

**Balteanu v Terrace on the Tenth, Inc.**

2022 NY Slip Op 31499(U)

May 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 512797/2017

Judge: Joy F. Campanelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS:PART DJMP

-----X  
MIRA BALTEANU,

Index Number: 512797/2017

Plaintiff,

DECISION AND ORDER

-against-

HON. JOY F. CAMPANELLI, J.S.C.

THE TERRACE ON THE TENTH, INC.,  
5024 10<sup>TH</sup> AVENUE LLC AND US  
INTERNATIONAL REALTOR, LLC,

Defendants.  
-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Notice of Motion/Order to Show Cause/Affidavits/Affirmations/Exhibits.....	1-2
Answering Affirmations/Affidavits/Exhibits.....	3
Reply Affirmations/Affidavits/Exhibits.....	4
Other.....	

IT IS ORDERED that:

Defendant US International Realtor LLC (hereinafter "US International") moves, by Order to Show Cause, for an Order: 1) pursuant to CPLR § 5015(a)(4) dismissing plaintiff's Amended Summons and Complaint based on the grounds that the Court lacks jurisdiction in this matter as the Amended Summons and Complaint was never served on US International; 2) pursuant to CPLR §§ 317, 3215 and 5015 vacating the default judgment that was entered on December 3, 2019 and allowing defendant US International to defend on the merits; 3) pursuant to CPLR § 6223 vacating the Sheriff's sale currently scheduled for May 11, 2022 at 12:00 pm of the condominium unit located at 9935 Shore Road, Unit 2C, Brooklyn, NY; 4) pursuant to CPLR §§ 6301 and 6313 temporarily restraining plaintiff, the Sheriff's Office of the City of New York, and Joseph Fucito Sheriff of the City of New York from levying upon and/or selling real property commonly known as 9935 Shore Road, Unit 2C, Brooklyn, NY; 5) pursuant to CPLR § 6301 granting movant a preliminary injunction restraining plaintiff, the Sheriff's Office of the City of New York, and Joseph Fucito

Sheriff of the City of New York from levying upon and/or selling real property commonly known as 9935 Shore Road, Unit 2C, Brooklyn, NY; and, 6) pursuant to CPLR § 6301 granting movant a permanent injunction restraining plaintiff, the Sheriff's Office of the City of New York, and Joseph Fucito Sheriff of the City of New York from levying upon and/or selling real property commonly known as 9935 Shore Road, Unit 2C, Brooklyn, NY.

Defendant argues that it is entitled to the above stated relief as plaintiff filed an Amended Summons and Complaint on August 18, 2017, without leave of the Court. In addition, paragraph 68 of said document erroneously alleges that defendant maintained a principal place of business at 34-36 Union Street, Suite 205, Flushing, NY 11354 as defendant's principal place of business is 979 51<sup>st</sup> Street, Suite 1R, Brooklyn, NY 11219. Defendant received no notice of this action until March 15, 2022, when Samy Lasheen, defendant's "sole member," received notice, that was mailed to his personal residence (located at 9935 Shore Road, Unit 2C, Brooklyn, NY), that it was to be sold by the Sheriff on May 11, 2022. Mr. Lasheen never maintained an office located at 34-36 Union Street, Suite 205, Flushing, NY even though he maintains a medical office located at 979 51<sup>st</sup> Street in Brooklyn. Mr. Lasheen argues that he possesses a meritorious defense in that even though he was formerly a condominium unit owner of unit M2, which was sold in late 2017, the condominium's management, rather than the unit owners, controlled and maintained the common areas of the premises, which included snow and ice removal. Even though US International Realtor, LLC was, at the time of plaintiff's accident, the owner of two units, it was not responsible for the maintenance of the sidewalk area where plaintiff's accident occurred.

CPLR §3025(a) states that "(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." In this matter, movant has failed to demonstrate that the period for responding to plaintiff's initial Summons and Complaint had expired

at the time it was amended to add defendant as a part to this action. As such, defendant has failed to demonstrate that plaintiff was obligated to secure leave prior to filing and serving the Amended Summons and Complaint.

LLC Law §303 states, in pertinent part:

*(a) Service of process on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such limited liability company shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose.*

It is undisputed that plaintiff's amended summons and complaint was served on moving defendant via the Secretary of State. Despite defendant's claims to the contrary, plaintiff's amended summons and complaint were served pursuant to LLC Law §303 rather than BCL §306. It is also noted that the Secretary of State forwarded a copy of plaintiff's amended summons and complaint to defendant at the address defendant purports is the correct and proper service address: 979 51<sup>st</sup> Street, 1R, Brooklyn, NY 11219 (See, NYSCEF Docs 44, 60 and 67) and that it maintained a place of business at 34-36 Union Street, Suite 205, Flushing, NY 11354 (NYSCEF Doc. 59 and 67). In instances where a defendant does not contend that the address it had on file with the Secretary of State was wrong, the mere denial of receipt of the summons and complaint, without more, is insufficient to constitute a reasonable excuse for its default [See, LLC Law §303(a); *Hamilton Public Relations v. Scientivity, LLC*, 129 A.D.3d 1025 (2d Dep't., 2015); *Trini Realty Corp. v. Fulton Center LLC*, 53 A.D.3d 479 (2d Dept., 2008)]. The mere denial of service by the defendant is insufficient to rebut the presumption of service created by the process server's affidavit of service *Commissioners of State Ins. Fund v. Nobre, Inc.*, 29 A.D.3d 511 (2d Dep't., 2006); *Truscello v. Olympia Const., Inc.*, 294 A.D.2d 350 (2d Dep't., 2002). Even though defendant has alluded that the address on file

with the Secretary of State was incorrect (See, NYSCEF Doc. 39 at ¶ 12) no demonstration of this has been made. Furthermore, even if defendant's argument that the Union Street address is not its principal place of business is true, defendant has failed to demonstrate that said address did not serve as a valid mailing address for the defendant or that the unit was sold in late 2017. In its decision on the case of *Ultimate One Distributing Corp. v. 2900 Stillwell Ave., LLC*, 140 A.D.3d 1054 (2d Dep't., 2016), the Second Department stated, in pertinent part:

*CPLR 3012(d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." The showing of reasonable excuse that a defendant must establish to be entitled to relief under CPLR 3012(d) is the same as that which a defendant must make to be entitled to vacate a default judgment (see Gershman v. Ahmad, 131 A.D.3d 1104, 1105, 16 N.Y.S.3d 836; Citimortgage, Inc. v. Stover, 124 A.D.3d 575, 2 N.Y.S.3d 147; Stephan B. Gleich & Assoc. v. Gritsipis, 87 A.D.3d 216, 226, 927 N.Y.S.2d 349). Here, personal jurisdiction was obtained over the defendant 2900 Stillwell Avenue, LLC (hereinafter the defendant), by personal delivery of copies of the summons and complaint to the Secretary of State (see Limited Liability Company Law § 303). The defendant failed to establish a reasonable excuse for its delay in appearing in the action, as the mere denial by its member of receipt of a copy of the summons and complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised \*1055 by the affidavit of service (see Xiao Lou Li v. China Cheung Gee Realty, LLC, 139 A.D.3d 724, 725–726, 32 N.Y.S.3d 198 [2d Dept.2016]; Chichester v. Alal–Amin Grocery & Halal Meat, 100 A.D.3d 820, 954 N.Y.S.2d 577; Sussman v. Jo–Sta Realty Corp., 99 A.D.3d 787, 788, 951 N.Y.S.2d 683). "If the [defendant] failed to actually receive a copy of the summons and complaint from the Secretary of State due to a change of address, it was due to its own fault as it failed to keep the Secretary of State advised [of] its current address for the forwarding of process' " (Sussman v. Jo–Sta Realty Corp., 99 A.D.3d at 788, 951 N.Y.S.2d 683, quoting Town House St., LLC v. New Fellowship Full Gospel Baptist Church, Inc., 29 A.D.3d 893, 894, 815 N.Y.S.2d 281). Although the defendant did not cite to CPLR 317 in support of its motion, this Court may consider CPLR 317 as a basis for vacating the default (see Eugene Di Lorenzo, \*\*144 Inc. v. A.C. Dutton Lbr. Co., Inc., 67 N.Y.2d 138, 501 N.Y.S.2d 8, 492 N.E.2d 116). However, the defendant's mere denial of receipt of the summons and complaint is also insufficient to establish lack of actual notice of the action in time to defend for purposes of CPLR 317 (see Xiao Lou Li v. China Cheung Gee Realty, LLC, 139 A.D.3d 724, 725–726, 32 N.Y.S.3d 198; Capital Source v. AKO Medical, P.C., 110 A.D.3d 1026, 1027, 973 N.Y.S.2d 794; Wassertheil v. Elburg, LLC, 94 A.D.3d 753, 754, 941 N.Y.S.2d 679; Matter of Rockland Bakery, Inc., v. B.M. Baking Co., Inc., 83 A.D.3d 1080, 1081, 923 N.Y.S.2d 572). (Emphasis added)*

A party seeking to vacate a default judgment pursuant to CPLR §5015(a)(1) must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138 (1986). A party who fails to keep the Secretary of State apprised of its current address for the forwarding of process is not entitled to vacatur pursuant to CPLR §5015(a)(1) *Moran v. Grand Slam Ventures, LLC*, 160 A.D.3d 944 (2d Dep't., 2018); *Ultimate One Distributing Corp. v. 2900 Stillwell Ave., LLC, supra*; *Sussman v. Jo-Sta Realty Corp.*, 99 A.D.3d 787 (2d Dep't., 2012).

Pursuant to CPLR §317, a defendant who was served with a summons other than by personal delivery may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense *Dove v. 143 School St. Realty Corp.*, 172 A.D.3d 1315 (2d Dep't., 2019). An application pursuant to CPLR §317 must be made within one year of acquiring actual knowledge of the judgment *Bing Fang Qiu v. Cameo Owners Corp.*, 172 A.D.3d 802 (2d Dep't., 2019); *Acqua Capital, LLC v. Camarella Contracting Co., Inc.*, 164 A.D.3d 1197 (2d Dep't., 2018) but in no event more than five years after such entry. The mere denial of receipt of the summons and complaint is insufficient to establish a lack of actual notice for the purposes of CPLR § 317 *Deutsche Bank National Trust Company v. Benitez*, 179 A.D.3d 891 (2d Dep't., 2020); *Bank of N.Y. v. Samuels*, 107 A.D.3d 653 (2d Dep't., 2013). The self-serving affidavit of Samy Lasheen amounts to nothing more than a denial of receipt of plaintiff's summons and complaint and, without more, is insufficient *Andrews v. Wartburg Receiver, LLC*, 203 A.D.3d 1000 (2d Dep't., 2022); *Dove v. 143 School St. Realty Corp.*, 172 A.D.3d 1315 (2d Dep't., 2019); *Moran v. Grand Slam Ventures, LLC, supra*.

Since defendant has failed to demonstrate the existence of a reasonable excuse for its default it is not necessary to consider, reach or address the issue of whether it possesses a potentially meritorious defense. Considering the foregoing, defendant's remaining contentions are without merit and denied as moot.

Accordingly, defendant US International's motion, brought by Order to Show Cause, to vacate is **DENIED** in its entirety.

A copy of this order with Notice of Entry must be served on all sides within thirty (30) days of entry.

This constitutes the decision and order of the Court.

Dated: May 6, 2022  
Brooklyn, NY

  
HON. JOY F. CAMPANELLI, J.S.C.