

Rodriguez v 158 W. 23 LLC
2020 NY Slip Op 34402(U)
November 10, 2020
Supreme Court, New York County
Docket Number: 153150/2017
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36
Justice
INDEX NO. 153150/2017
MOTION SEQ. NO. 002
JUAN RODRIGUEZ, Plaintiff,

- v -

158 WEST 23 LLC., 158 WEST 23RD STREET
CONDOMINIUM, JEFFREY BERTON,
MELINDA TAN, PEDRO TOME, GREG PASSERI,
ROSSROCK LLC., MONSTER SUSHI RESTAURANT. INC
d/b/a MONSTER SUSHI, MONSTER SUSHI
FRANCHISE LLC, and GODZILLA JAPANESE
REST. INC., ICC PERFORMANCE LIMITED
PARTNERSHIP, and ICC VENTURE CORP.,
Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

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

Plaintiff commenced this personal injury action seeking to recover for injuries sustained on or about August 16, 2013 at 158 W. 23rd Street, New York, New York when during the course of making a delivery, he fell on stairs leading from the sidewalk to the basement of 158 West 23rd Street. Defendants Monster Sushi Restaurant, Inc., d/b/a Monster Sushi, Monster Sushi Franchise LLC, and Godzilla Japanese Restaurant, Inc., move the court pursuant to CPLR § 317 or, in the alternative, CPLR § 5015(a)(1) seeking an order vacating the decision and order dated October 9, 2018 (Ling-Cohan, J) granting plaintiff's motion for a default judgment against them; staying the proceeding until the instant motion is decided; and for an extension of time to answer the second amended verified complaint.

Moving defendants argue that they were never personally served with the summons and complaint or the supplemental summons and second amended complaint. Defendants aver that they were made aware of this action when their insurance carrier was served with a subpoena. Thereafter, defendants communicated with plaintiff seeking a stipulation to vacate the default, but plaintiff refused. Thereafter, the instant motion was filed.

According to the affidavit of service regarding defendant Monster Sushi Restaurant, Inc., the summons and complaint and the supplemental summons and second amended complaint were served upon the Secretary of State on or about August 15, 2017. The address recorded for service of process was 22 W. 46th Street, New York, New York 10036. Defendants assert that the restaurant they operated out of 22 West 46th Street, New York, New York was closed and no longer conducting business as of late 2014/early 2015 and thus, they were never served with the pleadings. With respect to plaintiff's injury, defendants aver that Monster Sushi Restaurant, Inc.

did not install, construct, repair, replace, or alter the stairs at 158 West 23rd Street, New York, New York. Defendants further assert that they were not responsible for making repairs or alterations to the stairs and never hired or contracted any person or entity to perform work on the stairs. Finally, defendants state they did not have notice of the accident, or of any alleged defective condition.

As to defendant Godzilla Japanese Restaurant, Inc., the affidavit of service states that the summons and complaint and the supplemental summons and second amended complaint were served upon the Secretary of State on or about August 15, 2017 and the address recorded for service was 158 West 23rd Street, New York, New York. Defendants assert that this restaurant was also closed prior to the service attempt (specifically, as of November 2016) and thus, they did not receive the pleadings. As to the condition of the stairs, defendants assert that while Godzilla Japanese Restaurant, Inc. did lease the premises at 158 West 23rd Street, it did not install, repair, replace or alter the stairs leading from the sidewalk to the basement; did not retain any person or entity to perform repairs, placements or alterations to the stairs; and was not responsible for making repairs or alterations to the stairs. Finally, Godzilla Japanese Restaurant, Inc. asserts that it did not have notice of the defect or incident.

With respect to defendant Monster Sushi Franchise, LLC, the affidavit of service indicates it was served upon the Secretary of State on August 15, 2017 whose records indicate service could be made at 600 Madison Avenue, 22nd Floor, New York, New York. Defendants argue that Monster Sushi Franchise was a dormant domestic limited liability company as of August 2014 and was still in this dormant state in August 2017. They further argue that Monster Sushi Franchise, LLC did not conduct business in 2014, that it had no connection to the property located at 158 West 23rd Street, New York, New York, and that the law firm designated for service was not actively representing Monster Sushi Franchise, LLC at the time of the attempted service.

Based on the foregoing, defendants assert that pursuant to CPLR § 317, which does not require a reasonable excuse for default, the default should be vacated. Moreover, defendants argue that if the court decides this motion pursuant to CPLR § 5015, the default should still be vacated insofar as the defendants have a reasonable excuse and a meritorious defense.

In opposition, plaintiff states that Godzilla Japanese Restaurant, Inc. d/b/a Monster Sushi was leasing the premises located at 158 West 23rd Street New York, New York from subject lessor 158 West 23rd Street, LLC. The leased property included the basement and ground floor and plaintiff argues that defendant Godzilla Japanese Restaurant, Inc. d/b/a Monster Sushi failed to properly maintain the cellar staircase upon which he fell. Additionally, the lease provides that Carl Waltzer and Nita Bui were equal (50%) partners in each restaurant and that Carl Waltzer served as Chief Operating Officer of each restaurant.¹ According to plaintiff, the rider to the lease states that Godzilla Japanese Restaurant, Inc. accepts the premises "as is" and assumes responsibility for repair and maintenance. Plaintiff argues that as service upon the Secretary of State is proper service, defendants' contentions that they were not personally served must fail. Plaintiff avows that defendants' failure to maintain a current address with the Secretary of State

¹ Waltzer is listed as the principal of Godzilla Japanese Restaurant, Inc., Monster Sushi and Monster Sushi Franchise according to the NYS Department of State website.

pursuant to Business Corporation Law § 306 does not constitute a reasonable excuse for their failure to answer or appear. Additionally, plaintiff maintains that defendants' excuse of lack of notice fails as plaintiff sent letters to the defendants at the respective places of business while each was in business and upon Carl Waltzer himself on July 30, 2015. Plaintiff also asserts that notices were served upon Godzilla Japanese Restaurant, Inc. on February 7, 2018 and notices to preserve evidence were served by regular mail on January 5, 2017, yet all letters and notices went unanswered. Furthermore, plaintiff contends that despite its arguments of being dormant, defendants have failed to file Certificates of Dissolution. Lastly, plaintiff claims that the affidavit of Carl Waltzer fails to assert a basis of knowledge and is simply a general denial thus, failing to meet the criteria for a meritorious defense.

In reply, moving defendants argue that the letters allegedly sent by plaintiff were addressed in the same manner as the pleadings and thus, were likewise not received. Defendants further argue that if permitted to defend the action, plaintiff would have the opportunity to explore Mr. Waltzer's knowledge of the incident, that Waltzer as an officer has personal knowledge of his businesses, and Waltzer's affidavit clearly asserts that none of the moving defendants have a responsibility to maintain the structural integrity of the stairs. Furthermore, defendants aver that their error in not updating the Secretary of State records does not preclude them from defending the action.

CPLR § 5015(a) provides that a party may be relieved from a judgment on the ground of, among others, "excusable default." A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action. See CPLR § 5015(a)(1); *Gray v B. R. Trucking Co.*, 59 NY2d 649 [1983].

Under CPLR § 317, a defendant not served by personal delivery or through an agent (CPLR § 318) may be allowed to defend the action within one year after obtaining knowledge of the entry of judgment. Under this provision, a defendant is required to show a meritorious defense but there is no requirement to establish an excuse for failure to appear other than not receiving the summons in time to defend.

Here, the sole reason proffered as to why moving defendants did not receive the pleadings duly served upon the Secretary of State was its failure to update their respective addresses as required by Business Corporation Law (BCL) § 306. Based upon the dates provided by the moving defendants, they were not in compliance with BCL § 306 for a period of two to three years by the time this action was commenced. It is well-settled that failure to comply with BCL § 306 does not constitute a reasonable excuse however, such failure does not preclude a defendant from demonstrating an excusable default. (*Lawrence v Esplanade Gardens*, 213 AD2d 216 [1st Dept 1995]). In this instance, defendants have not set forth any other basis tending to show an excusable default. Inasmuch as the moving defendants were duly served by process upon the Secretary of State and no reasonable excuse has been proffered, defendants' arguments in support of vacatur under CPLR § 317 and § 5015 do not lie. Consequently, moving defendants' failure to establish an excusable default renders the instant claim of a meritorious defense moot. Therefore, the motion to vacate the default is denied and it is hereby

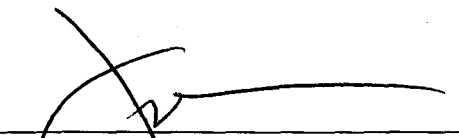
ORDERED that defendants' Monster Sushi Restaurant Inc., d/b/a Monster Sushi, Monster Sushi Franchise LLC, and Godzilla Japanese Restaurant, Inc. motion to vacate the default herein is denied and the matter shall be set down for an assessment of damages; and it is further

ORDERED that, upon the filing by the plaintiff with the General Clerk's Office (60 Centre Street, Room 119) of a copy of this order with notice of entry and a note of issue, and the payment of the fee therefor, the Clerk shall place this matter upon the trial calendar for an assessment of damages; and it is further

ORDERED that such filing with the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining parties are to appear remotely for a status conference on January 20, 2021, the method and means of which shall be provided by email no later than January 13, 2021.

November 10, 2020


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: