In the Matter of Exxon Mobil Corp. v New York City Dept. of Envtl. Protection
2019 NY Slip Op 33847(U)
January 28, 2019
Supreme Court, Queens County
Docket Number: 1228/2018
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : <u>HON. ROBERT J. MCDONALD</u>
Justice

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In the Matter of	Index No.: 1228/2018
EXXON MOBIL CORPORATION,	Motion Date: 1/24/19
Petitioner,	Motion No.: 9
For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	Motion Seq.: 2
- against -	
NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and VINCENT SAPIENZA, in his official capacity as Commissioner of the New York City Department of Environmental Protection,	FILED & RECORDED JAN 31 2019 COUNTY CLERK QUEENS COUNTY
Respondents.	

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The following papers numbered 1 to 8 read on this Order to Show Cause by respondents for an Order, inter alia, vacating the default Order and Judgment entered against respondents:

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits..............	1 - 4
Affirmation in Opposition-Exhibits-Memo. of Law........	5 - 8

Petitioner commenced this proceeding on February 13, 2018 for a Freedom of Information Law request for documents concerning, inter alia, the New York City Department of Environmental Protection's (DEP) determination that a public drinking water treatment facility, known as Station 6, no longer needs to be built.

The Petition was granted on default. A Judgment was entered on November 21, 2018. Respondents now seek to vacate the Judgment.

When the movants seek to vacate a judgment entered on default raise a jurisdictional objection, as here, the court is required to resolve the jurisdiction question in determining whether to vacate the judgment (see Canelas v Flores, 112 AD3d 87 [2d Dept. 2013]; Roberts v Anka, 45 AD3d 752 [2nd Dept. 2007]). "It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" (Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896 [2d Dept. 2013], quoting Krisilas v Mount Sinai Hosp., 63 AD3d 887[2d Dept 2009]). Thus, under CPLR 5015(a)(4), a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (see Hossain v Fab Cab Corp., 57 AD3d 484 [2d Dept. 2008]).

The process server's affidavit of service dated February 20, 2018, states that the Notice of Petition and Verified Petition were served on February 14, 2018 upon Vincent Sapienza, Commissioner, c/o NYCDEP at 59-17 Junction Boulevard, 19th Floor, Flushing, NY 11373 by personally delivering such with the Attorney, Sharon Lewis William, a person of suitable age and discretion, at Mr. Sapienza's actual place of business. On February 16, 2018, a copy was served upon Vincent Sapienza, Commissioner by first class mail to NYCDEP at 59-17 Junction Boulevard, 19th Floor, Flushing, NY 11373. Respondent DEP was also served on February 14, 2018, by personally delivering the notice of petition and verified petition to Sharon Lewis William, who informed the process server that she holds the position of Attorney with DEP and is authorized by appointment to receive service at 59-17 Junction Boulevard, 19th Floor, Flushing, NY 11373.

Respondents now contend that the above service on DEP was improper because CPLR 311(a)(2) requires service upon the City of New York through Corporation Counsel. However, CPLR 311(a)(2) also permits service upon the City of New York to any person designated to receive process in a writing filed in the office of the Clerk of New York County. DEP does not dispute that Sharon Lewis William represented herself to be an attorney authorized to accept service on behalf of DEP. Moreover, Sharon Lewis William does not submit an affidavit contending that she was not served with process. Additionally, respondents do not contest service upon Vincent Sapienza. Accordingly, this Court has personal jurisdiction over both respondents.

Respondents also seek to vacate the Judgment pursuant to CPLR 5015 based upon a reasonable excuse for the default and potentially meritorious opposition to the petiton (see Dokaj v

Ruxton Tower Ltd. Partnership, 91 AD3d 812 [2d Dept. 2012]; Karamuco v Cohen, 90 AD3d 998 [2d Dept. 2011]; Donovan v Chiapetta, 72 AD3d 635 [2d Dept. 2010]). The determination of what constitutes a reasonable excuse lies within the trial court's sound discretion, and if no reasonable excuse is found, the court need not consider whether meritorious opposition was sufficiently shown (see Diaz v Ralph, 66 AD3d 819 [2d Dept. 2009]; Tribeca Lending Corp. v Correa, 92 AD3d 770, 771 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732, 733 [2d Dept. 2011]).

As a reasonable excuse for the default, counsel for respondents, Marilyn Richter, submits an affirmation stating that she has a vague recollection of having read an email from an attorney containing an electronic copy of the notice of petition and petition. She intended to reopen the email at a later time, and to have the notice of petition and petition printed out and then entered into the case management system as a new case and assigned to an Assistant Corporation Counsel. Unfortunately, she did not set a reminder to do so and forgot to reopen the email at a later time. Ms. Richter further affirms that her negligence was inadvertent. The next time she received any notice concerning this case was on December 12, 2018, when counsel at DEP electronically transmitted a copy of the Notice of Entry of Judgment.

A claim of law office failure must be supported by a detailed and credible explanation of the default at issue (see Neilson v 6D Farm Corp., 123 AD3d 676 [2d Dept. 2014]; Eastern Savings Bank, FSB v Charles, 103 AD3d 683 [2d Dept. 2013]; Henry v Kuveke, 9 AD3d 476 [2d Dept. 2004]). A conclusory, undetailed, and uncorroborated allegation of law office failure does not amount to a reasonable excuse (see Aurora Loan Services, LLC v Lucero, 131 AD3d 496 [2d Dept. 2015]; Campbell-Jarvis v Alves, 68 AD3d 701 [2d Dept. 2009]; Forward Door of N.Y., Inc. v Forlader, 41 AD3d 535 [2d Dept. 2007]). Moreover, where the record demonstrates a pattern of default or neglect, the default should be considered intentional, and, therefore, not excusable (see Eretz Funding v Shalosh Assoc., 266 AD2d 184 [2d Dept. 1999]; Carmody v 208-210 E. 31st Realty, LLC 25 NYS3d 14 [1st Dept. 2016]).

This Court finds that respondents' claim of law office failure is insufficient to establish a reasonable excuse (see Abdul v Hirschfield, 71 AD3d 707 [2d Dept. 2010] [finding that forgetfulness is not a reasonable excuse]; Perez v New York City Hous. Auth., 47 AD3d 505 [1tt Dept, 2008] [finding that the overbooking of cases and inability to keep track of appearances does not constitute a reasonable excuse]; Ortega v Bisogno &

Meyerson, 38 AD3d 510 [2d Dept. 2007]. Additionally, this Court notes that respondents admit to missing two statutory deadlines in responding to petitioner's FOIL request and appeal.

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that respondents' application is denied in its entirety; and it is further

ORDERED, that the stay contained in the Emergency Order to Show Cause dated January 3, 2019 is vacated.

Dated: Long Island City, N.Y.
January 28, 2019

ROBERT J. MCDONALD
J.S.C.

FILED & RECORDED
JAN 31 2019
COUNTY CLERK
QUEENS COUNTY