

Star Heating & Cooling Corp. v Dato Air, Inc.

2020 NY Slip Op 32562(U)

August 7, 2020

Supreme Court, New York County

Docket Number: 154458/2018

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** IAS MOTION 14

Justice

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INDEX NO. 154458/2018

STAR HEATING & COOLING CORP., INDIVIDUALLY, AND
ON BEHALF OF ALL OTHER LIENORS,

MOTION DATE N/A

Plaintiffs,

MOTION SEQ. NO. 003

- v -

DATO AIR, INC., 24 SECOND AVENUE OWNERS
LLC, ALEKSANDER SHULMAN

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

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

The motion by defendants Dato Air, Inc. and Aleksander Shulman (“Movants”) to vacate the judgment and their defaults is denied.

Background

In this action, Movants seek to vacate their failure to appear or answer. They submit the affidavit of Mr. Shulman who claims that he never received service of process. He observes (as an officer of defendant Dato) that Dato entered into a trade contractor agreement with defendant 24 Second Avenue Owners LLC (“24 Second Avenue”) to do HVAC work at a development site. Shulman claims that Dato then retained the services of plaintiff Star to install ventilation risers. He insists that plaintiff Star failed to perform in accordance with an oral representation and that the amount was never agreed upon.

Shulman claims that a representative of co-defendant 24 Second Avenue told him he did not need to retain an attorney and that a settlement between plaintiff Star and 24 Second Avenue

would resolve the entire matter. Shulman points out he submitted an affidavit in support of 24 Second Avenue's motion to dismiss. He contends that when the action was settled between plaintiff and 24 Second Avenue, it was a full satisfaction of the lien.

Shulman claims he cannot be personally held liable as all transactions were done with Dato. He says he was not served by the process server as described in the affidavit of service, contends his description in that document is incorrect, and argues he never received anything from the Secretary of State sent to Dato. Shulman notes that the business address changed in April 2019.

In opposition, plaintiffs contend that the affidavits of service are prima facie evidence that Movants were served. Counsel for plaintiffs observes that he called Mr. Shulman during the course of this litigation and told him to appear and retain counsel, advice which counsel for plaintiffs contends was ignored. Plaintiffs contend that the matter was settled with 24 Second Avenue for \$10,000 and this amount was deducted from the judgment at the inquest held before this Court concerning Movants.

Plaintiffs observe that although they moved for a default after the one-year deadline, they emphasize that the judge previously assigned to this matter permitted them to submit supplemental papers on this point and ultimately granted their default motion (NYSCEF Doc. Nos. 93, 95). Plaintiffs argue that Movants have not established a reasonable excuse for their default and ask the Court to disregard Shulman's purportedly self-serving affidavit denying service.

In reply, Movants emphasize that the motion for a default judgment was untimely, that they have stated both a reasonable excuse (lack of notice) and a meritorious defense (the \$10,000 payment made by 24 Second Avenue).

Discussion

“A party seeking to vacate a judgment based on excusable default must demonstrate both a reasonable excuse for the default and a meritorious defense” (*Leader v Parkside Group*, 174 AD3d 420, 421, 103 NYS3d 427 [1st Dept 2019]).

Here, the Court denies the motion. It cannot ignore the fact that Mr. Shulman readily admits he knew about the case from its early stages. He submitted an affidavit in support of 24 Second Avenue’s unsuccessful motion to dismiss on August 22, 2019 (NYSCEF Doc. No. 26). That affidavit also states that “I have been advised by my attorneys that the lien filed by Star Heating and Cooling Corp. is invalid” (*id.* ¶ 8).

The fact is that the timeline of events in this case demonstrates that Mr. Shulman and Dato simply put their heads in the sand. They refused to participate in a case they knew was going on for years. Only *after* plaintiffs held an inquest, entered a judgment against Movants and froze Mr. Shulman’s bank account did Movants suddenly decide they should appear in this case.

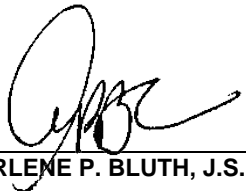
This is not a routine motion to vacate a default where the defendant claims he was completely unaware of the case and wants a chance to raise defenses. Instead, it appears Mr. Shulman made a calculated decision to not participate and it turns out this decision (based upon the apparent belief that a settlement with 24 Second Avenue would end the whole case) was misguided. A strategic choice to not appear does not constitute a reasonable excuse for a default. It would be manifestly unfair for plaintiffs to go through the time and expense of prosecuting a case, having an inquest, securing a judgment and then attempting to enforce that judgment only for a defendant who knew about the case to start litigating the case from the beginning.

To the extent that Movants claim plaintiffs failed to timely move for a default judgment, that argument is denied because the judge previously assigned ruled on this issue and granted the default judgment against Movants after plaintiffs submitted supplemental papers (NYSCEF Doc. Nos. 93, 95).

Accordingly, it is hereby

ORDERED that the motion to vacate is denied.

8/7/2020
DATE


ARLENE P. BLUTH, J.S.C.

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