

**Hotel 237, LLC v G.M. Canmar Residence Corp.**

2021 NY Slip Op 32903(U)

December 22, 2021

Supreme Court, New York County

Docket Number: Index No. 657772/2019

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

*Justice*

-----X

HOTEL 237, LLC,

Plaintiff,

- v -

G.M. CANMAR RESIDENCE CORP.,

Defendant.

-----X

INDEX NO. 657772/2019

MOTION DATE 12/16/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25

were read on this motion to/for

JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for a declaratory judgment on its summons with notice on default is DENIED; and it is further

ORDERED that the cross motion of defendant to extend its time to appear to September 30, 2020, the date it served and filed its notice of appearance, nunc pro tunc, and to compel plaintiff to file and serve its complaint is GRANTED; and it is further

ORDERED that plaintiff shall serve its complaint within twenty (20) days of service of a copy of this Order with notice of entry; and it is further

ORDERED that defendant shall serve and file its answer, or otherwise respond to the complaint, within twenty (20) days of service of the complaint; and it is further

ORDERED that plaintiff shall serve and file a reply, if any, to the answer, within twenty (20) days of service of the answer; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference orders on March 14, 2022.

#### DECISION

CPLR 317 provides, in part:

"[a] person served with a summons other than by personal delivery to him or to his agent for service under [CPLR] 318 \*\*\* may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment\* \* \* 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."

Here, the affidavit of service of plaintiff's process server states that on January 2, 2020, he effectuated service of the summons with notice dated December 31, 2019 upon defendant corporation not by personal delivery to it, but by delivery to the Secretary of State, as such defendant's agent, pursuant to CPLR § 311 and Business Corporation Law § 306. By affidavit of service, another process server states that he mailed the summons with notice to defendant at its business address on August 21, 2020, more than seven months later.

Defendant's principal states under oath that he did not personally receive knowledge of the service of such summons with notice made upon the Secretary of State because defendant corporation's address on file with the Secretary of State belonged to its attorney, who had deceased six years before. Defendant's principal asserts that he did not personally receive the summons with notice until delivery of the mailing of same to the corporation's business address.

Plaintiff is correct that as defendant has the obligation to keep the Secretary of State advised of its current and correct address" (Crespo v ADA Mgt, 292 AD2d 5,9 [1<sup>st</sup> Dept 2002]), defendant's failure to meet such obligation does not constitute a reasonable excuse for its late appearance, as required for a default vacatur under CPLR 5015(a)(1).

However, this court credits the statement of defendant's principal that he did not personally receive knowledge of the summons in time to defend, i.e., within thirty (30) days of delivery of such summons to the Secretary of State. Therefore, notwithstanding its neglect in failing to file a change of address with the Secretary of State, defendant is entitled to relief from his untimely appearance pursuant to CPLR 317. See Eugene Di Lorenzo, Inc v AC Dutton Co, Inc, 67 NY2d 138, 141-142 (1986).

Plaintiff's argument that CPLR 317 does not pertain because judgment has not been entered is unpersuasive. In fact, as no default judgment has been entered, the proper standard is not CPLR 5015(a)(1) review but the standard under CPLR 3012(d), which applies to motions to extend the time to serve pleadings, which defendant cites in its cross motion. See Jones v 414 Equities, LLC, 57 AD3d 65, 81 (1<sup>st</sup> Dept 2008).

As was held to be a CPLR 3012(d) requirement in Jones, defendant has raised a meritorious defense, in this case via the dueling affidavit of its principal denying that he executed the subject Lease Amendment.

Nor has plaintiff demonstrated any prejudice by defendant's late notice of appearance, as plaintiff waited seven months, which was after defendant served such notice, to move for a default judgment.

In addition, relative to the 3215(g)(4) notice that plaintiff delivered to defendant by mail at its business address some six months after the period that defendant had to appear, defendant's delay was brief.

Moreover, in light of "an absence of willfulness" and "a 'strong public policy favoring the determination of actions on

their merits'", Heskel's West 38<sup>th</sup> Street Corp v Gotham Const Co, LLC, 14 AD3d 306, 307 (1st Dept 2006), relief from defendant's tardiness in serving its notice of appearance is warranted.

*Debra A. James*

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12/22/2021

DATE

DEBRA 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