Thirty-One Co. v Truisi Design Group, PLLC
2019 NY Slip Op 33028(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 653310/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** ***Justice*** **PART** **IAS MOTION 7EFM**

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THIRTY-ONE CO.,

Plaintiff,

- v -

TRUISI DESIGN GROUP, PLLC, A/K/A TRUISI DESIGN GROUP PLLC D/B/A TRUISI DESIGN GROUP D/B/A/ TRUISI SUK DESIGN GROUP & MARK TRUISI,

Defendants.

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INDEX NO. 653310/2018

MOTION DATE 05/08/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

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

were read on this motion to VACATE JUDGMENT.

Smith & Krantz, LLP (William J. Ferrall of counsel), for plaintiff.
McManimon, Scotland & Baumann, LLC (William P. Opel of counsel), for defendants.

Gerald Lebovits, J.:

Plaintiff, Thirty-One Co. (Landlord), owns a building located at 254 West 31st Street in New York County. Plaintiff leased the 13th and 14th floors of the building to defendant Truisi Design Group, PLLC (Tenant). Defendant Mark Truisi, the principal of Tenant, executed a guaranty of the lease (Guarantor).

In July 2018, Landlord sued Tenant and Guarantor under the lease and guaranty, seeking $68,816.34 in unpaid rent owed through June 30, 2018, as well as Landlord's reasonable attorney fees. Defendants did not appear in the action. In December 2018, Landlord moved for a default judgment. By order dated January 17, 2019, and filed February 15, 2019, this court granted a default judgment for the $68,816.34, entered jointly and severally against defendants, and referred the issue of attorney fees to a Special Referee to hear and determine. (*See* Order, NYSCEF No. 20.)

Defendants now move to vacate the default judgment under CPLR 5015 (a) (1) and CPLR 317, asserting that they were not properly served and that they have a meritorious defense. Defendants' motion is denied.

Discussion

CPLR 5015 (a) (1) permits a court to vacate a default on grounds of excusable default within a year of the judgment being served with notice of entry. The defaulting party "must demonstrate both a reasonable excuse and the existence of a meritorious defense." (*Mutual Mar. Off. Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007].) Where the plaintiff has provided prima facie evidence of proper service through the affidavit of a process server, a conclusory denial that defendants received service is not sufficient to demonstrate a reasonable excuse. (*See Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015]). And "absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense." (*Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-77 [1st Dept 2016].)

Under CPLR 317, a defendant who has been "served with a summons other than by personal delivery" and has not appeared to defend "may be allowed to defend the action" upon a finding of the court that the defendant "did not personally receive notice of the summons in time to defend and has a meritorious defense." (CPLR 317.) For purposes of CPLR 317, though, "mere denial of receipt of the summons and complaint is . . . insufficient to establish lack of actual notice." (*Wassertheil v Elburg*, LLC, 94 AD3d 753, 754 [2d Dept 2012].)

A. Reasonable Excuse/Lack of Notice

Tenant here is a limited liability company. The Landlord's affidavit of service on Tenant indicates that Landlord's process server served the Secretary of State, as agent for Tenant, on July 20, 2018 (*see* NYSCEF no. 3), thereby completing service under Limited Liability Company Law § 303 (a) (*see Paez v 1610 St. Nicholas Ave. L.P.*, 103 AD3d 553, 553-554 [1st Dept 2013]). The Landlord's affidavit of service on Guarantor indicates that Landlord's process server left a copy of the summons and complaint at Truisi's address with "(John Doe) (Who Refused Full Name), Co-Tenant, a person of suitable age and discretion," and followed this delivery up by mailing a copy of the summons and complaint to that same address. (*See* Affidavit of Service, NYSCEF No. 2.) These affidavits suffice to establish prima facie that service was proper.

Tenant does not challenge the validity of service. In his affidavit supporting the motion to vacate (dated March 24, 2019), Guarantor asserts only that he "live[s] alone," was "never served with the aforementioned papers" personally, and "did not receive any written notice of the pendency of this proceeding in the mail (or otherwise) until January 2019." (Aff. of Mark Truisi, NYSCEF No. 27, at ¶ 6.) Guarantor does not, however, state whether he lived alone at the time of service in July 2018; or whether his apartment is sub-divided such that a co-tenant was living at the premises. His bare and conclusory denial of receipt is not sufficient to establish a reasonable excuse for purposes of CPLR 5015 (a) (1).

With respect to CPLR 317, Guarantor's assertion of a lack of notice is again insufficient. As to himself, Guarantor merely states that he "was never served" nor "received notice of the Complaint." (*Id.* at ¶ 9.) As to notice to Tenant, Guarantor states in his affidavit that he (as principal of Tenant) "never received a communication from the Office of the Secretary of State . . . related to this matter," and that he "no longer receive[s] mail at [his] prior business address."

(*Id.*, at ⁋ 8, 10.) Again, though, Guarantor does not state that Tenant's address on file with the Secretary of State was incorrect or outdated at the time Landlord served Tenant through the Secretary of State.

Additionally, discrepancies exist about when defendants became aware of the judgment against them. Guarantor states in his affidavit that he became aware "[i]n January 2019" that a "default judgment was entered against Defendants on or about January 17, 2019." (*Id.* at ⁋ 3.) But the default-judgment order, though dated January 17, was not filed until February 15. (*See* NYSCEF No. 20.) Additionally, defendants' memorandum of law in support of the motion to vacate states that defendants first "became aware of any pending action" in "January 2019, upon receipt of a copy of the Notice of Motion for Default Judgment," not the order granting that motion.[1] (NYSCEF No. 29, at 2.) Defendants do not explain this discrepancy—nor how they became aware of the motion for default judgment (or the order granting default judgment), but not the original complaint

B. Meritorious Defense

Defendants argue that they should not be held liable for the $68,8176.34 in unpaid rent and additional rent due as of June 30, 2018, because Tenant assertedly should have been permitted to apply a security deposit of $37,016.66 toward that unpaid rent. But the lease permits Landlord to apply the security deposit to any payments owed by Tenant, regardless of the order in which the payments came due. (*See* Lease, NYSCEF No. 14, at ⁋⁋ 32, 52.) Landlord properly applied the security deposit (plus interest) to unpaid rent accruing between July and November 2018. (*See* Aff. of David Brause, NYSCEF No. 34, at 4-6.)

Defendants also argue that a significant proportion of the unpaid rent sought is in dispute under the terms of a stipulation of settlement between Landlord and Tenant dated July 21, 2017. But defendants make only conclusory assertions that the sums of rent at issue are "disputed," "not explained" or "not agreed to," without specifying which charges are disputed and why. Further, the stipulation applied only to rent accruing under the lease prior to its execution; and the earliest sums in unpaid rent sought in this action by Landlord accrued on August 1, 2017. (*See* Aff. of William J. Ferrall, NYSCEF No. 32, at 18-23.)

Defendants thus cannot establish a meritorious defense to Landlord's claims in this action, as required to vacate a default judgment under both CPLR 5015 (a) (1) and CPLR 317.

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[1] The memorandum of law also states that "[a]s soon as Defendants received [the summons and complaint], Defendants began preparation to respond." (NYSCEF no. 29, at 2.) Guarantor's affidavit in support of the motion to vacate was not executed until late March 2019 (*see* NYSCEF No. 27); and defendants did not bring on their motion to vacate by order to show cause until April 2019 (*see* NYSCEF Nos. 26, 30).

Accordingly, it is

ORDERED that defendants' motion to vacate this court's February 15, 2019, order granting default judgment is denied.

10/4/2019
DATE

GERALD LEBOVITS, 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