

Kong's Body Shop, Inc. v Famek Mgt. Corp.
2022 NY Slip Op 32065(U)
June 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 502779/2021
Judge: Ingrid Joseph
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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of June 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
KONG'S BODY SHOP, INC.,

Plaintiff,

-against-

Index No. 502779/2021

FAMEK MANAGEMENT CORPORATION,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Order to Show Cause/Affidavit/Affirmation/Exhibits Annexed
Opposing Affidavit/Exhibits

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Upon the foregoing papers, defendant, Famek Management Corporation ("defendant"), moves (Motion Seq. 2) for an order vacating the judgment, entered on May 12, 2021, upon defendant's default in appearing in this action.

Plaintiff, Kong's Body Shop, commenced this matter by the filing of a summons and verified complaint on February 4, 2021. On May 13, 2021, plaintiff, through its attorney, filed a submission of judgment by default with an affidavit of default, setting forth the date on which defendant was served and its failure to interpose an answer, or otherwise appear in this matter. Plaintiff further submitted an affirmation of additional mailing, setting forth its compliance with the notice provisions outlined in Section 3215 of the CPLR. Specifically, plaintiff's attorney affirmed that a copy of the summons and

verified complaint were mailed to the defendant at its address of 736 E. 86th Street, Brooklyn, New York 11236. On May 14, 2021, the King's County Clerk entered a judgment against the defendant in the amount of \$24,254.76.

On June 2, 2021, the defendant's prior counsel (Okor Ogbu, Esq.), filed a notice of appearance, a request for judicial intervention, and an order to show cause, which was subsequently denied without prejudice by order dated August 5, 2021. The defendant filed the instant order to show cause on August 10, 2021. The court endorsed the application as presented on August 10, 2021, with no decretal paragraphs staying the action, or otherwise restraining the plaintiff, from enforcing the money judgment. Consequently, the Marshal of the City of New York., Martin A. Bienstock ("Marshal"), sent a notice to the defendant purporting to levy execution of the default judgment, which the defendant acknowledges receiving on August 19, 2021. Additionally, the Marshal levied execution on the defendant's bank account with Chase Morgan Bank, N.A., which turned over the sum of \$26,149.09 to the Marshal.

The defendant now seeks vacatur of the default judgment pursuant to CPLR § 5015 (a) (1). To be relieved of the judgment, the defendant is required to demonstrate both a reasonable excuse for its default in appearing in the action and a potentially meritorious defense to plaintiff's causes of action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Torres v DeJesus*, 197 AD3d 1260 [2021]). The determination of what constitutes a reasonable excuse sufficient to open a default lies within the sound discretion of the motion court (*see Matter of Gambardella v Orto v Light*, 278 AD2d 494 [2000]; *see also Harczark v Drive Variety, Inc.*, 21 AD3d 876,

876-877 [2005]). A second provision for obtaining relief from a default judgment is found in CPLR § 317. That section states, in part, that a person served with a summons other than by personal delivery to him or to his agent for service may be allowed to defend the action within one year after obtaining knowledge of entry of the judgment (CPLR § 317). There is no necessity for a defendant moving pursuant to CPLR § 317 to show a reasonable excuse (*Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 142-143 [1986]). It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR § 318 (*Taieb v Hilton Hotels Corp.*, 60 NY2d 725 [1983]).

In this case, the defendant did not identify whether vacatur of the May 2021 judgment is sought under Section 317 or 5015 of the Civil Practice Law and Rules. However, the court has discretion to treat the instant motion as if relief were sought under Section 5015 (a) or 317 of the Civil Practice Law and Rules pursuant to the “mistake, omission, defect or irregularity” exception outlined in CPLR § 2001 (*Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 142-143 [1986]). The record establishes, and plaintiff concedes, that it served the defendant via the Secretary of State, although there is no showing that the plaintiff was unaware of the defendant’s business address, or lacked information about the individual(s) authorized to accept service on behalf of the defendant. However, the record is devoid of any documents tending to show that plaintiff made prior attempts to effect personal service upon the defendant. Rather, plaintiff chose a method of alternative service, via the Secretary of State, even though

utilizing such service may avoid actual notice of this action in time for the defendant to defend against it.

The defendant's managing director, Frank Emeka ("Mr. Emeka"), states that the Summons and Complaint were never received and speculates that there may have been an issue with the delivery of mail from the Secretary of State in light of the COVID-19 pandemic. The court, upon consideration, finds Mr. Emeka's assertions credible, including his statement that he first learned of this action upon receipt of the Marshal's notice and confirmation of the withdrawal of funds from the defendants' account at Chase Bank.

Further, plaintiff's compliance, or lack thereof, with the additional notice provisions outlined in CPLR § 3215 is questionable, since the affirmation of its counsel provides that a copy of the summons and complaint was mailed to the defendants on May 12, 2021; the same day on which plaintiff submitted its statement for a money judgment to the Kings County Clerk. Plaintiff also caused a Marshal's Notice dated May 17, 2021 to be served upon the defendants just one day before levying execution on the defendant's bank account, on May 18, 2021.

The court notes that the defendant has set forth meritorious defenses in its proposed answer, including its assertion that it never owned a vehicle and allegation that the plaintiff is suing the incorrect party.

Accordingly, it is hereby

ORDERED, that the defendant's application is granted to the extent that the money judgment, entered on May 12, 2021, is vacated, and it is further

ORDERED, that the Marshal of the City of New York, Martin A. Bienstock, its agents, servants, employees, and assigns, are hereby restrained from transferring, removing, disposing, or handing over to either party herein, the property and/or funds of defendant that were seized, or levied, pursuant to the May 12, 2021 judgment, pending further order of the court, and it is further

ORDERED, that defendant's proposed Answer (At NYSCEF Doc. No. 30) is deemed filed and served upon plaintiff, upon service of a copy of this order with notice of entry, and it is further

ORDERED, that the defendant shall serve a copy of this order with notice of entry upon plaintiff within twenty (20) days of such entry.

The foregoing constitutes the decision and order of the court.

ENTER,


HON. INGRID JOSEPH, J. S. C.

**Hon. Ingrid Joseph
Supreme Court Justice**