affirmation, in Torres' affirmation, or in its answer how any of plaintiff's injuries was caused by her own culpable conduct, how she has failed to state a cause of action as against Del Mar, or in what way plaintiff by her actions assumed the risk of her alleged injuries in its motion. Statements like "Failure to State a Cause Action" (Del Mar's Answer, at ¶ 1, NYSCEF Doc. #17) or "Unclean Hands" (Del Mar's Answer, at ¶ 5, NYSCEF Doc. #17) or "Plaintiff assumed the risk of injury to her person by actions on the alleged date of injury" (Del Mar's Answer, at ¶ 6, NYSCEF Doc. #17) alone are not a meritorious defense. Del Mar's meritorious defenses sound like standard formulations.

Del Mar's only defense having a bit of substance is that co-defendant UHAB is responsible because of their contractual relationship. Still, it is unclear why that contractual relationship should have any effect on plaintiff or anybody else not party to the contract. Even if UHAB has a contractual obligation to make sure that the premise is properly insured and that Del Mar is covered by the insurance contract (Affirmation of Pigott, at ¶ 3-8, NYSCEF Doc. #17; Affirmation of Torres, at ¶ 4 & 6, NYSCEF Doc. #17), this does not mean that Del Mar cannot be responsible for any injuries of others or for legal representation or compensation. According to the Management Agreement, UHAB has certain duties regarding the indemnification of Del Mar. (Exhibit A of the Del Mar's Motion Papers, at ¶ 6, NYSCEF Doc. #17) To indemnify simply means to make compensation to for incurred hurt, loss, or damage. It does not mean that Del Mar is stripped off all responsibilities against everybody else. Even the Management Agreement has exceptions for indemnity. (Exhibit A of the Del Mar's Motion Papers, at ¶ 6, NYSCEF Doc. #17.)

Del Mar does not allege any meritorious defense except in a conclusory way and by counsel, someone without personal knowledge. The Management Contract does not bind plaintiff or make Del Mar immune to claims. The Management Agreement means only that there are circumstances in which Del Mar has the right to be reimbursed by UHAB for damages it suffered or payments it had to make to injured third-persons.

Accordingly, it is hereby

ORDERED that defendant Del Mar's motion to vacate the default judgment of December 7, 2017, and to permit defendant Del Mar to file a late answer in this matter (Motion Seq. No. 003) is denied without prejudice to renewal.

Dated: April 4, 2018



J.S.C.

HON. GERALD LEOVITS
J.S.C.