

Skyline Steel, LLC v Sky Materials Corp.

2020 NY Slip Op 32693(U)

August 18, 2020

Supreme Court, Kings County

Docket Number: 526741/2019

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 18th day of August 2020

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X
SKYLINE STEEL,LLC,

Plaintiff,

Index No. 526741/2019

-against-

DECISION and ORDER

SKY MATERIALS CORP. and PRIME MIX CORP.,

Defendants.
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendant's Order to Show Cause:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memorandum of Law.....	_____

Upon the foregoing cited papers, and after oral argument, defendant Prime Mix Corp. moves by Order to Show Cause, for an Order Vacating a Judgment, dated March 18, 2020, and entered on June 26, 2020.

The underlying action was commenced by plaintiff Skyline Steel, LLC. ("Plaintiff") to recover \$46,616.42 for materials that it allegedly delivered to defendants Sky Materials Corp. ("Sky Materials") and Prime Mix Corp. ("Prime Mix").

On March 18, 2020, Plaintiff applied for a default judgment against Prime Mix in the County Clerk's Office, which was most recently entered on June 26, 2020. The instant application ensued.

In support of the instant Order to Show Cause, Prime Mix notes that the default judgment was issued by the County Clerk's office despite the fact that it filed written opposition to Plaintiff's application. Chris Paradiso, Prime Mix's Vice President, further avers that his company has no record of receiving a duly served copy of the Summons and Complaint. In particular, Paradiso points out that the affidavit of service for the pleadings indicates that it was delivered to an employee named Andrea "Smith." However, he denies that an individual with that name ever worked for Prime Mix. Paradiso also asserts that the entity has never conducted business with Plaintiff. Thus, Prime Mix submits that it has established a reasonable excuse and a meritorious defense to vacate the default judgment.

Plaintiff, in opposition, contends that its process server not only delivered the pleadings to Andrea "Smith," an individual who acknowledged her authority to accept service for Prime Mix pursuant to CPLR 311(a)(1), but also mailed copies of them via UPS second day delivery.

Moreover, Plaintiff argues that the defendants are alter egos of each other. It states that both Sky Materials and Prime Mix share the same business space, have been represented in various litigation by the law firm of Cole Schotz PC, and had the same President/Owner, Michael Cholowsky, during the transactions at issue. It adds that Prime Mix made a number of wire transfers to Plaintiff on Sky Materials' behalf.

In rebuttal, Prime Mix maintains that the pleadings neither alleged that it entered into a contract with Plaintiff nor that it was an alter ego of Sky Materials. It further stresses that Andrea "Smith," who allegedly accepted service of the pleadings, never worked for Prime Mix; and that the "Affidavit of Additional Service" for the alleged UPS mailing, did not state the method of service.

It is routinely held that a movant seeking to vacate a default judgment must establish a meritorious defense, and a reasonable excuse for the default (*Atlantic Mut. Ins. Co. v. Shaw*, 222 AD2d 581 [2d Dept 1995]; CPLR § 5015(a)(1)). "Although the decision to vacate a default judgment rests within the sound discretion of the trial court, it is equally true that a disposition on the merits is favored" (*Hann v. Morrison*, 247 AD2d 706 [3d Dept 1998]).

In the instant case, this Court determines that Prime Mix has demonstrated both a reasonable excuse and a meritorious defense. Specifically, Prime Mix denies having an employee named Andrea "Smith," who had the authority to accept service for it. Plaintiff represented that an individual named Andrea Cabarcas is employed by Sky Materials, and that Prime Mix is its alter ego. However, Prime Mix aptly noted that Plaintiff has not plead an alter ego theory in its pleadings, and has raised the allegation for the first time in its opposition papers. The record also does not reflect that Prime Mix's default was either willful or evinces a pattern

of neglect that will unduly prejudice Plaintiff. Consequently, this Court, in the interest of justice, hereby vacates the default judgment.

Accordingly, based upon the above, Prime Mix's Order to Show Cause to Vacate a Judgment is **GRANTED**. All stays, including the Temporary Restraining Order, as well as any liens or restraints on Prime Mix's bank account are hereby lifted.

ORDERED that Prime Mix files and serves its Answer on all parties within thirty (30) business days hereof.

This constitutes the Decision and Order of the court.

A handwritten signature in black ink, consisting of the initials 'CW' inside a circle, positioned above a horizontal line.

**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE**