Schwartz v Port Imperial Ferry Corp.
2020 NY Slip Op 32216(U)
July 8, 2020
Supreme Court, New York County
Docket Number: 157203/2018
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

TODD SCHWARTZ,

Plaintiff,

- v -

PORT IMPERIAL FERRY CORP D/B/A NY WATERWAY, ROMULUS DEVELOPMENT CORP.

Defendant.

----------X

INDEX NO. 157203/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64

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

The motion by defendants to vacate the default judgment and decision after inquest is granted.

Background

Defendants claim they did not appear in this matter because a long-time "Senior Legal Adjuster" employed by a claims management company failed to tell defendants about this case. They claim this management company ("Walters Nixon") had an attorney assigned to protect the legal interests of the defendants and that this person allowed a default to be entered against defendants. Defendants contend that they first they heard about this case was after the default judgment was entered. They assert that defendant Romulus was served at an address it had not occupied since 2009.

Defendants also maintain they have meritorious defenses. This case is about a trip and fall on a depressed/cracked area of pavement and defendants insist the area where plaintiff fell is

actually owned by the City of New York and is in close proximity to the structures that permit necessary venting for the Lincoln Tunnel. Defendants also claim that they have no record of an incident report, any complaints about the pavement in the area where plaintiff fell or any maintenance records about the location. They also claim that pursuant to the lease with the City of New York, they have no obligation to "engage in capital improvements."

In opposition, plaintiff insists that defendants failed to demonstrate a reasonable excuse. He insists that reliance upon an attorney working for a claims handler is not sufficient to establish a reasonable excuse and that defendants acknowledge receiving the summons and complaint. Plaintiff asserts that defendants and Walters Nixon were attempting to adjust the case themselves to avoid putting it through insurance or hoped that plaintiff would just give up. He also points out that defendants failed to submit an affidavit from the chairman for both defendants (who plaintiff observes is a licensed attorney in New Jersey). Plaintiff concludes that law office failure is not a reasonable excuse where the neglect is obvious.

In reply, defendants point out that plaintiff did not address whether defendants have a meritorious defense. They also insist that they have a reasonable excuse for not appearing and that law office failure can constitute a reasonable excuse.

Discussion

> CPLR 317 "states, in part, that '[a] person served with a summons other than by personal delivery to him or to his agent for service under CPLR 318 may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.' As 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. It is also 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. Thus, corporate defendants served 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" (*Eugene Di Lorenzio, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141, 42, 501 NYS2d 8 [1986] [citations omitted]).

"A defendant who meets the requirements of [CPLR 317] normally will be entitled to relief, although relief is not automatic, as the section states that a person meeting is requirements may be allowed to defend the action. Thus, denial of relief under CPLR 317 might be appropriate where, for example, a defendant's failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice" (*id.* at 143 [internal quotations and citations omitted]).

The Court grants the motion. The fact is that the attorney working for Walters Nixon admits she made a mistake (NYSCEF Doc. No. 53). She flat out acknowledges that "due to my neglect, I did not notify Port Imperial's insurance broker or insurer about the summons and complaint that had been served on Port Imperial, and provided to me for the purpose of making these notifications" (*id.* ¶ 16). She also mentions discussing the case for years with plaintiff's attorney and explains she simply lost track of the case (*id.*).

The Court declines to enforce a judgment for $7.35 million against defendants where defendants hired a third-party to track claims like these and the case simply got overlooked. This is a situation where counsel for plaintiff was discussing the claim with Walters Nixon starting in June 2016 and then allegedly ceased communications from August 1, 2016 until the instant case was commenced in June 2018. Clearly, this was not the only case the Walters Nixon employee was working on during that time period and she didn't pay close enough attention to this case.

The Court emphasizes that cases should be decided on the merits and that the mistake at issue here was not part of a larger scheme to avoid service on defendants. The harsh consequence of such a large judgment based on an oversight does not comport with principles of

justice. To deny the motion here would require the Court to disregard the affidavit from the Walters Nixon employee, where she takes full responsibility. She does not try to deflect or blame others; she readily admits defendants did not answer because of her neglect *in an affidavit she submitted with this motion*. The Court finds that defendants have demonstrated they have a reasonable excuse for their default and a meritorious defense.

Accordingly, it is hereby

ORDERED that the motion to vacate the default judgment and the decision after inquest is granted, and defendants shall e-file an answer pursuant to the CPLR; and it is further

ORDERED that the note of issue filed in this matter is also vacated.

Next Conference: October 20, 2020 at 10 a.m. The parties are directed to consult the part's rules and the docket concerning whether the conference will take place virtually. They may e-file a preliminary conference order for the Court's approval prior to the conference.

7/8/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[X]	**GRANTED**	[ ]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:		**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**