

<b>Badlak v 728 Kings Hwy. LLC</b>
2020 NY Slip Op 32732(U)
July 24, 2020
Supreme Court, Kings County
Docket Number: 511816/2017
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
SLAWOMIR BADLAK,

Plaintiff,

-against-

728 KINGS HIGHWAY LLC,

Defendant.  
-----X

Decision and Order

Index No. 511816/2017

Cal. No. 24

Mot. Seq. 2

Submitted: 7/24/2020

AFTER ORAL ARGUMENT, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers Numbered

<p>Defendant's OSC to vacate default judgment dated March 9, 2020; Attorney Affirmation of Jeffrey A. Miller, Esq., affirmed on March 6, 2020; Affidavit of Yosef Friend, sworn to on March 5, 2020;</p> <p>Defendant's Exhibit A<sup>1</sup>-Affidavit of Service upon Secretary of State, on August 11, 2017, sworn to on August 11, 2017;</p> <p>Defendant's Exhibit B-Judgment entered on December 6, 2019 for \$1,173,340.00;</p> <p>Defendant's Exhibit C-Envelope addressed to 728 Kings Highway LLC, 25 Algonquin Drive, Cranford NJ 07016-3301;</p> <p>Defendant's Exhibit D-Letter from Jeffrey A. Miller, Esq. dated March 6, 2020 to Slawomir Platta, Esq. informing counsel of application for a TRO;</p>	1
<p>Plaintiff's attorney affirmation of Laurence D. Rogers, Esq., affirmed on July 6, 2020:</p> <p>Plaintiff's Exhibit A-Notice of Commencement of Action Subject to Mandatory Electronic Filing dated June 15, 2017;</p> <p>Plaintiff's Exhibit B-Affidavit of Service of service upon Secretary of State on August 11, 2017 and sworn to on August 11, 2017;</p> <p>Plaintiff's Exhibit C-NYS Department of State Entity Information, Initial Filing Date 2/5/2009;</p>	

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<sup>1</sup> Because plaintiff has utilized letters instead of numbers, the court will distinguish by describing the exhibits as plaintiff's A, etc. and defendant's A etc.

Plaintiff's Exhibit D-Notice of Plaintiff's Motion for default judgment dated September 29, 2017;	
Plaintiff's Exhibit E-Notice of Entry dated January 18, 2018 of Order entered on January 8, 2018.	
Plaintiff's Exhibit F-Judgment with Notice of Entry dated December 10, 2019 of Order entered on December 9, 2019.	
Plaintiff's Exhibit G-Certified Record as of June 26, 2020 of Biennial Statement of 728 Kings Highway LLC.	2

Appearances:

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Westerman Ball Ederer Miller Zucker &  
Sharfstein, LLP  
Attorneys for Defendant  
By: Jeffrey A. Miller, Esq.  
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MONTELIONE, RICHARD J., J.

This action involves a claim for personal injuries. Defendant 728 Kings Highway LLC seeks to vacate a default judgment entered against it on December 9, 2019 pursuant to CPLR 317 on the basis that the first time it knew of this judgment was by service of this judgment upon its principal, Yosef Freind, at his residence at 25 Algonquin Drive, Cranford, New Jersey on or about February 18, 2020. The plaintiff claims that the address on file with the New York State Secretary of State, 319 Stoughton Avenue, Cranford, New Jersey, was formerly owned by Mr. Freind's sister who moved out in 2013. The address on file with the New York State Secretary of State was eventually updated sometime in March 2020. Defendant claims that service at all locations specified within plaintiff's affidavits of service did not result in his knowing about this action because he did

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not reside or otherwise receive any notice at these addresses. The defendant also states that the plaintiff and defendant have had numerous interactions since the commencement of the action and plaintiff never mentioned this litigation to him.

The plaintiff argues that service on the New York Secretary of State is effective, that the failure of the defendant to change his address is tantamount to an attempt to avoid service of process. There appears to be no dispute regarding the fact that the address was not timely changed with the New York State Secretary of State. Plaintiff directs the court's attention to the *defendant's claims* that the papers could have been sent to his place of business at 718 Kings Highway, Brooklyn, New York, and also directs the court's attention to its affidavit of service dated January 18, 2018 whereby the Notice of Entry of the court's order (Exhibit E) was in fact mailed to "728 Kings Highway LLC, 728 Kings Highway, Brooklyn, NY 11223."

#### Legal Analysis

The crux of the plaintiff's opposition is that the mailing of the Notice of Entry to 728 Kings Highway LLC at 728 Kings Highway, Brooklyn, NY 11223 placed the defendant on notice of this litigation. First, defendant's position is that it could have been *served* at the Kings Highway address where defendant has a superintendent in residence. Second, it appears that both the plaintiff and defendant's superintendent lives at the address and it is unknown whether they

share a common mail slot as is typical in many buildings where mail could easily be interspersed and accessible to either or any party residing in the building. Moreover, there is no indication of any apartment number in the address or indication as to whether or not the mail was returned as undeliverable.

The Court in *Berardi Stone Setting, Inc. v Stonewall Contr. Corp.*, 170

AD3d 934, 935 (2d Dept 2019) reflects the standard to be applied when there is a motion to vacate pursuant to CPLR 317:

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 notice of the summons in time to defend and has a meritorious defense’ (see *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141, 492 NE2d 116, 501 NYS2d 8 [1986]; *Taieb v Hilton Hotels Corp.*, 60 NY2d 725, 728, 456 NE2d 1197, 469 NYS2d 74 [1983]; *Schacker Real Estate Corp. v 553 Burnside Ave., LLC*, 133 AD3d 586, 587, 20 NYS3d 91 [2015]). In order to obtain vacatur of a default judgment pursuant to CPLR 317, a defendant must establish that it moved to vacate the default within one year after it obtained knowledge of entry of the judgment, that it did not receive notice of the summons in time to defend, that it did not deliberately attempt to avoid service, and that it has a potentially meritorious defense (see *Lange v Fox Run Homeowners Assn., Inc.*, 127 AD3d 823, 7 NYS3d 33 [2015]4).

Moreover, service through the New York State Secretary of State is “not personal” delivery. (See notes to NY CLS CPLR R 318, “Service on corporation by delivery of process to Secretary of State is not personal delivery to corporation

or agent designated under CLS CPLR § 318; for the purposes of the statute, personal delivery is defined as “in-hand” delivery. *Fleetwood Park Corp. v Jerrick Waterproofing Co.*, 203 A.D.2d 238, 615 N.Y.S.2d 695, 1994 N.Y. App. Div. LEXIS 3196 (N.Y. App. Div. 2d Dep’t 1994).

The court finds that the defendant has met its burden of showing that it was unaware of this action until February 2020, that it did not attempt to avoid service, and that it has adequately stated a meritorious defense. *Berardi Stone Setting, Inc. v Stonewall Contr. Corp.*, 170 AD3d 934, 935 (2d Dept 2019).

Based on the foregoing, defendant’s Motion to vacate its default judgment is GRANTED; and it is

ORDERED that the Judgment entered on December 6, 2019 is vacated; and it is further

and the note of issue filed 1/18/18 is vacated. (P)

ORDERED that this matter is restored to active status and assigned to a random IAS Part for further proceedings; and it is further

ORDERED that the defendant must serve a verified answer within 20 day of entry of this Order; and it is further

ORDERED that a preliminary conference is scheduled for December 1, 2020.

A copy of this order must be served on all sides within fifteen (15) days of entry with notice of entry.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY

JUL 24 2020



RICHARD J. MONTELEONE, A.J.S.C.

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