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| Diamonds Direct N.Y. LLC v Ulanoff |
| 2022 NY Slip Op 31970(U) |
| June 27, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 153345/2021 |
| Judge: Sabrina Kraus |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

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DIAMONDS DIRECT N.Y. LLC

Plaintiff,

- v -

ANDREA ULANOFF,

Defendant.

-----X

INDEX NO. 153345/2021

MOTION DATE 06/13/2022

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 57 were read on this motion to/for EXTEND - TIME.

BACKGROUND

Plaintiff commenced this action for breach of contract relating to diamonds plaintiff provided to defendant, for inspection, which plaintiff alleges were never returned or purchased. Plaintiff is seeking damages in the amount of \$39,856.00 plus interest. Plaintiff asserts on or about September 9, 2014, the parties entered into an agreement, (Agreement 1) specifically referred to as a “Memorandum”, wherein plaintiff provided defendant with diamonds, with a reported value of \$32,356.00, for the purpose of inspection only. Agreement 1 states that the diamonds were to be returned on demand. Plaintiff alleges the diamonds were not returned by defendant. On or about June 25, 2015, plaintiff asserts the parties entered into a second

memorandum (Agreement 2), in which plaintiff provided defendant with more diamonds, for inspection only, valued at \$8500.00. However, plaintiff required a \$1000 deposit from defendant, which was paid in two parts, \$500 by check and \$500 in cash. Plaintiff alleges the diamonds were not returned by defendant.

Defendant failed to timely answer or appear, and the court granted plaintiff a default judgment pursuant to a decision and order dated February 18, 2022.

PENDING MOTIONS

On May 2, 2022, defendant appeared by counsel and moved by order to show cause for an order:

- a. Vacating the March 9, 2022 default judgment entered in favor of plaintiff and against defendant, in the amount of \$43,758.04; and
- b. Requiring proper service of the Summons and Complaint upon defendant; and
- c. Vacating any and all levies and/or liens on any and all of defendant's assets, including but not limited to defendant's bank accounts; and
- d. Returning any and all of defendant's assets that were turned over as a result of any levy in this action.

On June 13, 2022, plaintiff moved for an order pursuant to CPLR §306-b extending its time to serve a summons and complaint.

The motions are consolidated herein for determination and granted to the extent set forth below.

DISCUSSION

Defendant notably does not move for dismissal based on the alleged improper service, although defendant does assert service was improper as it was at an incorrect address.

Defendant's moving papers do not cite the statutory provision pursuant to which she seeks relief. Defendant does request that plaintiff be directed to properly serve defendant with the pleadings in this action, which further supports the inference that plaintiff does not seek dismissal of this action.

Plaintiff's counsel in its affirmation in support of Motion 4 consents to all the relief sought by defendant in Motion Seq No. 3. Plaintiff asserts the prior address used was from defendant's drivers license and voting registration but does not attach documentation to support these claims. Defendant does not dispute that the address where service was made is listed on her driver's license.

As defendant does not seek dismissal of the action and has not specified that the motion is brought pursuant to CPLR §5015(a)(4), the court will treat plaintiff's motion as being made pursuant to CPLR §317 or CPLR §5015(a)(1).

Defendant has established the right to relief under either of these statutes by asserting excusable default and alleging potentially meritorious defenses. Moreover, as noted plaintiff has consented to the relief sought.

Based on the foregoing, the defense of lack of jurisdiction has been waived by defendant, as she appeared without seeking dismissal on that basis, and the relief sought in Motion Seq No 4 is denied as moot.

WHEREFORE it is hereby:

ORDERED that defendant's motion to vacate its default herein is granted and defendant shall serve and file an answer to the complaint herein, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff return any and all assets that were turned over as a result of any levy in this action; and it is further

ORDERED the judgment entered herein is vacated, as are all levies and liens; and it is further

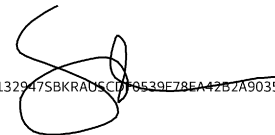
ORDERED that Motion seq No 4 is denied as moot; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); 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); and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference on August 10, 2022, at 12 PM.

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6/27/2022

DATE

SABRINA KRAUS, 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