

Salazar-Ramirez v Martinique Hotel Assoc.
2022 NY Slip Op 30796(U)
March 10, 2022
Supreme Court, New York County
Docket Number: Index No. 153728/2017
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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CELSO SALAZAR-RAMIREZ,
Plaintiff,

- v -

MARTINIQUE HOTEL ASSOCIATES, HKS
CONSTRUCTION CORP, PENTA RESTORATION CORP.

Defendants.

-----X

INDEX NO. 153728/2017
MOTION DATE 03/10/2022
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for VACATE - JUDGMENT

The motion by defendant Penta Restoration Corp. ("Penta") to vacate the judgment entered against it is denied.

Background

In this Labor Law case, plaintiff successfully moved for a default judgment against all defendants (NYSCEF Doc. No. 13). This Court then held an inquest at which it awarded \$400,000 against defendants jointly and severally (NYSCEF Doc. No. 29). Plaintiff then had the judgment entered.

Penta now moves to vacate the judgment and claims that service was improper. It argues that the process server's claim that the papers were left with an office assistant is not sufficient. Penta argues that plaintiff also never served an affidavit of additional mailing.

Penta also takes issue with the merits of the default judgment (granted by the judge previously assigned to this case) and observes that plaintiff failed to timely file a note of issue,

which resulted in the Court striking the case from the active calendar. Plaintiff later had to move to restore the case. Penta complains about how long it took for plaintiff to do the inquest and to enter judgment after the inquest.

Also submitted is the affidavit of Penta's president, who claims that he was aware of plaintiff's injury and notified Penta's insurance broker about the incident (NYSCEF Doc. No. 37 at 2). Penta's president, Mr. Fillas, insists that this broker assured Penta that it had coverage through an indemnification provision with a subcontractor and that this subcontractor would defend and indemnify Penta. Mr. Fillas maintains he thought Penta's interests in this case were covered by this indemnification provision and only found out about the judgment when a credit monitoring service notified him about it.

In opposition, plaintiff argues that Penta's claims about improper service cite the wrong provision of the CPLR and insists the affidavit of service demonstrates that there was proper service. Plaintiff maintains it was not required to serve Penta under CPLR 3215(g)(4) and that any additional notices it sent to defendants were simply good faith efforts to give notice. It concludes that Penta failed to identify a reasonable excuse or meritorious defense.

Discussion

“As to vacating the default, a party seeking to vacate a default judgment must demonstrate both a reasonable excuse for the default and a meritorious defense” (*Aetna Life Ins. Co. v UTA of KJ Inc.*, 2022 NY Slip Op 01266 [1st Dept 2022] [citations omitted]). An affidavit of service is prima facie evidence of proper service (*Bank of Am., N.A. v Budhan*, 171 AD3d 622, 622, 99 NYS3d 264 [1st Dept 2019]).

Here, the affidavit of service insists that service was effectuated on Rachael Pavon, an office assistant for Penta (NYSCEF Doc. No. 46). Penta did not sufficiently rebut the

presumption of proper service based on the process server's affidavit. The Court observes that Mr. Fillas, Penta's president, did not explain why service on Ms. Pavon was improper. He did not deny that she works in his office, he did not claim that the description of her was inaccurate and he did not even claim that she was not authorized to accept service. Only plaintiff's attorney takes issue with this service. And plaintiff did not attach an affidavit from Ms. Pavon to either dispute she accepted service or explain why service on her was insufficient. In other words, Penta's conclusory denial of service does not compel the Court to grant the instant motion.

And Penta's claim about plaintiff's failure to serve the additional mailings is also without merit because plaintiff effectuated service on Penta via personal in hand service (*see* CPLR 3215[g][4] [requiring additional mailing where service was effectuated via the Secretary of State]).

The Court also emphasizes that Mr. Fillas admits that "if Penta received any correspondence with the matter, it is Penta's pattern and practice to simply forward the document(s) to its broker" (NYSCEF Doc. No. 37, ¶ 11). While it was a good idea to forward correspondence to its insurance broker, it seems that Penta never followed up or ever confirmed what was happening in a case in which it was named as a direct defendant. And it shows that Penta knew about plaintiff's claim and possibly this litigation.

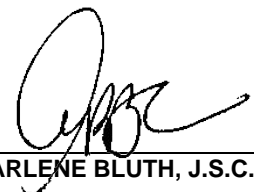
Even if Penta could raise a reasonable excuse for its default, it failed to raise a meritorious defense. The assertion that it thought it was entitled to defense and indemnity from a subcontractor at the job site is not a defense to plaintiff's claims. Whether Penta might have potential claims against the insurance broker or the subcontractor remains to be seen. But, for purposes of this motion, it does not raise a meritorious defense to plaintiff's claim against Penta.

That plaintiff may have made certain mistakes or not moved quickly to secure a judgment is besides the point. Penta did not satisfy the elements of a motion to vacate.

Accordingly, it is hereby

ORDERED that the motion by defendant Penta Restoration Corp. to vacate the judgment entered against it is denied.

3/10/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE