

**Gardner v Sun of May, LLC**

2020 NY Slip Op 32787(U)

August 21, 2020

Supreme Court, Kings County

Docket Number: 516927/18

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 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 21<sup>st</sup> day of August, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X

CHRISTOPHER GARDNER,  
Plaintiff,

- against -

Index No. 516927/18

SUN OF MAY, LLC d/b/a CORNER SOCIAL,  
ANAHI ANGELONE, ELITE PLUS SECURITY, LLC,  
MAHMOUD MOHAMED and JOHN DOE, said  
Name being fictitious and intended to represent  
A security person, employee and or agent of  
One of the defendants as referred to in the  
Complaint,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	88-96
Opposing Affidavits (Affirmations) _____	104-136
Reply Affidavits (Affirmations) _____	137-138

Upon the foregoing papers in this assault and negligent hiring action, defendant Elite Plus Security LLC (Elite) moves (in motion sequence [mot. seq.] eight) for an order: (1) vacating its default, pursuant to CPLR 317 and 5015; or, alternatively, (2) granting it leave to renew plaintiff's motion for a default judgment, pursuant to CPLR 2221, and,

upon renewal, denying plaintiff's motion for a default judgment; and (3) extending its time to answer the complaint, pursuant to CPLR 3012.

### *Background*

#### *The Instant Action*

On August 20, 2018, plaintiff Christopher Gardner (Gardner) commenced this action against Elite and others for assault and negligent hiring by filing a summons and a verified complaint. The complaint alleges that on June 17, 2018, at approximately 11:15 p.m., Gardner was a customer at the restaurant/bar known as "Corner Social" at 321 Lennox Avenue in New York when he was removed from the premises. The complaint alleges that a "bouncer" allegedly pushed Gardner causing him to fall, and that Elite "provided security services at the premises."

#### *Gardner's Service of Process Upon Elite*

According to Gardner's affidavit of service in the record, on September 4, 2018 at 3:45 p.m., Elite was served with the summons and verified complaint, pursuant to Limited Liability Company Law § 303, by delivering them to the Secretary of State. Subsequently, on September 13, 2018, Gardner sent, by first class and certified mail, the summons and complaint, notice that service was made on the Secretary of State and a copy of the September 4, 2018 affidavit of service to Elite c/o Mahmoud Mohamad at 38 West 38<sup>th</sup> Street in New York, "the address designated for that purpose . . ." The United States Postal Service Tracking report indicated that "Addressee [was] Unknown," "Unable to deliver item, problem with address" and that the certified mail was returned to

sender on October 2, 2018. Consequently, Elite did not receive the summons and complaint, and defaulted by failing to timely answer the complaint.

On October 17, 2018, Gardner moved for a default judgment against Elite, and the motion was granted by a November 27, 2018 order, which was entered on December 6, 2018. Notably, Elite admittedly learned that the action was pending against it in December 2018, when a codefendant and Gardner contacted Elite's insurance carrier, Zurich Insurance Group (Zurich).

### *Elite's Instant Motion*

On June 30, 2020 – 17 months after Elite learned of the action – Elite moved for an order vacating its default, pursuant to CPLR 317 and 5015, or, alternatively, granting it leave to renew plaintiff's motion for a default judgment, pursuant to CPLR 2221, and, upon renewal, denying plaintiff's motion and extending its time to answer the complaint. In support of its motion to renew, Elite's counsel asserts that Gardner's motion for a default judgment "made no mention of [the] fact that the certified mailing was returned undeliverable." Apparently, in an effort to justify its delay in moving to vacate its default, Elite's counsel explains that Zurich initially denied coverage, and "on February 20, 2020, Zurich ultimately revoked its denial letter and agreed to defend a suit (under a reservation of rights)[,]" at which time defense counsel was retained.

Elite submits an affidavit from Mahmoud Yehia (Yehia), its owner and president, who attests that when Elite was first formed in April 2006, Elite's office was located at 38 West 38<sup>th</sup> Street, 5<sup>th</sup> Floor, in New York. Yehia attests that in May 2015, he moved

Elite's office to 1178 Broadway, Suite 311, in New York, and in April 2017, Elite's office was again moved to 99 Madison Avenue, Suite 418, in New York. Yehia attests that "[i]n my years as a small business owner, I never learned that I was required to update a company's address with the New York Secretary of State" and "I did not change Elite's registered address with the New York Secretary of State when its offices moved." Yehia asserts that he "deeply regrets not knowing sooner of the requirement to register a change of address." Thus, Elite admits that it did not receive process because it failed to update the Secretary of State with its new corporate address. Elite's counsel asserts that Elite was not trying to evade process, since Yehia updated Elite's address on its website.

Regarding the merits of the assault claim, Yehia attests that "Elite was, effectively, a go-between its business clientele (consisting largely of restaurants, bars and entertainment venues) and security guards, doormen (and women), bouncers and other similar personnel" and that "Elite did not hire the security guards, doormen or other personnel." Yehia asserts that "Elite provided its clients with independent contractors[.]" who "were instructed not to engage in any physical or violent confrontation with Elite's clients' patrons or customers." Yehia attests that "beyond that, the contractors were instructed only to adhere to the assigned client's and location's instructions with respect to their duties and how to carry them out." Yehia attests that Elite's contractors were issued 1099 forms for taxes and did not wear uniforms. Elite argues that it has a meritorious defense because it cannot be held vicariously liable for the acts of an independent contractor.

Regarding the negligent hiring and retention claim, Yehia attests that “Elite did check that security guards it contracted for clients had security guard licenses from the State of New York[,]” which “entails having undergone a state background check for serious criminal activity” and training. Yehia further attests that Elite retained complaints, and “Elite did not continue to work with any contractor whom I ha[d] reason to believe may not be able to properly and professionally complete a job.” Yehia attests that he believes that “Miguel Castro was the contractor who is alleged to have pushed the plaintiff[,]” that Miguel Castro, a long-time contractor for Elite, was one of Elite’s “trusted contractors” and “I have never had reason to believe that he would be violent, inappropriate or unprofessional with anyone.” Elite contends that “it had taken adequate and sufficient steps to ensure that only qualified personnel were contracted to provide services to [its] clients and that it had no notice of Castro having any violent propensities.”

### *Gardner’s Opposition*

Gardner, in opposition, argues that Elite’s motion to vacate the default judgment, which was entered more than one and a half years ago, should be denied because “Elite’s failure since 2006 to file biennial LLC forms raises an inference that Elite deliberately attempted to avoid notice of lawsuits as a matter of law.” Gardner’s counsel asserts that this “inference is further confirmed by all of the cases that I could find in which Elite was sued” and “failed to answer, even in the cases (4) predating its change of address and, after changing its address, [it] continued to evade service.” Gardner’s counsel cites to

numerous unrelated New York cases in which default judgments were entered against Elite after it was served through the Secretary of State. Gardner's counsel notes that Elite never updated its address with the Secretary of State, despite the fact that it knew about these default judgments. Gardner argues that Elite "knowingly attempted to avoid or evade notice of any lawsuits and at the very least has engaged in willful neglect" based on "its long standing failure to keep its address current with the Secretary of State, and the cases against Elite . . ."

Gardner further argues that Yehia's affidavit of merit is conclusory, self-serving and completely insufficient to establish that Elite has a meritorious defense to this action. Although Yehia attests that Elite provides its clients with independent contractors, Gardner notes that Elite fails to submit a copy of its contract with the restaurant/bar or the security guard, Miguel Castro, to substantiate that claim. Gardner further argues that:

"Yehia does not tell us anything about Elite's relationship to the guards, how he picked them, are they paid by the hour, do they have the right to turn down assignments, do they have the right to accept employment other than through Elite, does Elite provide the guards with Worker's Compensation, if a guard is not doing his job properly, does Elite remove the guard and substitute someone else, or is that the client's . . . responsibility, does the contract provide that Elite . . . be responsible for any incidents involving the guards, does Elite pay for overtime, does the client . . . have the right to employ the guards without going through Elite, is Elite, by contract, required to obtain liability insurance for the actions of the guards . . ."

In addition, Gardner notes that while Yehia attests that the security guards are required to undergo training to obtain their licenses, “Elite does not tell us what training they require their security guards to undergo and who trains them.”

Gardner also submits the deposition transcript of Jack Jaramillo (Jaramillo), an Elite security guard, that was taken in an unrelated lawsuit, in which Jaramillo testified that he was Elite’s employee, that his “direct supervisor” at Elite was Joseph Fouad, who instructed him regarding his job responsibilities, and that Elite paid his salary, provided him with walkie talkies, ear pieces and devices for scanning patron’s licenses. While Yehia attested that Elite only hires licensed security guards, which ensures proper training, Jaramillo testified that a license merely means that a security guard has taken a one-day, eight-hour training class.

Gardner also relies on the deposition testimony of Anahi Angelone (Angelone), owner of the Corner Social restaurant, who testified that he hired Elite to provide trained security guards, and that Elite was “in charge” of making sure that the restaurant is safe. Based on Angelone’s deposition testimony, the court recently granted the codefendants’ motion for summary judgment based on their claim that Elite was an independent contractor for which they cannot be held liable. For this reason, Gardner contends that he would be “severely prejudiced” if Elite’s default were vacated. Gardener explains that “[h]ad Elite made this motion even four months ago . . . Elite’s allegations would have raised an issue of fact which would have precluded the granting of summary judgment . . .”

*Elite's Reply*

Elite, in reply, asserts, as a preliminary matter, that “plaintiff’s attempt to litigate other cases, to make unfounded assumptions based on incomplete docket entries and filings will not be entertained here and should not be entertained by this court” because this case “should be litigated on its own merits.” Elite contends that “the failure to file [biennial forms] is not *dispositive* of the question of whether a corporate entity is attempting to evade service[,]” and “it merely permits the inference.” Elite argues that “any such inference is far outweighed and overcome by the unrebutted proof that [it] was not hiding its corporate location; it had displayed it on its website the entire time.”

Elite argues that Gardner cannot credibly claim that he is prejudiced because “counsel could have reached Elite at any time (for purposes of subpoena, deposition, party or non-party discovery, such as may be necessary to oppose a motion) by simply searching online for its address and then obtaining whatever materials it needed . . .” Elite further argues that there “are no legitimate bases on which to challenge” Yehia’s affidavit of merit, “since the Yehia affidavit laid out several of the factors that support the characterization of the guards as ‘independent contractors’ in this case.”

*Discussion*

In *Bookman v 816 Belmont Realty, LLC* (180 AD3d 986 [2020]), a factually identical case, the Appellate Division, Second Department recently held that the defendant corporation was not entitled to an order vacating its default, under CPLR 317, because “since September 2011, the defendant had not filed, with the Secretary of State,

the required biennial form that would have apprised the Secretary of State of its current address . . . thus raising an inference that the defendant deliberately attempted to avoid notice of actions commenced against it.” In *Bookman*, the Second Department further held that the defendant corporation was not entitled to an order vacating its default, pursuant to CPLR 5015 (a) (1), because “defendant’s failure to keep the Secretary of State apprised of its current address over a significant period of time did not constitute a reasonable excuse.” Consequently, the court held that it was “unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense.”

Here, Yehia, Elite’s owner and president, admits that he failed to apprise the Secretary of State of Elite’s current address since Elite was initially formed in 2006. Yehia thus attests that “[i]n my years as a small business owner, I never learned that I was required to update a company’s address with the New York Secretary of State.” Yehia further attests that “I did not change Elite’s registered address with the New York Secretary of State when its offices moved.” Therefore, it is apparent from Yehia’s admission that Elite failed to file the requisite biennial form with the Secretary of State, which would have apprised the Secretary of State of Elite’s address change years ago. This raises an inference that Elite deliberately attempted to avoid notice of actions commenced against it, as a matter of law.

Because Elite has failed to establish a reasonable excuse for its default, as a matter of law, this court need not determine whether Elite has demonstrated a potentially meritorious defense. Based on the Second Department’s dispositive holding in *Bookman*,

Elite's instant motion to vacate its default, pursuant to CPLR 317 and 5015 (a) (1), is denied. Having failed to vacate its default, Elite cannot move for an order renewing and then opposing Gardner's motion for a default judgment, pursuant to CPLR 2221. Accordingly, it is

**ORDERED** that Elite's motion (in mot. seq. eight) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Justice Lawrence Knipel