

**Creative Direction Constr. & Design, LLC v  
Westchester Fire Ins. Co.**

2022 NY Slip Op 31357(U)

April 25, 2022

Supreme Court, New York County

Docket Number: Index No. 653820/2020

Judge: Arlene Bluth

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. ARLENE BLUTH **PART** **14**

*Justice*

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CREATIVE DIRECTION CONSTRUCTION & DESIGN, LLC,

Plaintiff,

- v -

WESTCHESTER FIRE INSURANCE COMPANY, NORTHE  
GROUP, INC., NEW YORK CITY DEPARTMENT OF  
PARKS AND RECREATION, NEW YORK CITY  
DEPARTMENT OF FINANCE, CITY OF NEW YORK

Defendant.

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**INDEX NO.** 653820/2020

**MOTION DATE** 04/18/2022

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

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

The motion by defendant Northe Group Inc. (“Northe”) to vacate the default judgment entered against it is granted.

**Background**

Northe moves to vacate the default entered against it and submits the affidavit of its owner, Mr. Albert Zihenni ( NYSCEF Doc. No. 96). Mr. Zihenni explains that he was not living at the place where service was allegedly effectuated—his co-op apartment. He observes that his apartment suffered a massive fire in 2017 and has been empty since then so the alleged service in August 2020 is not sufficient. Mr. Zihenni also claims he has been living in Pelham, New York since November 2018 and attaches a signed lease for an apartment there.

He maintains that affidavit of service’s reference to delivery on a “John Albert, Managing Agent” is not satisfactory because he has never gone by the name John and he does not match the

description of the person who was served. Mr. Zihenni insists that Northe has numerous meritorious defenses and wants to assert counterclaims against plaintiff. He argues that this entire case is about a subcontract where Northe hired plaintiff and an alleged oral change order. He emphasizes that Northe never agreed to compensate plaintiff for its time and materials at a 23.2% markup as referenced in this alleged oral change order.

In opposition, plaintiff points out that this Court granted a default judgment against Northe on January 5, 2021 and that the case has been settled with defendant Westchester Fire Insurance Company. It insists that Northe did not move to vacate the default in a timely manner as it took Northe approximately 80 days to do so. Plaintiff contends that Northe did not move to vacate the note of issue filed by plaintiff within 20 days as required under 22 NYCRR 202.22.

In reply, Northe acknowledges that its moving papers misrepresented that no note of issue had been filed but that this should not compel the Court to deny the motion. It insists that plaintiff did not address any of the substantive arguments raised by Northe.

### **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.*, 160 NYS3d 590, 2022 NY Slip Op 01266 [1st Dept 2022]).

The Court grants the motion. As Northe points out, plaintiff did not directly address any of the substantive arguments raised by Northe in its moving papers. And Northe established that it has a reasonable excuse for not appearing (its owner was not living where service was allegedly effectuated) and a meritorious defense. Instead, plaintiff focuses on the fact that Northe did not move to vacate the note of issue within 20 days after it was filed. But that fact is irrelevant because Northe had not yet appeared in the case when the note of issue was filed.

That plaintiff has apparently settled this case with other defendants is immaterial. That assertion has nothing to do with whether another defendant can seek to vacate a default judgment entered against it.

Accordingly, it is hereby

ORDERED that the motion by defendant Northe Group Inc. to vacate its default is granted and this defendant shall file an answer on or before May 12, 2022; and it is hereby

ORDERED that the note of issue is hereby stricken and this matter is scheduled for a conference on July 14, 2022 at 10 a.m.; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; 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](http://www.nycourts.gov/supctmanh)).

By July 7, 2022, please upload one of the following:

1. A fully executed discovery stipulation. If you timely upload this, it will be reviewed; if the court finds it satisfactory, then it will be so-ordered and uploaded. There will be no need for you to attend the above-scheduled conference and we will set the date for the next conference. If it is not satisfactory (such as being a repeat of the prior conference order), then the conference may be held or adjourned, as the Court deems appropriate.
2. A stipulation of partial agreement. Parties must stipulate to what they can agree and leave blanks for what they cannot. Parties must then submit a written explanation as to the disagreed portions. The Court will either decide the issue based on your written explanations, hold the conference or approve what you have agreed and instruct you to make a motion as to the disputed matters.

3. A letter indicating why you cannot agree to anything and identifying the areas in dispute.

If nothing is timely submitted, then the conference will be adjourned. If you fail to timely submit one of the above for three consecutive conferences, your case will be dismissed.

<u>4/25/2022</u> <b>DATE</b>					 <b>ARLENE BLUTH, J.S.C.</b>
<b>CHECK ONE:</b>	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
<b>APPLICATION:</b>	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE