

Rotary Overseas Ltd v Delta Sales Group Co, Inc

2020 NY Slip Op 31993(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 150251/2019

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 150251/2019

ROTARY OVERSEAS LTD,

MOTION DATE 02/25/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

DELTA SALES GROUP CO. INC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion to vacate the judgment granted on default is DENIED.

DECISION

By Order dated December 13, 2019, this court granted plaintiff's motion (Motion Seq. No. 1) for a default judgment and judgment was entered on January 9, 2019. Defendant now moves (Motion Seq. No. 2) to vacate its default.

In support of the motion defendant submits the affidavit of its sole owner and principal who states that the service address on file with the Secretary of State was incorrect and that he had not updated the address since buying defendant corporation in 2006 or 2007, and therefore never received notice of this

action until a retired employee went into the office in January 2020 and discovered the Marshal's Notice of Levy and Sale. He does not refute the statement of plaintiff's process server, by affidavit of service, that on February 12, 2019, such process server also mailed an additional copy of the process to defendant's correct address. Nor does defendant's principal refute plaintiff's statement that plaintiff served the notice of motion seeking a default judgment by mailing such to defendant's correct office address on July 29, 2019 but states that he "did not see it at [defendant's] office when I went there." He explains that he is in ill health and comes into the office infrequently; and specifically, that between April 2019 and the middle of June 2019, he was out of the country and for some of that time hospitalized in intensive care. He also states that the defendant has no other employees and that the only other person who regularly visits defendant's office is a retiree, who barely knows English, and who never informed him about any papers concerning a lawsuit until service of the Marshall's Notice of Levy.

Defendant further contends that it has a valid defense to plaintiff's claim for goods sold and delivered, which claim constitutes the basis of the judgment. Defendant's principal states that the plaintiff was timely notified that the goods

were non-conforming due to a lack of packaging and instructions and that such constitutes a meritorious defense to the action.

The court finds that defendant has not shown a reasonable excuse for its default in answering the complaint.

"[U]nder CPLR 5015, there is no per se rule that a corporation served through the Secretary of State, and which failed to update its address on file there, cannot demonstrate an 'excusable default.' Rather, a court should consider, among other factors, the length of time for which the address had not been kept current."

Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., Inc., 67 NY2d 138, 143 (1986).

Defendant at bar concedes that the corporation's address has not been kept current for over a decade. As held in J & S Const. of NY, Inc. v 321 Bowery LLC, 39 AD3d 391 (1st Dept 2007) (internal citations omitted):

"While such a failure [to update corporate address on file with the Secretary of State] does not constitute a per se barrier to vacatur, and some flexibility may be allowed by the courts, here flexibility is not warranted. At least three years passed during which the appellant's address on file with the Secretary of State was not updated, and appellants' principal, while denying that he had received the default order, acknowledged that it had been mailed to his home address."

Defendant has also failed to establish a meritorious defense. Defendant's assertions that the goods delivered by plaintiff were non-conforming fail to include any statement that any or all of such goods were rejected. See New York Uniform Commercial Code § 2-601. Moreover, the fact that substantially

all of defendant's assets are under injunction by the order of the court in a separate action pending in this court before another Justice (Citibank, N.A. v Delta Sales Group Co., Inc. [Index No.: 650065/2020, Sup Ct, NY County, Ostrager, J.]) does not constitute a valid defense to this action.

6/24/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

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