SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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JESSICA FISHER

Plaintiff,

- v -

LEWIS CONSTRUCTION NYC, INC.,

Defendant.

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INDEX NO. 655224/2018

MOTION DATE 06/18/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

This is an action brought by Jessica Fisher against Lewis Construction NYC, Inc. (**Lewis Construction**) for breach of an oral agreement for home improvement and general contracting services. Ms. Fisher seeks to recover damages for breach of contract, violation of Section 771 of the General Business Law, and unjust enrichment. The Court granted Ms. Fisher's motion for default judgment and Lewis Construction now moves to vacate the default judgment pursuant to CPLR §§ 317 and 5015 (a) (1). For the reasons set forth below, the motion is denied.

On or about September 28, 2017, Ms. Fisher and Lewis Construction entered into an oral agreement pursuant to which Lewis Construction agreed to provide general contracting services in connection with the renovation of Ms. Fisher's apartment located at 60 Beach Street, Apartment 2, New York, NY 10013 (Complaint, ¶ 5). Lewis Construction required Ms. Fisher to remit a down payment of $87,795.30 prior to the commencement of work (*id.*, ¶ 6). Ms. Fisher paid the down payment and Lewis Construction acknowledged that payment was received

(*id.*). Under a second oral agreement, on or about May 29, 2018, Lewis Construction agreed to procure and install a refrigerator in Ms. Fisher's temporary rental apartment, provided that Ms. Fisher pay the full purchase price of the refrigerator plus an installation fee totaling $12,956.39 (*id.*, ¶¶ 7-8). After installing the refrigerator, Lewis Construction discovered that it was defective and returned it for a full refund (*id.*, ¶ 9). Ms. Fisher demanded repayment for the refrigerator, but Lewis Construction refused to return the refunded amount (*id.*, ¶ 10).

Ms. Fisher commenced this action by filing a summons and complaint on October 19, 2018. Ms. Fisher filed an affidavit of service stating that the summons and complaint were served on Lewis Construction by regular mail, sent on November 5, 2018 to its last known address, 160 Cabrini Boulevard #10, New York, New York 10033 (NYSCEF Doc. No. 2). Ms. Fisher also filed an affidavit of service stating that the same was served on the Secretary of State on October 25, 2018 (NYSCEF Doc. No. 3). On December 13, 2018, Ms. Fisher moved for default judgment pursuant to CPLR § 3215 based on Lewis Construction's failure to file an answer or otherwise appear in this matter (NYSCEF Doc. No. 6). By Decision and Order dated January 24, 2019, this Court granted Ms. Fisher's motion for default judgment and directed the Clerk to enter judgment in favor of Ms. Fisher and against Lewis Construction in the amount of $103,251.69, plus statutory interest at the rate of 9% from the date of entry of judgment, together with costs and disbursements as allocated by the Clerk (NYSCEF Doc. No. 16). Judgment was entered by the Clerk on February 7, 2019, in the amount of $104,047.66 (NYSCEF Doc. No. 22). On February 11, 2019, Lewis Construction brought the instant motion to vacate the default judgment pursuant to CPLR §§ 317 and 5015 (a) (1) on the ground of excusable neglect, alleging that

Lewis Construction never received copies of the summons and complaint (NYSCEF Doc. No. 23).

First, Lewis Construction moves to vacate the default judgment pursuant to CPLR § 5015 (a) (1). Under CPLR 5015 (a) (1), a court may relieve a party from a judgment or order where there is an excusable default provided that a motion to set aside or vacate is made within one year after service of the judgment or order on the moving party (CPLR 5015 [a] [1]). A party seeking relief from a default judgment pursuant to CPLR § 5015 (a) (1) must establish both a reasonable excuse for the default and a meritorious claim or defense to the action (*Bobet v Rockefeller Ctr., N., Inc.*, 78 AD3d 475 [1st Dept 2010]). Relief is not appropriate where there is evidence of dilatory or otherwise intentional behavior suggesting that the default was willful or contumacious (*id.* at 475).

Here, Ms. Fisher has submitted affidavits of service of the summons and complaint, the notice of motion for default judgment, the decision and order, and the notice of entry. An affidavit of service in accordance with CPLR § 302 is *prima facie* evidence of proper service (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). A conclusory denial of service is insufficient to rebut the presumption of proper service to which an affidavit of service is entitled (*Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]). Although Lewis Construction denies receiving service of the summons and complaint, it does not deny receiving all of the other notices served by Ms. Fisher in this action, and in any event, its denials are bare and conclusory.

Lewis Construction acknowledges that it was aware of the pending action but denies that it had any obligation to file an answer or appear because it alleges that it never received a copy of the summons and complaint from the Secretary of State (Lewis Aff., ¶ 8). This argument is misguided, however, because service of process on a corporation is deemed complete when the Secretary of State is served, regardless of whether service is subsequently received by the corporate defendant (*Associated Imports v Amiel Publ.*, 168 AD2d 354, 354 [1st Dept 1990]). Ms. Fisher has submitted an affidavit of service of process on the Secretary of State pursuant to CPLR § 306 demonstrating that Lewis Construction was properly served. Therefore, service was proper in this case and Lewis Construction, with knowledge that the action had been commenced, intentionally failed to file an answer or appear.

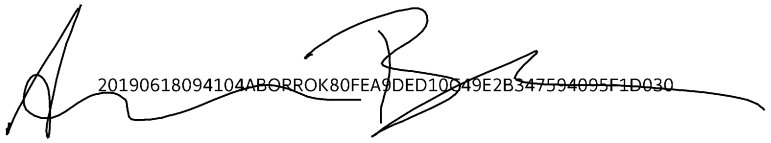
Lewis Construction argues that its neglect in failing to file an answer or otherwise appear in this matter is excusable because it does not have a great system for receiving mail at its business address. This argument is unavailing. Lewis Construction acknowledges that it has been aware for several years that it could not reliably receive mail at the address that it maintains for its general contractor's license and that it holds out to the public as its business address (Lewis Aff., ¶¶ 2-3). But it also states that the building has a doorman and a porter, and that any mail received is either given directly to Lewis Construction's President and CEO's mother, who lives in the building and maintains a medical office on the first floor, is left at the door of the apartment or the medical office, or is placed on top of the building's mailboxes (*id.*, ¶ 4). Under these circumstances, Lewis Construction's failure to occasionally check for mail falls short of excusable neglect. Therefore, Lewis Construction is not entitled to vacatur of the default judgment under CPLR § 5015 (a) (1).

Lewis Construction also seeks to vacate the default judgment pursuant to CPLR § 317. 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]).

Where a party's attorneys are aware that an action has been commenced and engage in active negotiations prior to the filing of a motion for default judgment, the party has actual notice and is not entitled to relief from the default judgment under CPLR § 317 (*Residential Bd. of Mgrs. of 99 Jane St. Condominium v Rockrose Dev. Corp.*, 17 AD3d 194, 194 [1st Dept 2005]). In this case, Lewis Construction acknowledges that it had actual notice of the action as early as October 23, 2018, when its counsel, with whom Ms. Fisher had been actively engaged in negotiations regarding this matter, received a copy of the summons and complaint (Lewis Aff., ¶ 8). Lewis Construction also does not deny that it received the numerous subsequent notices served on it by Ms. Fisher, which would have apprised it of the pendency of this action. As Lewis Construction had actual notice of the action in time to defend and failed to answer or otherwise appear, Lewis Construction is not entitled to relief under CPLR § 317 (*Matter of Renaissance Economic Dev. Corp. v Jin Hua Lin*, 126 AD3d 465, 465 [1st Dept 2015]).

Accordingly, it is

ORDERED that the defendant's motion to vacate the default judgment is denied.



6/17/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE