

<b>One Penn Plaza LLC v KKL Solutions LLC</b>
2021 NY Slip Op 31413(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 160304/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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ONE PENN PLAZA LLC

Plaintiff,

- v -

KKL SOLUTIONS LLC, DBA NYER CONSULTING,

Defendant.

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INDEX NO. 160304/2020
MOTION DATE 04/26/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

The motion by defendant to vacate the default judgment entered against it is denied.

Background

Plaintiff brings this case for breach of a lease signed by defendant (tenant). The Court previously awarded plaintiff a default judgment, a motion that defendant failed to oppose. Now defendant moves to vacate that decision.

Defendant claims that it filed an answer and argues that the parties discussed potential settlement. It contends that while these negotiations were ongoing, plaintiff filed a notice of rejection for this answer. Defendant complains that plaintiff then filed a motion for a default judgment but defendant did not have sufficient time to oppose.

Defendant claims that it never received actual notice of the summons and complaint in time to defend the case. It also argues that there was no significant delay to plaintiff in the untimely answer and the Court should accept it nunc pro tunc. Defendant contends that it thought the case would be settled "before and after the default motion." It also asserts that it has a

potentially meritorious defense for not paying the rent because the premises (office space) were unusable due the ongoing pandemic.

In opposition, plaintiff claims that whether or not defendant vacated the premises prior to service from the Secretary of State is of no moment. It questions how defendant suddenly found out about the case in light of the fact that it allegedly never received service. Plaintiff details what it believes are defendant's acts of delay throughout the litigation, including the failure to timely file an answer. It also insists that defendant lacks a meritorious defense.

In reply, defendant emphasizes that it never received the summons and complaint.

## Discussion

“An application brought pursuant to CPLR 5015 to be relieved from a judgment or order entered on default requires a showing of a justifiable excuse and legal merit to the claim or defense asserted” (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9, 739 NYS2d 49 [1st Dept 2002]). “A party may move to vacate a default judgment against it under CPLR 317 or CPLR 5015. Even where the moving party cites only one statutory provision, the reviewing court may consider whether application of either statute would warrant the relief requested. While it is unclear under which statute defendant's motion was made, both statutes require that, in order to prevail, the movant must demonstrate that it has a meritorious defense to the action. Even where it is uncontroverted that defendant did not receive notice of the summons and complaint in time to defend the action, as defendant claims here, the failure to adequately demonstrate a meritorious defense will be fatal to defendant's motion to vacate” (*Peacock v Kalikow*, 239 AD2d 188, 189, 658 NY2d 7 [1st Dept 1997] [citation omitted]).

The Court denies the motion. As an initial matter, the Court finds that defendant did not establish a reasonable excuse. Although defendant submits an affidavit from an employee in which he claims that defendant never received the summons and complaint (NYSCEF Doc. No. 24), there is no explanation for how defendant learned about the case. Here, defendant obviously found out about the case by January 28, 2021 when it filed an answer.

The more critical point for this Court is defendant's failure to take any action after filing the answer. Plaintiff timely rejected that answer (NYSCEF Doc. No. 6) and, in response, defendant did nothing. Defendant did not move to compel late acceptance of the answer. In fact, defendant failed to oppose plaintiff's motion for a default judgment despite the fact that it received notice of that motion. Once defendant e-filed an answer, every filing on the docket generates an email to defendant's counsel. And defendant did not raise a reasonable excuse for completely ignoring the case while plaintiff prosecuted this action.

Defendant did not deny that it knew about the motion for a default judgment. It admits that "Upon receipt of the default motion, Defendant further approached to Plaintiff and provided its financials of 2020 to Plaintiff" (NYSCEF Doc. No. 23, ¶ 24). Although defendant may have genuinely believed that the case would settle, that is not a basis to ignore a motion for a default judgment.

Moreover, defendant's claim that it did not have sufficient time to offer opposition is completely without merit. Defendant did not argue that the plaintiff's notice of motion violated CPLR 2214(b) (time limits about motion papers) or that it requested an adjournment of the motion. This Court frequently grants requests for adjournments when parties seek additional time to oppose motions. For some reason, defendant did not do that.

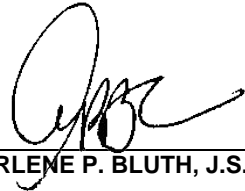
Instead, Defendant makes the bizarre argument that “it is our understanding that the Court’s calendar is significantly influenced by the Covid-19 pandemic due to heavy workload and restricted office use, and the Court will set up the calendar and notify the parties of the motion return date before which date the attorneys should prepare all documents and present a full legal argument. Defendant’s attorney was not notified of a return date” (*id.* ¶ 26). Frankly, the Court has no idea what this means but it is not a reasonable excuse. This Court has continued to issue written opinions during the ongoing pandemic; there is no “backlog” in this part. The claim that defendant was not notified of the return date is ludicrous—the return date was indicated on plaintiff’s notice of motion (NYSCEF Doc. No. 7). The motion was submitted on the return date, March 12, 2021, and the Court issued a decision on March 19, 2021.

Defendant also did not establish a reasonable excuse. As plaintiff points out, courts have rejected efforts by commercial tenants to be excused from rent obligations due to the pandemic (*e.g. Gap Inc. v Ponte Gadea New York LLC*, 20 CV 4541-LTS-KHP, 2021 WL 861121, at \*1 [SD NY 2021]). The Court also observes that plaintiff did not seek an acceleration of the lease; it sought all rent owed through February 2021 in a motion filed on February 23, 2021. And the Court finds that plaintiff’s failure to attach a signature to the affirmation of counsel for plaintiff in support of the motion for a default judgment in support (NYSCEF Doc. No. 8) can be overlooked. The fact is that in order to file this document, counsel had to log in to NYSCEF under his account. While the affirmation should have been signed, the act of logging in with counsel’s username and password and uploading the affirmation with that account is sufficient for this Court. The Court also observes that the affidavit from plaintiff’s Executive Vice President was properly notarized (NYSCEF Doc. No. 9).

Accordingly, it is hereby

ORDERED that the motion by defendant to vacate the default judgment entered against it is denied.

4/27/2021  
DATE

  
ARLENE P. BLUTH, 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