

<b>Batista v R &amp; D Equity LLC</b>
2020 NY Slip Op 32049(U)
June 23, 2020
Supreme Court, Kings County
Docket Number: 503276/18
Judge: Lawrence S. Knipel
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At an IAS Term, DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of June, 2020

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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MARIA BATISTA,

Plaintiff,

- against -

Index No. 503276/18

R & D EQUITY LLC,

Defendants.

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2, 3, 4
Opposing Affidavits (Affirmations) _____	5
Reply Affidavits (Affirmations) _____	6
_____ Affidavit (Affirmation) _____	
Other Papers: _____	

This is an action to recover money damages for losses allegedly sustained by plaintiff due to negligently performed construction and/or excavation work by defendant, the owner of the property adjacent to plaintiff's property. Service upon defendant was effected by

serving the Secretary of State on March 19, 2018. When defendant failed to appear, plaintiff moved for a default judgment which was granted by order dated December 4, 2018. An inquest was held on February 9, 2019, and this court awarded plaintiff damages in the amount of \$38,759.96. A judgment based thereon was entered December 5, 2019.

Defendant brought an order to show cause pursuant to CPLR 5015 and 317 to vacate the judgment entered on its default, to dismiss the action pursuant to CPLR 3211(8), or, in the alternative, granting defendant leave to serve and file a late answer. In support of the motion, a member of defendant R & D Equity LLC avers that defendant never received a copy of the summons and complaint or the motion for a default judgment. Nor did defendant receive the additional copy of the summons and complaint required by CPLR 3215(4). Nor, it is alleged, was any proof offered by plaintiff that such a mailing was done. Moreover, the address on file with the Department of State is 107-14 71<sup>st</sup> Road, Floor 2, Forest Hills, NY 11375. The address to which the judgment after inquest was sent was 107-41 71<sup>st</sup> Road, not 107-14.

As a potential meritorious defense, defendant argues that it did not cause damage to plaintiff's property, and, in any event, plaintiff failed to submit any proof as the value of her allegedly lost property and how that value was determined. Defendant argues it never

intended to abandon this action, it retained counsel as soon as the judgment was discovered, and that the default should be vacated.

In opposition, counsel for plaintiff maintains that “undoubtedly” the correct address was used to mail the summons and complaint and the CPLR 3215(4) mailing. As for the purported meritorious defense, plaintiff argues that her claims for monetary damages were supported by invoices, cancelled checks and bank records, and that the court specifically excluded additional damages based on hearsay. Since, according to plaintiff, no reasonable excuse was presented and no meritorious defense was alleged, the motion should be denied.

CPLR 317 permits a defendant who has been served with a summons other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive the notice of the summons in time to defend and has a meritorious defense (see CPLR 317; *Eugene Di Lorenzo, Inc. v A. C. Dutton Lumber Co.*, 67 NY2d138, 141 [1986]; *Schacker Real Estate Corp. v 553 Burnside Avenue, LLC*, 133 AD3d586 [2d Dept. 2015]).

Here, service was unquestionably effected through the Secretary of State and not by personal delivery. The affidavits from a member of defendant, as well as the attorney whose office is listed as the place of service by the Secretary of State, adequately show for purposes

of this motion that defendant did not receive the summons and complaint in time to defend.

In addition, defendant has sufficiently demonstrated the existence of a potentially meritorious defense.

Accordingly, defendant's motion to vacate the default judgment is granted.

Defendants must serve an answer within 30 days of this order.

The foregoing constitutes the decision and order of this court.

E N T E R F O R T H W I T H ,



J. S. C.

**Justice Lawrence Knipel**