

Dashdevs LLC v Capital Mkts. Placement, Inc.

2020 NY Slip Op 31556(U)

April 27, 2020

Supreme Court, New York County

Docket Number: 655993/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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DASHDEVS LLC

Plaintiff,

- v -

CAPITAL MARKETS PLACEMENT, INC.,

Defendant.

-----X

INDEX NO. 655993/2018

MOTION DATE 11/07/2019

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this breach of contract action, the defendant moves to vacate this court's June 21, 2019 order granting default judgment pursuant to CPLR 5015 and CPLR 317, and upon the granting of such relief to (i) restore the case to the trial calendar, and (ii) for restitution pursuant to CPLR 5015(d) or 317. The plaintiff opposes the motion. The motion is granted to the extent discussed herein.

It is undisputed that on November 10, 2017, the parties entered into a Master Contractor Agreement wherein the plaintiff agreed to provide consulting services to the defendant's clients. On the same date, the parties also entered into a contract where the plaintiff would perform a project for one of the defendant's clients, the Pearson Project. On March 15, 2018, the parties entered into a second contract by which the plaintiff would perform a project for another of the defendant's clients, the Journal Engine Project. In early April 2018, the defendant failed to pay the full amount owed to the plaintiff in their invoices for both projects. On May 11, 2018, the plaintiff sent an invoice to the defendant indicating that several invoices remained outstanding. On May 18, 2018, the defendant responded stating that it would pay the outstanding invoices, but requested information regarding the computer code used in the Journal Engine Project. The plaintiff responded that it would not provide the code unless its outstanding invoices on the

Pearson Project were paid. Throughout June 2018, the parties attempted to resolve the dispute. However, the plaintiff did not receive any further payment from the defendant.

On December 5, 2018, the plaintiff filed the complaint in this action alleging, *inter alia*, causes of action for breach of contract, unjust enrichment, and account stated. The plaintiff served the summons and complaint on the on the Secretary of State pursuant to BCL § 306-b on December 6, 2018. On December 10, 2018, pursuant to CPLR § 3215(g)(4)(i), the plaintiff sent additional notice to the defendant by mailing the complaint and notice of service to two other addresses associated with the defendant, 41 Madison Avenue, New York, NY 10010 and 33 West 26th Street, 4th Floor, New York, NY 10010. However, the defendant claims that it relocated from its previous address at 33 West 26th Street in Manhattan to 157 East 86th Street in Manhattan in May 2017. The defendant did not update its address with the Secretary of State prior to the commencement of this action.

The defendant failed to move, answer, appear or otherwise respond to the complaint, and on February 7, 2019, the plaintiff filed an application pursuant to CPLR 3215 seeking entry of a clerk's default judgment. On February 21, 2019, the Clerk declined to enter judgment on the basis that it was unable to liquidate the amount owed in connection with the Journal Engine Project and advised that a motion must be filed. On March 19, 2019, the plaintiff filed a motion for default judgment. On June 24, 2019, the court granted the plaintiffs motion for default judgment in the amount of \$67,017, plus costs and interest. On July 30, 2019, the Clerk entered the judgment in the amount of \$75,312.80, and in August and September 2019 the judgment was collected.

The defendant now claims that because it had relocated, it only became aware of this action when judgment was executed against it in August 2019. The defendant also argues that it has a meritorious defense, as under the Master Contractor Agreement, the plaintiff warranted that it would "perform any and all services...in a professional quality conforming to generally accepted industry standards and practices and to the reasonable satisfaction of the [defendant]," and the defendant claims that there were issues with the code created by the plaintiff in both projects.

The defendant's motion pursuant to CPLR 5015 is denied because the defendant has failed to meet its burden of demonstrating both a meritorious defense to the action and a

reasonable excuse for its failure to oppose the plaintiff's motion for default judgment. See CPLR 5015(a); Matter of Bendeck v Zablah, 105 AD3d 457 (1st Dept. 2013); Youni Gems Corp. v Bassco Creations Inc., 70 AD3d 454 (1st Dept. 2010). The defendant claims that it did not receive service of the summons and complaint, however said nonreceipt is directly attributable to the plaintiff's failure to update its address with the Secretary of State for over eighteen months prior to the service of the summons and complaint in this action. See On Assignment v Medasorb Techs., LLC, 50 AD3d 342 (1st Dept. 2008) (fifteen month delay updating address with Secretary of State does not constitute reasonable excuse).

However, the defendant does establish entitlement to relief under CPLR 317. That statute provides that a defendant who is not served by personal delivery in an action may vacate its default as long as it demonstrates that it did not personally receive notice of the lawsuit in time to defend against the action and shows that it possesses a potentially meritorious defense. See Stillwell Cafe, Inc. v 1680 Eastchester Realty Corp., 145 AD3d 645 (1st Dept. 2016); Olivaria v Lin & Son Realty, Corp., 84 A.D.3d 423, 425, 922 N.Y.S.2d 337, 339 (1st Dept. 2011); see also Dalton v Noah Constr. & Bldrs., Inc., 136 AD3d 730 (2nd Dept. 2016). Here, plaintiff submitted an affidavit of service showing that it served the Secretary of State, which is not considered personal delivery to defendant or its agent designated under CPLR 318. See Seijas v Rawhide Ranch, 99 AD2d 739 (1st Dept. 1984). Further, defendant has shown that it moved to vacate the default within one year of obtaining knowledge of entry of the judgment and that it did not personally receive notice of the summons in time to defend. See Olivaria v Lin & Son Realty, Corp., supra. The defendant also submits the affidavit of its president averring in support of the motion that defendant never received the summons and complaint and first learned of this lawsuit in August 2019, upon the restraint of defendant's bank account by plaintiff. Moreover, under the circumstances of this case, the defendant succeeds in setting forth a potentially meritorious defense to the action inasmuch as under the Master Contractor Agreement provides that the plaintiffs were to perform to the "reasonable satisfaction of the [defendant]." Finally, the evidence does not suggest that the defendant's failure to update its service address with the Secretary of State constituted a deliberate attempt to evade notice; hence, that failure did not preclude the granting of relief to it under CPLR 317. See Dalton v Noah Constr. & Bldrs., Inc. supra.

In response the plaintiffs submit the affidavit of its CEO Igor Tomych, which appends a series of email communications between Tomych and the defendant wherein the defendant

acknowledges that the plaintiff was contemplating a lawsuit and attempts to settle the matter. These communications include a December 23, 2018 email from the defendant's counsel in this matter, Ryan Long, wherein he states that he believes that plaintiff had filed a lawsuit against the defendant and requests a copy of the complaint. Although these submissions suggest that the defendant may have been on notice of the possibility of this lawsuit prior to their default, the submissions do not demonstrate that the defendant actually ever received a copy of the summons and complaint, or had actual notice of this action such that denial of the defendant's motion under CPLR 317 is warranted. See Residential Bd. of Managers of 99 Jane St. Condo. v Rockrose Dev. Corp., 17 AD3d 194 (1st Dept. 2005); Gibson, Dunn & Crutcher LLP v Glob. Nuclear Servs. & Supply, Ltd., 280 AD2d 360 (1st Dept. 2001).

The defendant, in its notice of motion, moved for restitution in the amount of \$150,000. The defendant avers that this is because approximately twice the value of the judgment, \$75,312.80, was frozen in their accounts pending collection. As the plaintiff avers that collection on the judgment has been completed, and none of the defendants' accounts remain frozen, the court concludes that restitution in the amount of \$75,312.80, the amount collected by the defendant on the June 21, 2019 order is proper. See CPLR 5523.

Accordingly, it is hereby,

ORDERED that the motion is granted to the extent of vacating this court's default judgment order of June 21, 2019 and awarding the defendant in restitution in the amount of \$75,312.80; and it is further,

ORDERED that the defendant shall serve a copy of this order on the Clerk of the court who shall restore the case to the trial calendar and mark the case accordingly; and it is further,

ORDERED that the parties are to appear for a preliminary/settlement conference on September 10, 2020 at 9:30 a.m.

This constitutes the Decision and Order of this Court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/27/2020
 DATE

 NANCY M. BANNON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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