

|  |
|--|
| <b>Santamarina &amp; Assoc. v Humble Monkey, LLC</b>   |
| 2022 NY Slip Op 32148(U)   |
| June 28, 2022  |
| Supreme Court, New York County   |
| Docket Number: Index No. 150851/2021   |
| Judge: Verna L. Saunders   |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.   |

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36M

*Justice*

-----X INDEX NO. 150851/2021  
SANTAMARINA & ASSOCIATES, Plaintiff, MOTION SEQ. NO. 003

- v -

HUMBLE MONKEY, LLC, Defendant.

**AMENDED  
DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for

VACATE - JUDGMENT

Plaintiff commenced this action alleging breach of contract, account stated, and unjust enrichment in connection with unpaid legal services rendered to defendant (NYSCEF Doc. No. 1, *summons and complaint*). Plaintiff moved, pursuant to CPLR 3215, for a default judgment against defendant in the amount of \$50,307.62, plus interest from February 10, 2017, based on defendant's failure to answer or otherwise appear in this action. (NYSCEF Doc. Nos. 9-14). However, insofar as plaintiff failed to submit an affidavit of service of the motion papers, the motion was denied with leave to renew. (NYSCEF Doc. No. 17, *August 11, 2021 Decision and Order*). Plaintiff renewed its application and its motion for a default judgment was granted, without opposition. (NYSCEF Doc. Nos. 20-28, Motion; 29, *September 24, 2021 Decision and Order*). Now, defendant moves by order to show cause, pursuant to CPLR 5015(a)(3) seeking an order vacating the judgment entered against it on the grounds that it has an excusable default and viable defenses. (NYSCEF Doc. No. 36, *Order to Show Cause*).

As to its reasonable excuse, defendant claims that it was unaware it had been served via the Secretary of State as it did not receive the pleadings and learned of the judgment against it when its bank placed a hold on its account. Defendant asserts that the motion papers were mailed to its old address 25½ East 61<sup>st</sup> Street, New York, New York ("61<sup>st</sup> Street address") and that it updated its address with the Secretary of State in 2019 to 232 East 50<sup>th</sup> Street, 5<sup>th</sup> Floor, New York, New York ("50<sup>th</sup> Street address"). However, due to its employees working remotely as a result of the COVID-19 pandemic, it terminated its lease at the 50<sup>th</sup> Street address and obtained a virtual address where its mail can be received: 757 Third Avenue, 20<sup>th</sup> Floor, New York, New York ("Third Avenue address"). Defendant states that it contacted the United States Postal Service in order to have its mail forwarded from the 50<sup>th</sup> Street address to the Third Avenue address. Defendant argues that it took the necessary steps to ensure it received its mail from the 50<sup>th</sup> Street address and while it concedes that it did not update its address with the Secretary of State when it moved from the 50<sup>th</sup> Street address to the current Third Avenue address, it maintains that it never received pleadings from the Secretary of State despite mail forwarding and periodically checking the mail at 50<sup>th</sup> Street. Defendant argues that plaintiff

failed to make any effort to ensure it obtain defendant's current address prior to serving the pleadings and failed to serve the motion papers on the Secretary of State or send an email with the motion papers annexed. Defendant argues that plaintiff should have been required to effectuate personal service of the defendant's renewed motion for default and that plaintiff's principal, an attorney whom the firm is named after, should not have served the papers.

Regarding its meritorious defense, defendant asserts that it hired plaintiff for legal representation with respect to two separate lawsuits but that it fired plaintiff due to unsatisfactory performance at depositions and immediately retained new counsel. The parties exchanged emails in 2017 pertaining to payment and according to defendant, plaintiff agreed to substitute out as counsel without defendant paying the invoices. In 2019, plaintiff contacted defendant via email requesting payment, and defendant rejected plaintiff's request. Defendant asserts that it disputed the invoices received and that certain invoices submitted in support of this action had never been received. According to defendant, there was no further communication between the parties and in January 2021, defendant received a phone call from a third-party attorney who informed it of this lawsuit, but it had not received the pleadings. Defendant argues that plaintiff failed to inform the court, in its motion for default, that it had been fired on April 19, 2017 which would call into question the invoices dated after April 19, 2017 and undermine its causes of action for breach of contract, unjust enrichment, and account stated.

In opposition, plaintiff avers that it was not obligated to anticipate and then inform the court of defendant's potential defenses on its motion for a default judgment. As to defendant's assertion of fraud, plaintiff claims that defendant's argument fails as the default judgment was a result of defendant's failure to answer or appear and not on any fraud by plaintiff. Plaintiff further argues that service of the motion papers at defendant's 61<sup>st</sup> Street address was sufficient under CPLR 2103 as it was the last address of which plaintiff knew. Furthermore, plaintiff points out that while defendant argues that it should have been personally served with the motion papers, it was no longer located at its address on file with the Secretary of State when service was effectuated, and thus, personal service would not be possible. Plaintiff also argues that defendant's failure to appear was willful as it admits to being aware of the action since January 2021 and failed to take any steps to defend itself until its bank account was restrained. Moreover, defendant's failure to update its address with the Secretary of State is fatal to its motion to vacate and avers further, that to date, the address has not been updated.

With respect to a meritorious defense, plaintiff argues that defendant has failed to establish same and that its opinion regarding how the deposition was conducted does not amount to a meritorious defense against the breach of contract claim or refute the fact that plaintiff is entitled to compensation for services rendered and a mere questioning of the invoices is insufficient.

CPLR § 5015(a) provides that a party may be relieved from a judgment on the ground of, among others, "excusable default." A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action. See CPLR § 5015(a)(1); *Gray v B. R. Trucking Co.*, 59 NY2d 649 [1983].

Under CPLR 5015 there is no *per se* rule that a corporation served through the Secretary of State, and failed to update its address on file there, cannot demonstrate an “excusable default”, instead, a court should consider, among other factors, the length of time for which the address had not been kept current. (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138 [1986].)

Courts generally favor disposition on the merits upon a showing of a reasonable excuse and a meritorious defense. Here, defendant asserts in its affidavit in support that it moved from its 61<sup>st</sup> Street address to the 50<sup>th</sup> Street address in March 2019, and by April 2019, it updated its address for service of process with the Secretary of State. In January 2021, defendant then moved to the Third Avenue address. While defendant outlines the steps it took to ensure it received mail from the 50<sup>th</sup> Street address when it relocated to the Third Avenue address, such as requesting mail forwarding with the United States Postal Service and periodically checking the mail at the 50<sup>th</sup> Street address, there is no indication defendant took similar steps to ensure that it received mail from the 61<sup>st</sup> Street address when it moved from there to the 50<sup>th</sup> Street address.

Furthermore, pursuant to the affidavit of service, plaintiff served the Secretary of State on February 4, 2021, a few days after defendant had moved from the 50<sup>th</sup> Street address, the address the Secretary of State had on file, to the Third Avenue address. Based upon defendant’s measures, the mailing from the Secretary of State to the 50<sup>th</sup> Street address would have been forwarded to its new address at Third Avenue or picked up from the 50<sup>th</sup> Street mailbox which it asserts it checked. Whether it was delivered or not, the plaintiff properly served the pleadings pursuant to Limited Liability Law § 303. Defendant’s focus on service of the motion papers, rather than service of the pleadings is a fallacy as defendant cannot successfully argue that service upon the Secretary of State was not proper. There is no authority to support defendant’s assertion that it should have been personally served with the motion papers and if plaintiff did elect to personally serve the motion, whether it attempted service at the 61<sup>st</sup> Street address or the 50<sup>th</sup> Street address, personal service would not have been effectuated as on September 8, 2021, when the renewed motion was filed, defendant was no longer located at either address.

Additionally, defendant’s disclosure that it became aware of the action on January 29, 2021, five days prior to service of the pleadings on the Secretary of State but failed to take any action to retrieve the pleadings and defend itself belies its argument that it had a reasonable excuse for its default. Defendant asserts that it “was on the lookout for a process server or any mailings from the Secretary of State” but it never took steps to contact an attorney, the Secretary of State, or the court within the nearly ten months before judgment was awarded. Furthermore, defendant states that it was aware that plaintiff was seeking payment for invoices representing what it believed it was owed for the legal service provided and thus, once defendant was made aware of the pending lawsuit, defendant undoubtedly knew that the action sought to recover money owed. Thus, defendant has failed to set forth a reasonable excuse for its default.

Even assuming *arguendo* that its failure to update its address with the Secretary of State is not fatal to its application for a default judgment, defendant failed to take any measures to ensure it received correspondence from the 61<sup>st</sup> Street address when it relocated to the 50<sup>th</sup> Street address. Further, defendant was aware of the litigation yet elected not to determine whether or not it was obligated or even prudent to defend itself. Moreover, defendant failed to establish a

meritorious defense to breach of contract, account stated, and unjust enrichment as it has not pleaded that it paid the debt in full or partially or that the services alleged were not tendered. (*On Assignment v Medasorb Tech., LLC*, 50 AD3d 342, 342 [1st Dept 2008].) Based upon the foregoing, it is

ORDERED that defendant's motion to vacate its default herein is denied and the decision and order dated September 24, 2021 entering judgement against defendant shall remain; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the defendants, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that such filing with 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)).

June 28, 2022

  
\_\_\_\_\_  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: