

Pizzarotti IBC, LLC v A.L. One Constr., Inc.
2019 NY Slip Op 31056(U)
April 19, 2019
Supreme Court, New York County
Docket Number: 653514/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

PIZZAROTTI IBC, LLC, N/K/A PIZZAROTTI LLC,
Plaintiff,

- v -

A.L. ONE CONSTRUCTION, INC., A.L. ONE INC., WILLIAM FELCONE

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD

Upon review of the foregoing documents and for the reasons set forth below, the motion to vacate the default judgment is granted.

Pizzarotti IBC, LLC n/k/a Pizzarotti LLC (the Plaintiff) sued A.L. One Construction, Inc., A.L. One Inc. (A.L. One Construction, Inc. and A.L. One Inc., collectively the Corporate Defendants), and William Felcone (Mr. Felcone, together with the Corporate Defendants, hereinafter, collectively, the Defendants) for breach of contract in connection with the performance of carpentry and drywall work on two projects; one located at 527 West 27th Street, New York, New York (the West 27th Street Project) and the second located at The Ritz Carlton Residences Phase II (the Ritz Carlton Project). After serving an amended complaint on the Corporate Defendants on September 27, 2018, and when such Corporate Defendants failed to timely answer such amended complaint, the Plaintiff moved on December 24, 2018 pursuant to CPLR § 3215 for default judgment against the Corporate Defendants and simultaneously asked

the court for an extension of time to serve Mr. Felcone. In a decision and order, dated January 25, 2019, the court granted the Plaintiff's motion for default judgment against the Corporate Defendants and granted an additional forty-five days to serve Mr. Felcone. The Defendants now move by order to show cause to vacate the default judgment, permit the Defendants to file an answer, and stay the trial for an assessment of damages.

To establish entitlement to relief under CPLR § 317, a defendant must show that (i) the defendant was served by a method other than personal delivery, (ii) the movant did not have actual notice of the action in time to defend, (iii) there is a meritorious defense, and (iv) the motion is made within one year of the receipt of knowledge of the entry of judgment, and not more than five years from the entry of judgment (CPLR § 317; *Li Xian v Tat Lee Supplies Co., Inc.*, 126 AD3d 424, 424 [1st Dept 2015]). Service on a corporation through the Secretary of State is not personal delivery for the purposes of CPLR § 317 (*Eugene Di Lorenzo Inc. v. Dutton Lbr. Co.*, 67 N.Y.2d 138, 142 [1986]). Rather, personal delivery under this section requires "in-hand delivery" (*Fleetwood Park Corp. v Jerrick Waterproofing Co., Inc.*, 203 AD2d 238, 239 [2d Dept 1994]).

In this case, the Corporate Defendants were not served by personal delivery as they were served through the Secretary of State pursuant to CPLR § 311 [1] and BCL § 306. There is no evidence to suggest that the Corporate Defendants had actual notice of the action in time to defend.

Further, the Corporate Defendants have demonstrated a potentially meritorious defense. To wit, Mr. Felcone asserts that (i) Pizzarotti did not properly perform work as agreed, (ii) Pizzarotti refused to pay the Defendants for work that was properly performed, (iii) Pizzarotti signed for

the work performed by the Corporate Defendants, thereby signaling their approval of the work that they now claim was deficient (Felcone aff ¶¶ 6-8, 15-16; Felcone aff, exhibits 8, 11). Finally, the motion was timely filed. Service of the notice of entry of the decision and order granting default judgment against the Corporate Defendants was delivered by regular mail on March 25, 2019. The instant order to show cause was brought on March 26, 2019, immediately upon discovery of the action and of the default.

For the foregoing reasons, and in light of the strong public policy in favor of deciding cases on the merits, the motion to vacate the default judgment is granted (*Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]).

Accordingly it is,

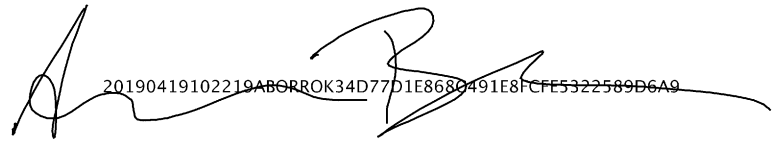
ORDERED that defendants' motion to vacate their default is granted on the condition that the defendants serve and file an answer to the complaint herein, or otherwise respond thereto, within 14 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendants 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 forthwith.



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4/19/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE