SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT D. KALISH** **PART** **IAS MOTION 29**

Justice

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GERSHON SHLUKER,

Plaintiff,

- v -

SPIEGEL INC., SPIEGEL INC.,D/B/A SPIEGEL RESTAURANT and SPIEGEL RESTAURANT,

Defendants.

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INDEX NO. 153287/2019

MOTION DATE 10/13/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41

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

Motion by Defendants Spiegel, Inc. ("Inc."), Spiegel, Inc., d/b/a Spiegel Restaurant ("d/b/a"), and Spiegel Restaurant ("Restaurant") (collectively, "Defendants") seeking an order pursuant to CPLR § 317, CPLR § 5015 and CPLR § 2005: (1) to vacate the default judgment order of July 25, 2019 ("the Default Judgment") issued against the Defendants; (2) to restore the above entitled action to the court calendar; and (3) for such other and further relief this Court may deem just and proper is denied for the reasons stated herein.

BACKGROUND

In the instant action, Plaintiff Gershon Shluker ("Plaintiff") has sued Defendants for money damages relating to personal injuries he allegedly sustained on November 13, 2018. (NYSCEF Doc. No. 23 [DJ Order].) In sum and substance, the complaint alleges that Plaintiff was assaulted and battered while at Spiegel's bar/restaurant located at 26 First Avenue, New York, New York (the "Premises") due to the negligence of Defendants. (Id. at 1.)

On July 25, 2019, this Court issued an order (NYSCEF Doc. 12) directing the entry of a default judgment in favor of Plaintiff and against Defendants and directing that an immediate trial of the issues regarding damages shall be had. (Id. at 2.) On that motion, Plaintiff submitted affidavits of service establishing that: 1) Defendant Inc. was served via the Secretary of State pursuant to BCL 306; 2) that Defendant d/b/a was served via the Secretary of State pursuant to BLC 306; and 3) that Defendant Restaurant was served by delivering a copy of the summons and complaint to an employee named Ivana "Smith" at the Premises and mailing an additional copy to the Premises pursuant to CPLR 308 (2). In addition, Plaintiff submitted an affidavit of service of an additional June 3, 2019 mailing of the summons and complaint, pursuant to CPLR 3215 (g) (4) addressed to Defendants at the Premises. (Id.) As such, this Court found that "Plaintiff has shown prima facie that Defendants were served with process, that they have failed to appear in

the action, and that their time to do so has expired." (Id.) This Court further found that Plaintiff "submitted adequate proof of the facts constituting his claims for the purposes of the instant motion by means of his affidavit." (Id.)

On the instant motion, Defendants seek to vacate the aforesaid default judgment. In sum and substance, Defendants assert that the employee who was served with the summons and complaint—a barista apparently named Ivana Newball ("Newball")—did not "hand" the papers to the owner of Defendants, Noah Shalem ("Shalem"), and as such there is "no way [Shalem] could have known without actually receiving service personally." (NYSCEF Doc. No. 24 [Shalem Aff.] ¶ 6.) As such, Defendants argue that this Court should grant the instant motion vacating the default judgment because Defendants "have a meritorious defense and this case should be resolved on the merits given that there is no prejudice against the Plaintiff, Defendants' have a reasonable excuse for the delay and there is no showing of bad faith." (NYSCEF Doc. No. 20 [Affirm. in Supp.] ¶ 13; *see also* Shalem Aff. ¶ 8 ["I have been advised by my attorneys that I have a meritorious defense in this action."].)

In opposition, Plaintiff argues that the instant motion should be denied because Defendants have failed to establish a reasonable excuse for their defaults, and—even if they did have a reasonable excuse—Defendants have failed to establish that they have a meritorious defense. With regard to Defendants' reasonable excuse, Plaintiff argues:

> "Defendants were served on three different occasions herein: one on April 15, 2019, by Secretary of State, one at its last know address on April 16, 2019 by a processor server and again on June 3, 2019, at its place of business. Defendant has had three notifications of the lawsuit. At least one of these service attempts must have found its target."

(NYSCEF Doc. No. 26 [Affirm in Opp.] ¶ 28.) Plaintiff asserts that, in addition to Defendants being put on notice of the lawsuit by being properly served with process:

> "Defendants were further alerted to this lawsuit on (1) June 28, 2019 Defendants were served with the Notice of Motion for Default; (2) July 25, 2019 Notice of Entry served upon Defendants; (3) Text messages exchanged between Plaintiff and Defendants; (4) August 1, 2019 insurance claim filed by Plaintiff through Defendants Insurance Carrier, Utica Insurance Company and Utica informing Defendants of its decision to deny Plaintiff's claim; and (5) Telephone conversation with Defendants and email advising that an inquest was scheduled for February 5, 2020."

(Id. ¶ 28.) Plaintiff further argues that Shalem admits in his own affidavit that he received notice of the lawsuit by "an Order granting a Default Judgment on July 25, 2019" and that roughly seven months still elapsed before Defendants filed the instant motion. (Shalem Aff. ¶ 9.)

Furthermore, Plaintiff argues that even if this Court were to find that Defendants had a reasonable excuse for their defaults, the Court should still deny the instant motion because Defendants fail to establish that they have a meritorious defense. Plaintiff asserts that Defendants' counsel conclusorily asserts that Defendants have a meritorious defense and that the

motion should be granted so that the action can be "resolved on the merits." (Affirm in Opp. ¶¶ 35-37.)

In Reply, Defendants reiterate the same arguments in their moving papers. In addition, Defendants now argue that "service of the Summons and Complaint to the Secretary of State fails as 'personal delivery' [pursuant to CPLR 317], and therefore personal delivery could have only been enacted through serving Noah Shalem himself, as the owner of SPIEGEL restaurants, or a designated agent to accept service on SPIEGEL's behalf." (NYSCEF Doc. No. 41 [Affirm. in Reply] ¶ 7.) With regard to the other aforesaid means by which Defendants were alerted to the action, Defendants argue that such "fail[s] to demonstrate that [Defendants] obtained notice" and that "the only thing [Defendants] would have reasonably known is that a lawsuit had generally commenced." (Id.)

DISCUSSION

As mentioned, on the instant motion, Defendants seek an order, pursuant to CPLR 317, 2005 and 5015, vacating the Default Judgment and restoring the above entitled action to the court calendar.[1] CPLR 317 states in relevant part:

> "A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, 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."

CPLR 5015 states in relevant part:

> "(a) The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry."

CPLR 2005 states in relevant part:

> "Upon an application satisfying the requirements of subdivision … subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure."

[1] The Court notes that Defendants also state that they are moving pursuant to CPLR 5010. However, this section of the CPLR does not exist.

In sum and substance, CPLR 317 and CPLR 5015 (a) (1) both allow a court to vacate a lawfully obtained default judgment—like the one in this case—if the movant makes the appropriate showing; and CPLR 2005 clarifies that a default caused by "law office failure" does not preclude vacating a default pursuant to CPLR 5015 (a) (1).

Under CPLR 5015 (a) (1), the party seeking vacatur "must demonstrate a reasonable excuse for its [default] and a meritorious defense to the action." (*See Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 [1986].)

Under CPLR 317, the moving defendant must establish that: 1) it was served by a method other than personal delivery (or delivery to a CPLR 318 agent); 2) it did not personally receive notice of the summons in time to defend; and 3) it has a meritorious defense. (*Country-Wide Ins. Co. v Power Supply, Inc*., 179 AD3d 405 [1st Dept 2020].)

Unlike CPLR 5015 (a) (1), CPLR 317 does not require the movant to demonstrate a reasonable excuse for his default, and thus it is considered to be more lenient. However, CPLR 317 is only available to a defendant that was served in a manner other than "personal delivery" and to one that moves within a year of when it "obtains knowledge of entry of the judgment"—and the moving defendant must also show that notice of the summons and complaint was not in fact received in time to defend. CPLR 317 thus "seeks to encourage plaintiffs to make service by personal delivery, as it is the method best calculated to give actual notice." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 317.)

Ironically, the distinctions between CPLR 5015 (a) (1) and CPLR 317 are meaningless on this motion because Defendants have failed to establish the "meritorious defense" that both provisions require. Here, Defendants merely provide the following statement from Shalem: "I have been advised by my attorneys that I have a meritorious defense in this action." (Shalem Aff. ¶ 8.) Lest there be any confusion, saying the words "I have a meritorious defense"—without any factual specificity or further explanation—is insufficient for establishing a meritorious defense for purposes of either CPRL 5015 (a) (1) or CPLR 317. (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997] [holding that an affidavit of merit "must do more than merely make conclusory allegations or vague assertions].)[2]

As such, this Court need not consider whether Defendants have met any of the other requirements of either CPLR 5015 (a) (1) or CPLR 317. However, were it to do so, it would also find these showings to be unavailing. Although service via the Secretary of State is not "personal delivery" for purposes of CPLR 317, Defendants fail to explain why such service did not provide them with "adequate time to defend" and/or that they did not receive such notice. (*Country-Wide Ins. Co. v Power Supply, Inc*., 179 AD3d 405 [1st Dept 2020].) Likewise, the fact that Newball may not have "handed" the summons and complaint to Shalem does not by itself provide a reasonable excuse for Defendants default under these circumstances. Moreover, and again, although Defendants claim that Newball never handed the summons and complaint to Shalem, it was made clear at oral argument that Defendants did receive the papers through the Secretary of State, and that they were in communication with Plaintiffs' counsel.

[2] Although Defendants' counsel did provide additional detail about the underlying incident during oral argument, these statements are not admissible for the truth of the matter asserted.

Although there is a strong policy in this state to decide actions on their merits, the movant on a vactatur motion must still meet its burden. This was not done here. For all these reasons, the motion is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Defendants Spiegel, Inc. ("Inc."), Spiegel, Inc., d/b/a Spiegel Restaurant ("d/b/a"), and Spiegel Restaurant ("Restaurant") (collectively, "Defendants") for an order seeking an Order pursuant to CPLR §317, CPLR §5015 and CPLR § 2005 seeking: (1) to vacate the default judgment order of July 25, 2019 ("the Default Judgment") issued against the Defendants; (2) to restore the above entitled action to the court calendar; and (3) for such other and further relief this Court may deem just and proper is DENIED; and it is further

ODERED that the matter shall be returned to the inquest part for inquest on the issue of damages; and it is further

ORDERED that within five days of the filing date of this decision and order, counsel shall serve a copy of said decision and order with notice of entry on the clerk of the court and all parties.

The foregoing constitutes the decision and order of the Court.

10/13/2020
DATE

ROBERT DAVID KALISH, J.S.C.

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