

**Hess Corp. v 936-938 Cliffcrest Hous. Dev. Fund Corp.**

2019 NY Slip Op 30384(U)

February 15, 2019

Supreme Court, New York County

Docket Number: 153822/2015

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 153822/2015

HESS CORPORATION,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND  
CORPORATION,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

STAY

The motion to vacate a default judgment and stay the sale of the subject property is granted.

**Background**

This action arises out of invoices for fuel oil sent by plaintiff. Defendant is a housing development fund corporation (an HDFC) that runs the building located at 938 St. Nicholas Avenue, New York, NY. The complaint alleges that the last payment for oil was received on February 21, 2014 and \$48,276.86 is owed by defendant.

Plaintiff obtained a default judgment against defendant totaling \$63,549.83 on July 19, 2016 (NYSCEF Doc. No. 15). Defendant now moves to *inter alia* vacate that default judgment, to stay a sale of the property and to dismiss plaintiff's complaint.

**Discussion**

CPLR 317 "states, in part, that '[a] person served with a summons other than by personal delivery to him or to his agent for service under CPLR 318 may be allowed

to defend the action within one year after he obtains knowledge of entry of the judgment 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.’ As has been emphasized in numerous cases, there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay. It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR 318. Thus, corporate defendants served under Business Corporation Law § 306 have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend” (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141, 42, 501 NYS2d 8 [1986] [citations omitted]).

“A defendant who meets the requirements of [CPLR 317] normally will be entitled to relief, although relief is not automatic, as the section states that a person meeting its requirements may be allowed to defend the action. Thus, denial of relief under CPLR 317 might be appropriate where, for example, a defendant’s failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice” (*id.* at 143 [internal quotations and citations omitted]).

Here, defendant’s president, Carlton Burroughs, claims that the location where plaintiff tried to serve defendant with the notice of motion for default (Apt. 1B) is vacant and that he never received a copy of the initial summons and complaint (NYSCEF Doc. No. 19, ¶¶ 6, 7). Defendant’s treasurer, Shimalee Lambert, also claims that defendant had no notice of the instant action until it received a notice of sale by the sheriff (NYSCEF Doc. No. 18, ¶ 11).

In opposition, plaintiff claims that defendant did not deny receiving the summons and complaint nor that the address on file with the Secretary of State was the proper mailing address. Plaintiff also insists that defendant failed to raise a meritorious defense.

In reply, defendant claims that it has stated a meritorious defense and speculates that plaintiff's owner is attempting to acquire defendant's building through unsavory means because it is valuable real estate.

The Court grants the portions of defendant's motion to the extent that it seeks to vacate the default judgment and stay the sale of the property. The fact is that defendant was served via the Secretary of State and defendant's president and treasurer claim defendant never got the summons and complaint. Defendant insists that it only found out about this case when Mr. Burroughs saw a copy of the notice of sale from the sheriff. This Court prefers to decide cases on their merits.

Defendant has also stated a meritorious defense. Ms. Lambert claims that neither she nor Mr. Burroughs received invoices that identify the amount owed to plaintiff, the terms and conditions that accompanied the alleged debt, or whether the fuel was actually received. The invoices plaintiff attached to its motion for a default judgment identify the customer as Delmar Management and indicates the oil is to be shipped to the subject property (NYSCEF Doc. No. 9). This raises questions about with whom plaintiff contracted to provide oil. It may be that defendant is correct that these charges were for oil that was never delivered. Or plaintiff might eventually prove that Delmar Management was plaintiff's property management company and defendant was responsible to make payments for services procured by its agent. However, on this motion, defendant need only point to a meritorious defense; it need not prove that defense.

Because the Court vacates the default judgment, defendant is entitled to a stay of the sale until this case is decided. Obviously, if defendant successfully defends this action, then there would be no reason to sell the property.

The Court stresses that, contrary to defendant's assertions, the issues with the invoices raised by defendant is not a ground to dismiss the complaint. The invoice clearly states that the oil should be shipped to Clifferest HDFC at 938 St. Nicholas Ave in Manhattan (*id.*). Along with the complaint, this is enough at this stage of the litigation (i.e., before an answer has been filed) to state a cause of action against defendant. As the litigation progresses, plaintiff will have to marshal proof that it is entitled to the money it seeks in the complaint. But the Court cannot conclude that plaintiff failed to state a cause of action where there are purported invoices for fuel directed to defendant's address.

To the extent that defendant claims that plaintiff has violated Judiciary Law § 489 (champerty), the Court finds that it is premature. Defendant, of course, may assert counterclaims against plaintiff in this litigation, but the Court cannot make a finding about whether plaintiff has violated rules prohibiting champerty without the benefit of any discovery.

### Summary

The Court takes no position and makes no findings concerning defendant's assertion that plaintiff is involved in a scheme to acquire valuable Manhattan real estate. At this stage, this case is about whether defendant owes plaintiff for fuel oil. Plaintiff's purported motives or legal maneuvers are not presently before this Court and played no role in the instant motion. The fact is that courts often grant motions to vacate default judgments where the summons and complaint was served via the Secretary of State and the corporation claims it never received the commencing papers (*Eugene Di Lorenzo, Inc.*, 67 NY2d at 141). Case law is clear that these types of cases should be decided on the merits.

Accordingly, it is hereby

ORDERED that the motion by defendant is granted to the extent that the default judgment entered against it is vacated, the sale of the property is stayed and denied as to the remaining branches of the motion;

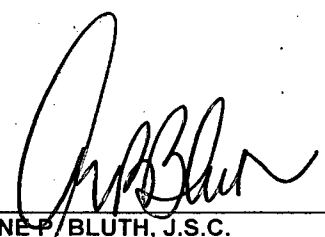
ORDERED that defendant shall file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further:

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further]

ORDERED that counsel are directed to appear for preliminary conference on this matter on May 14, 2019 at 2:15 p.m.

2/15/19  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE