

Purinova, LLC v Angelo Spray Foam Corp.
2021 NY Slip Op 30309(U)
February 3, 2021
Supreme Court, New York County
Docket Number: 155853/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

PURINOVA, LLC,

Plaintiff,

- v -

ANGELO SPRAY FOAM CORP. and WENDY
HERNANDEZ,

Defendants.

-----X

INDEX NO. 155853/2020

MOTION DATE 02/01/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

ORDER

Upon the foregoing documents, it is

ORDERED that defendants' motion to vacate the judgment of default dated November 10, 2020 is granted pursuant to CPLR § 317 and CPLR 5015(a)(4) and all restraints on bank accounts at Bank of America owned by defendant Hernandez are vacated, effective immediately; and it is further

ORDERED that defendants shall serve and file (an) answer(s) to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon 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 counsel are directed to submit to 59nyef@nycourts.gov and file with NYSCEF a proposed preliminary conference order or a counter proposed preliminary conference order on March 19, 2021.

DECISION

The Temporary Relocation Agreement Dated November 16, 2018 between the owner/landlord and tenant Hernandez, defendant at bar, regarding 9-21 Sherman Avenue, New York, New York, states, in pertinent part:

2. Tenant and all members of Tenant's household shall vacate the Premises on the Commencement Date, and neither Landlord nor HPD shall be responsible for any personal property remaining in the Premises after the Commencement Date.

Such agreement provided the Commencement Date to be November 30, 2018, stated in the recitals that the "Landlord's

Work shall take approximately twenty-four (24) months", and left the Completion Date for such construction work blank.

Defendant Hernandez, in her sworn affidavit, stated that on August 28, 2020, neither she nor her father were at 21 Sherman Avenue, the premises where the process server stated that he served "John" Hernandez, as she and her father vacated the apartment in question in accordance with the agreement, and did not return to such premises until November 2020. Defendant also produces a cable invoice through October 30, 2020 and an electric bill through November 25, 2020 for the premises where she and her father relocated. This court finds that the agreement and utility bills are irrefutable proof of defendant Hernandez's statement that she did not return to the premises where service was purportedly effectuated upon a person of suitable age and discretion until November 2020. Such evidence proves that plaintiff failed to serve process upon defendant Hernandez in accordance with CPLR § 308.

This court agrees with plaintiff that its failure to provide an affidavit that "an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment", in accordance with BCL § 306 and CPLR § 3215(g)(4)(i) does not implicate personal jurisdiction over the corporate defendant at bar. See Gourvitch v 92nd and 3rd Rest

Corp, 146 AD3d 431 (1st Dept 2017). However, given that the additional mailing was not made to the last known address of the corporation, which was the change of address defendant corporation filed with the Secretary of State, this court finds that the corporate defendant "did not personally receive notice of the summons in time to defend" pursuant to CPLR § 317. Eugene Di Lorenzo, Inc v AC Dutton Lumber Co, Inc, 67 NY2d 138, 141-142 (1986). This court also finds that the corporate defendant has raised a meritorious defense, to wit, fraud on the part of plaintiff in procuring the judgment in Illinois. See Boston & M.R.R. v Delaware & Hudson Co, 238 AD 191 (3d Dept 1933).

2/3/2021

DATE

Debra A. James
 DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE