Commissioners of the State Ins. Fund v Newgle Corp.
2019 NY Slip Op 31456(U)
May 23, 2019
Supreme Court, New York County
Docket Number: 450455/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 37

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COMMISSIONERS OF THE STATE INSURANCE FUND, DECISION AND ORDER

Plaintiff, Index No. 450455/2018

- against -

NEWGLE CORP.,

Defendant.

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ARTHUR F. ENGORON, J.:

Defendant Newgle Corp. moves, pursuant to CPLR 317, 3012 (b), 3211 (a) (8), 5015 (a) (1) and (a) (4), to vacate the judgment entered in default against it, for leave to interpose an answer to the complaint, and for dismissal. For the reasons set forth below, the motion is denied.

Background

Plaintiff is a state agency authorized under the Workers' Compensation Law to issue workers' compensation and disability policies (NY St Cts Elec Filing [NYSCEF] Doc No. 18, aff of Kimberly Harper [Harper], ¶ 3). In 2014, plaintiff issued policy no. 23345515, effective May 15, 2014, to defendant (NYSCEF Doc No. 19, Harper aff, exhibit B at 1). The policy was renewed every year until plaintiff canceled it for nonpayment on December 20, 2016 (NYSCEF Doc No. 18, ¶ 8). Plaintiff served defendant with a final invoice dated February 15, 2017 for $93,785.67 (NYSCEF Doc No. 26, Harper aff, exhibit at 1), but the invoice was not paid.

On March 20, 2018, plaintiff commenced this action by filing a summons and complaint seeking damages for breach of contract and for an account stated. An affidavit of service sworn to April 27, 2018 reveals that defendant was served with process pursuant to Business Corporation Law § 306 (NYSCEF Doc No. 27, affirmation of plaintiff's counsel, exhibit I at 1). On May 8, 2018, plaintiff sent an additional copy of the summons and complaint with notice of service

pursuant to the Business Corporation Law by first class mail to defendant's last known address, which was 914 58th Street, 4B, Brooklyn, New York, in conformity with CPLR 3215 (g) (4) (NYSCEF Doc No. 28, affirmation of plaintiff's counsel, exhibit J at 1). A judgment for $105,220.16 was entered and docketed against defendant on June 13, 2018 (NYSCEF Doc No. 29, affirmation of plaintiff's counsel, exhibit K at 2).

Defendant now moves to vacate the judgment entered against it and for dismissal on the ground that the court lacks personal jurisdiction. Submitted on the motion is an affidavit from defendant's president, Yong Shan Liu (Liu), who avers that defendant was not properly served with process. Liu states that service was made at "an old company address, rather than properly served upon me at my place of business" (NYSCEF Doc No. 14, Liu aff, ¶ 5), and repeats that the "summons . . . was never properly served on me" (*id.*, ¶ 6). Defendant submits that its correct address is 1016 67th Street, 1FL, Brooklyn, New York, which plaintiff could have discovered by conducting a simple "Google" search (NYSCEF Doc No. 15, affirmation of defendant's counsel, ¶ 6). Liu avers that he first learned of this action when he received a restraining notice on defendant's bank account (*id.*, ¶ 4). Liu further avers that defendant possesses a meritorious defense because "the amounts demands [sic] are entirely inflated or otherwise error [sic]," claims that "some third party bust [sic] have run it up without my knowledge or consent," and that "it is disputed as to accuracy" (*id.*, ¶ 12).

Plaintiff argues, in opposition, that service was proper under Business Corporation Law § 306, and that the address on file with the Secretary of State for process is the 1016 67th Street, 1FL, Brooklyn, New York address (NYSCEF Doc No. 30, affirmation of plaintiff's counsel, exhibit L at 1). Thus, the Secretary of State would have mailed the summons and complaint it had received to defendant's correct address. Furthermore, plaintiff posits that defendant lacks a

meritorious defense. Harper, an underwriter employed by plaintiff, avers that the final amount due included premiums based upon an audit of plaintiff's books and records from May 15, 2014 through December 20, 2016, less applicable credits or payments (NYSCEF Doc No. 18, ¶ 12). Submitted with Harper's affidavit are the information pages for the insurance policy issued to defendant, a detailed statement of account, and the audit statements or worksheets showing how plaintiff calculated the final amount due.

Defendant, in reply, submits that even if service upon the Secretary of State was proper, vacatur should be granted under CPLR 317. Defendant alleges that the final invoice reflects an amount that is more than 20 times greater than the estimated annual premium on the policy. It submits that plaintiff failed to explain this discrepancy.

Discussion

CPLR 5015 (a) (1) provides for vacatur of a judgment for "excusable default." A party seeking to vacate its default under CPLR 5015 (a) (1) must establish both a reasonable excuse for the failure to appear and a meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). It is within the court's discretion to determine whether a proffered excuse is reasonable (*see Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010]), taking into consideration the "length of the delay, prejudice to the opposing party and the strong public policy in this State favoring the resolution of matters on the merits" (*Mejia v Ramos*, 113 AD3d 429, 430 [1st Dept 2014] [internal quotation marks and citation omitted]). Absent a reasonable excuse, the court need not determine whether a party in default has presented a meritorious defense (*see Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016]; *Expo Dev. Corp. v 824 S. E. Blvd. Realty Corp.*, 113 AD3d 549, 549 [1st Dept 2014]).

Pursuant to CPLR 5015 (a) (4), a judgment entered in default may also be vacated for lack of jurisdiction. "When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4) and also seeks a discretionary vacatur pursuant to CPLR 5015 (a) (1), a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1)" (*West Coast Servicing, Inc. v Yusupova*, — AD3d —, 2019 NY Slip Op 03401, *1 [2d Dept 2019] [internal quotation marks and citations omitted]; *accord Caba v Rai*, 63 AD3d 578, 581 n 1 [1st Dept 2009]). Thus, the court shall address the jurisdictional issue first.

Service of process upon a corporation under Business Corporation Law § 306 (b) is complete upon delivery of the summons and complaint to the Secretary of State (*see State Farm Mut. Auto. Ins. Co. v Dr. Ibrahim Fatiha Chiropractic, P.C.*, 147 AD3d 696, 696 [1st Dept 2017], *lv denied* 29 NY3d 912 [2017]). Jurisdiction is obtained "irrespective of whether the process ever actually reached [the corporate] defendant" (*Shanker v 119 E. 30th, Ltd.*, 63 AD3d 553, 554 [1st Dept 2009]). A properly executed "affidavit of a process server constitutes prima facie evidence of proper service" (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]).

Here, the affidavit of service demonstrates that service was properly made in accordance with Business Corporation Law § 306 (b) and CPLR 311 (a) (1) (*see Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431, 431 [1st Dept 2017]). Thus, defendant's assertion that jurisdiction was never obtained is not persuasive, and that branch of the motion seeking vacatur under CPLR 5015 (a) (4) and dismissal under CPLR 3211 (a) (8) is denied. Because defendant's excuse, namely the claim that it was never served with process, is not reasonable, that part of the motion brought under CPLR 5015 (a) (1) is also denied (*see Residential Bd. of Mgrs. of 99 Jane St. Condominium v Rockrose Dev. Corp.*, 17 AD3d 194, 194 [1st Dept 2005]).

CPLR 317 allows for vacatur of a judgment where a person has been served with a summons other than by personal delivery. A party moving for relief under CPLR 317 must also establish that the application was made "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." The statute is applicable because "service on a corporation through delivery of process to the Secretary of State is not 'personal delivery'" (*Eugene Di Lorenzo, Inc.*, 67 NY2d at 142] [internal quotation marks and citation omitted]). In addition, defendant filed the instant motion less than three months after the judgment was entered. Nevertheless, relief under CPLR 317 is not warranted.

Defendant has not demonstrated that it failed to receive notice of the summons in time to defend the action (*see Unifiller Sys., Inc. v Melita Corp.*, 127 AD3d 961, 962 [2d Dept 2015]), because the Secretary of State had defendant's correct address on file as stated above. Nor has defendant demonstrated that it possesses a meritorious defense to the action. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993] [internal quotation marks and citation omitted]). The cause of action "exists where the party to a contract receives bills or invoices and does not protest within a reasonable time" (*Russo v Heller*, 80 AD3d 531, 532 (1st Dept 2011] [internal quotation marks and citation omitted]). To prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff's final invoice bears a billing date of February 15, 2017, and the invoice was mailed to defendant (NYSCEF Doc No. 18, ¶ 29). Although Liu disputes the

amount due (NYSCEF Doc No. 14, ¶ 12), he does not deny having received the invoice in February 2017, nor does he claim to have challenged the accuracy of the amount due within a reasonable time (*see Fleming v Vassallo*, 43 AD3d 278, 279 [1st Dept 2007]).

Accordingly, it is

ORDERED that the defendant's motion to vacate the judgment entered in default against it, for leave to interpose an answer, and for dismissal of the complaint is denied.

Dated: 5/23/19

ENTER:

J.S.C.

HON. ARTHUR F. ENGORON