

Weinberger v Wild Orchid Flowers Corp.

2020 NY Slip Op 34496(U)

March 11, 2020

Supreme Court, Kings County

Docket Number: 500224/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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LEAH WEINBERGER,

Plaintiff,

-against-

WILD ORCHID FLOWERS CORP. and
I.J. EMPIRE, INC.,

Defendant(s).

-----X

Decision and Order

Index No. 500224/2019

Mot. Seq. 002

The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Defendant's Notice of Motion to Vacate Default Judgment dated November 15, 2019; Affirmation of Heather Smar, Esq., affirmed on November 8, 2019; Affidavit of Josef Hanono, sworn to on November 8, 2019; and Exhibits A-G.....	4
Defendant's Memorandum of Law in Support of Defendant's Motion to Vacate Default Judgment dated November 8, 2019.....	3
Plaintiff's Attorney Affirmation in Opposition of Avrohom Becker, Esq., affirmed on January 14, 2020; and Exhibits A-L.....	3
Defendant's Affidavit in Reply of Heather Smar, Esq. affirmed on January 20, 2020; Affidavit of Fanny Cohen, sworn to on January 17, 2020; and Exhibits H-I.....	4

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The court notes that supplemental papers from both plaintiff and defendant were received. However, supplemental papers were not considered as they were submitted without permission of the court.

MONTELIONE, RICHARD J., J.

Defendant I.J. Empire, Inc. moves to vacate the default judgment pursuant to CPLR 317 or 5015(a). Plaintiff commenced this personal injury action by filing the summons and complaint on January 4, 2019. Service was made upon the New York Secretary of State pursuant to CPLR 306 on January 16, 2019. No answer was interposed and plaintiff moved for

default judgment. The Court granted default judgment on May 7, 2019 and an inquest was scheduled for July 23, 2019. After inquest on July 23, 2019, plaintiff was awarded judgment in her favor in the amount of \$200,000.00 and the final judgment was entered on September 30, 2019.

Defendant, I.J. Empire, Inc., moves to vacate its default contending, *inter alia*, that defendant did not receive the summons and complaint or any papers related to this matter and did not know about the default judgment until on or about October of 2019 when its bank account was frozen and defendant took immediate action to address the default judgment. Defendant also contends that it has a meritorious defense; namely, that plaintiff may be comparatively negligent, that defendant did not have notice of any alleged defective condition and defendant did not cause or create any alleged dangerous condition.

Plaintiff opposes and contends, *inter alia*, that defendant's assertion regarding the condition of the sidewalk is patently false and that defendant has not proffered a reasonable excuse for its default in appearing in the instant action.

Pursuant to CPLR 5015(a)(1), "[a] party seeking to vacate a default in appearing or answering and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*Hamilton Pub. Relations v. Scientivity, LLC*, 129 A.D.3d 1025, 1025, 12 N.Y.S.3d 234; *see* CPLR 5015[a][1]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Mid-Hudson Props., Inc. v. Klein*, 167 A.D.3d 862, 864, 90 N.Y.S.3d 264; *White v. Inc. Vill. of Hempstead*, 41 A.D.3d 709, 710, 838 N.Y.S.2d 607, 608).

"CPLR 317 provides that a person served with a summons, other than by personal delivery to him or her, who does not appear, may be allowed to defend the action within one year

after he or she obtains knowledge of entry of the judgment upon a finding of the court that he or she did not personally receive notice of the summons in time to defend and has a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116 [1986], *Xiao Lou Li v. China Cheung Gee Realty, Inc.*, 139 A.D.3d 724, 724-725 [2nd Dept 2016]). “It is also well established that service on a corporation through delivery of process to the Secretary of State is not ‘personal delivery’ to the corporation or to an agent designated under CPLR 318 (*see, e.g., Taieb v Hilton Hotels Corp.*, 60 NY2d 725; *Cecelia v Colonial Sand & Stone Co.*, 85 AD2d 56, 57). Thus, corporate defendants served under Business Corporation Law § 306 have frequently obtained relief from default judgments where the address served was incorrect and consequently, did not receive actual notice of the action in time to defend (*see, e.g., Union Indem. Ins. Co. v 10-01 50th Ave. Realty Corp.*, 102 AD2d 727; *Meyer v Fisher & Sons Dental Lab.*, 90 AD2d 889)” (*Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 142, 492 N.E.2d 116 [1986]). Whether to grant relief pursuant to CPLR 317 is discretionary (*see Goldfarb v. Zhukov*, 145 A.D.3d at 759, 43 N.Y.S.3d 135), and relief may be denied “where, for example, a defendant’s failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice” (*Eugene Di Lorenzo, Inc.*, 67 N.Y.2d at 143)(*see Stevens v. Stepanski*, 164 A.D.3d 935, 937, 84 N.Y.S.3d 1, 3 [2d Dept. 2018]). “A failure to file a change of address with the Secretary of State ‘does not constitute a per se barrier to vacatur of a default judgment pursuant to CPLR 317’ (*Arabesque Recs., LLC v. Capacity LLC*, 45 A.D.3d 404, 404, 846 N.Y.S.2d 43)”(*see Evans v. City of Mt. Vernon*, 163 A.D.3d 770, 772, 81 N.Y.S.3d 176, 178 [2nd Dept. 2018]).

In the instant case, the court finds that defendant adequately demonstrated that it did not receive the summons and complaint in time to defend. Moreover, defendant established a

potentially meritorious defense, namely, that the sidewalk was not defective and defendant did not have any notice of any defective conditions. It should be noted that defendant's burden of showing a meritorious defense is not as great as the burden in opposing a motion for summary judgment as long as some potential meritorious defense is shown (*see Bilodeau-Redeye v. Preferred Mutual Ins. Co.*, 38 AD3d 1277 [4th Dept. 2006]) and public policy favors the resolution of cases on the merits (*see McKiernan v. Vaccaro*, 168 A.D.3d 826, 827, 90 N.Y.S.3d 292, 293 [2nd Dept 2019]; *see generally Morgan v. City of New York*, 59 A.D.3d 412, 872 N.Y.S.2d 543 [2nd Dept 2009]). In the light of the fact that the default judgment was entered not more than two months before the present motion, the sharp factual disputes between the parties and given the "general allegations of negligence in the complaint" (*Hon-Kuen Lo v. Gong Park Realty Corp.*, 16 A.D.3d 553, 792 N.Y.S.2d 145 [2nd Dept. 2005]), defendant established its entitlement to vacatur of the default judgment (*see Bing Fang Qiu v. Cameo Owners Corp.*, 172 A.D.3d 802, 803, 101 N.Y.S.3d 181, 183 [2nd Dept. 2019]; *see gen. Workman v. Amato*, 231 A.D.2d 714, 647 N.Y.S.2d 794 [2nd Dept. 1996]).


Therefore, defendant, I.J. Empire, Inc.'s motion to vacate the default judgment is granted and it is ORDERED that the default judgment against defendant I.J. Empire, Inc. is vacated. Consequently, it is further ORDERED that plaintiff's default judgment against defendant Wild Orchid Flowers, Corp. is hereby modified to the extent that the inquest shall take place at the time of trial.

The Note of Issue is hereby vacated and the matter is restored to active status. Defendant, I.J. Empire, Inc. shall interpose a verified answer to the verified complaint within 45 days hereof. This matter shall be overridden to a random IAS part and parties to appear for a preliminary conference on April 24, 2020 in the intake part at 9:30 a.m.

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

This constitutes the decision and order of the court.

Dated: MAR 11 2020


Richard J. Montelione, A.J.S.C.

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FILED

