

<b>Dematos v GDC LIC Owner LLC</b>
2019 NY Slip Op 33404(U)
November 15, 2019
Supreme Court, New York County
Docket Number: 156870/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH

PART IAS MOTION 18EFM

Justice

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INDEX NO. 156870/2017

WELLINGTON DEMATOS,

MOTION DATE 08/21/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

GDC LIC OWNER LLC, RINALDI BUILDERS, INC., 94TH CONSTRUCTION LLC, ALABAMA IRON WORKS CORP., BMNY CONTRACTING CORP., BAYPORT CONSTRUCTION CORP., SCHEAR CONSTRUCTION, LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

GDC LIC OWNER LLC, RINALDI BUILDERS, INC.

Third-Party Index No. 595888/2017

Plaintiff,

-against-

THAG CONSTRUCTION LLC

Defendant.

-----X

GDC LIC OWNER LLC, RINALDI BUILDERS, INC.

Second Third-Party Index No. 595118/2019

Plaintiff,

-against-

ALABAMA IRON WORKS CORP., BMNY CONTRACTING CORP., BAYPORT CONSTRUCTION CORP., SCHEAR CONSTRUCTION, LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 103, 104, 105, 106, 107

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

Upon the foregoing papers, third-party defendant Thag Construction LLC (Thag) moves for an order vacating the decision and order of the Hon. David Cohen, dated December 13, 2018,

and entered on December 17, 2018 in the Office of the New York County Clerk granting third-party plaintiffs' GDC LIC OWNER LLC (GDC) and RINALDI BUILDERS, INC. (RINALDI) motion for default judgment as against third-party defendant Thag and defendant 94<sup>th</sup> CONSTRUCTION LLC's (94<sup>th</sup>) cross motion for default judgment on its cross-claims against Thag;<sup>1</sup> and seeking permission from the court to file answers.

### DISCUSSION

As an initial matter, the branch of the order to show cause requesting vacatur of the default judgment in favor of GDC and RINALDI is granted without opposition.

As to the default judgment entered in favor of 94<sup>th</sup>, there are two provisions for obtaining relief from a default judgment, CPLR § 317 and CPLR 5015(a) (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986]).

“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” (Pizzarotti IBC, LLC v A.L. One Const., Inc., 2019 NY Slip Op 31056[U], \*2 [Sup Ct, NY County 2019], citing Li Xian v Tat Lee Supplies Co., Inc., 126 AD3d 424, 424 [1st Dept 2015]).

“It is [] 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” (Eugene, 67 NY2d at 142 [citations removed]). “Thus, corporate defendants served

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<sup>1</sup> The Court notes, without deciding, that the default judgment against Thag on 94<sup>th</sup>'s cross claims may not have been properly decided in the first place. Thag is not a co-defendant in the main action, and 94<sup>th</sup> is not a third-party plaintiff in the third-party action.

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” (*id.* [citations removed]).

In support of its motion, Thag submits an affidavit of its member Thaigo Marques Rocha (NYSCEF Doc. No. 87). According to Rocha, Thag was a subcontractor on a construction project at 11-22 45<sup>th</sup> Road and 45-25 11<sup>th</sup> Street, Queens, New York (premises) (*id.* at ¶ 5). Thag performed its work at the premises but was not paid for its actual work performed (*id.* at ¶ 6). As a result, Thag filed a demand for arbitration with the American Arbitration Association, demanding a sum of \$676,488.84 from 94<sup>th</sup>, the general contractor on the project, however, the was suspended due to lack of funding (*id.* at ¶¶ 5, 7).

Rocha only recently learned of the underlying action (*id.* at ¶ 8). Rocha and Thag were “never personally served, never received a copy of the pleadings, and never received the supplemental mailing” (*id.* at ¶¶ 2, 4). Thag’s listed corporate address with the New York Secretary of State, Division of Corporations, is 275 Madison Avenue, 6th Fl., New York, New York. However, the above location is only a “virtual office called CORPORATE SUITES who provides phone and mail service” to Thag, and at the time of service by GDC, RINALDI and 94<sup>th</sup> to this address, Thag had stopped renting space at such address (*id.* at ¶¶ 9-10).

Here, Thag was not personally served (*id.* at ¶ 4). Defendant 94<sup>th</sup>’s verified cross claims were served upon the Secretary of State (NYSCEF Doc. No.95 [Affidavit of Service of Verified Cross-Claims]). Service upon the Secretary of State is not personal delivery and thus, Thag was not personally served as required by CPLR § 317 (see *Eugene*, 67 NY2d at 142).

Further, Thag did not receive actual notice of the action in time to defend the action. In fact, Thag only recently learned of this litigation (NYSCEF Doc. No. 87 [third-party defendant’s

affidavit] at ¶ 8). Defendant 94<sup>th</sup> argues that Thag did have notice in time to defend the lawsuit because of an alleged telephone conversation it had on December 13, 2018, the day the order granting the default motion was signed, with non-party Mr. Richard Mack, who purchased Thag's lien claim against 94<sup>th</sup>, and Mr. Greg Maidman, Mr. Mack's attorney (NYSCEF Doc. No. 103 [defendant 94<sup>th</sup>'s affidavit in opposition] at ¶ 8). Defendant 94<sup>th</sup> argues that during this telephone conversation, Mr. Maidman represented to Defendant 94<sup>th</sup>'s attorney that Mr. Maidman would "discuss the matter with Mr. Blum," Thag's counsel in the instant matter (NYSCEF Doc. No. 103 [defendant's affidavit in opposition] at ¶ 9). However, non-party Mr. Mack's counsel, Mr. Maidman, represented in response that said telephone conversation in fact occurred on December 20, 2018, a date after the Order granting the default motion was both signed and entered (NYSCEF Doc. No. 106 [third-party defendant's affirmation in further support] at ¶ 2). Thus, even if non-party attorney Mr. Maidman had the opportunity to "discuss the matter" with Thag's counsel, which he alleges he did not (*id.* at ¶ 4; *see also* NYSCEF Doc. No. 107 [third-party defendant's affirmation in further support Exhibit A] at 1-2), this would not have been in time to defend because the date of default had already lapsed and motion papers were already submitted. Thus, Thag did not have notice in time to defend the suit as required by CPLR § 317.

The instant matter is similar to Pizzarotti. In that 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 [and] [t]here [wa]s no evidence to suggest that the Corporate Defendants had actual notice of the action in time to defend" (Pizzarotti, 2019 NY Slip Op 31056[U] at \*2). In this case, Thag was served through the Secretary of State, which was not personal service, and there is no evidence to suggest that Thag had actual notice of the action in

time to defend. While Defendant 94<sup>th</sup> argues that the telephone conversation proves actual notice, this is not the case, as 94<sup>th</sup> did not speak directly with a representative of Thag and Mr. Maidman did not have a conversation with Thag or its representatives until after April 8, 2019 (NYSCEF Doc. No. 106 [third-party defendant's affidavit in further support] at ¶¶ 5, 6). Thus, there is no evidence that Thag had actual notice.

Third-party defendant Thag mentions a reasonable neglect in their motion papers, however, “[a]s 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” (Eugene, 67 NY2d at 141).

However, when moving pursuant to CPLR § 317, the party must set forth a meritorious defense (Peacock v Kalikow, 239 AD2d 188, 190 [1st Dept 1997]). “In order to demonstrate a meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts” (id.). Such affidavit “must make sufficient factual allegations [and] it must do more than merely make conclusory allegations or vague assertions (id.).

Here, the Court finds that Thag has stated a meritorious defense. Thag states as a defense 94<sup>th</sup>'s breach of contract (NYSCEF Doc. No. 87 [third-party defendant's affidavit] at ¶ 13). Thag also states its meritorious defense with sufficient factual allegations, as Thag sets forth that “94<sup>th</sup> owes substantial money to Thag. . . . [and] refused to make payments to Thag for work performed” (id. at ¶¶ 13-14). Thag further sets forth that it is owed \$676,488.84 for the work that it performed (id. at ¶ 11). This affidavit from a member of third-party defendant Thag with knowledge of the facts “in support of the motion raise[s] question of fact supporting a meritorious defense” (Eugene, 67 NY2d at 142).

Finally, to succeed on a claim governed by CPLR § 317, the motion must be 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 (see Pizzarotti, 2019 NY Slip Op 31056[U] at \*2). Here, Thag stated in its affidavit on the 5<sup>th</sup> of July 2019 that it “only recently learned about this lawsuit” (NYSCEF Doc. No. 87 at ¶ 8). Since the entry of judgment was dated December 13, 2018 and the instant motion was made on July 3, 2019, Thag made the motion within one year of knowledge of the judgment and not more than five years from the entry of judgment.

Thus, Thag has shown entitlement to relief under CPLR § 317. Accordingly, there is no need to consider relief pursuant to CPLR 5015(a) (see Eugene, 67 NY2d at 143).

**CONCLUSION**

It is hereby ORDERED that third-party defendant Thag’s motion to vacate default judgment is granted; and it is further

ORDERED that Thag serve and file its responsive pleading(s) within 20 days. This constitutes the decision and order of the Court.

11/15/2019

DATE

ALEXANDER M. TISCH, 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