

<b>Santos Alas v Republic Natl. Holding Corp.</b>
2022 NY Slip Op 33531(U)
October 13, 2022
Supreme Court, New York County
Docket Number: Index No. 153030/2021
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR

PART **34M**

*Justice*

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INDEX NO. 153030/2021

SIFREDO ANTONIO SANTOS ALAS,

MOTION DATE 06/27/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

REPUBLIC NATIONAL HOLDING CORP., ROBERT  
BIRNBAUM, U.S. ELECTROPLATING CORP., UNITED  
INTERNATIONAL ELECTROPLATING INC., ARDITO  
MASON CONTRACTORS, L.L.C.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47

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

Plaintiff, Sifredo Antonio Santos Alas (plaintiff), commenced this action pursuant to Labor Law §§ 200, 240(1), and 241(6) for damages stemming from an October 14, 2020 fall from a ladder while working at the premises located at 37 Potter Street, Nassau, New York. On April 4, 2022, this Court granted plaintiff's motion for a default judgment against defendant Ardito Mason Contractors, LLC (Ardito), a subcontractor working at the premises the same time as plaintiff. Ardito now moves pursuant to CPLR 317 to vacate the April 4, 2022 default judgment entered against it. Plaintiff opposes the motion. For the following reasons, Ardito's motion is granted.

In support of its motion, Ardito argues that it was not personally served with the summons and complaint and that it was not aware that a summons and complaint was filed until it received a copy of the default judgment. In opposition, plaintiff contends that Ardito's

counsel's argument is without probative value because affidavit of its principal, Michael Ardito (the principal), fails to demonstrate that Ardito did not receive a copy of the commencement papers. In reply, Ardito submits a new affidavit, wherein the principal explains that it did not receive a copy of the summons and complaint in time to defend the action and that it became aware of the suit when it received the April 4, 2020 order. Counsel for Ardito states that this information was not included in the original affidavit "as a result of law office failure" (NYSCEF doc. no. 41 at ¶ 6). In an authorized sur-reply, plaintiff contends that the court should not consider the principal's new affidavit because it offers new evidence not submitted in the moving papers.

At the outset, the Court considers the principal's affidavit submitted in reply. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006]). "This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (*id.* at 382). Here, while the affidavit submitted in Ardito's reply does not concern an argument made by plaintiff in opposition, plaintiff was given an opportunity to file a surreply addressing the substantive points raised in the reply, including the principal's statement that Ardito did not receive notice of the suit until after the motion for default judgment was decided (*see Gastaldi v Chen*, 56 AD3d 420, 420 [2d Dept 2008] ["The Supreme Court providently exercised its discretion in considering the surreply of the plaintiffs, which was in response to the gap-in-treatment argument raised in the

defendants' reply papers for the first time"). Plaintiff declined to do so. Accordingly, the Court reviews Ardito's motion using the affidavit submitted in its reply papers.

Pursuant to CPLR 317, a defendant who has been served with a summons other than by personal delivery but who has not appeared may be allowed to defend the action upon a finding that it did not personally receive notice of the summons and complaint in time to defend and that it has a potentially meritorious defense (*see* CPLR 317; *Country-Wide Ins. Co. v Power Supply, Inc.*, 179 AD3d 405, 406 [1st Dept 2020]). While "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," the corporation still must establish that it did not actually receive notice of the action in time to defend in order to avail itself of the relief afforded by CPLR 317" (*Rockland Bakery, Inc. v B.M. Baking Co.*, 83 AD3d 1080, 1081 [2d Dept 2011], quoting *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138 [1986]).

Here, Ardito demonstrated that it was not personally served pursuant to CPLR 317 and that it has a meritorious defense. Initially, the parties agree that plaintiff provided proof of service via the Secretary of State of New York and that the business address used to serve Ardito was correct. Further, the principal states that Ardito did not receive a copy of the summons and complaint prior to the motion for a default judgment and only became aware of the action when the principal received the April 4, 2022 decision and order. Notably, plaintiff fails to argue that Ardito's denial was conclusory. Moreover, Ardito demonstrates a meritorious defense, as Ardito states that it was not the owner, tenant or general contractor for the job at issue and did not supervise, direct or control plaintiff's work or create any condition that caused plaintiff's ladder


to break down. Accordingly, Ardito’s motion pursuant to CPLR 317 to vacate the April 4, 2022 decision and order is granted.

Accordingly, it is hereby

ORDERED that defendant’s motion pursuant to CPLR 317 to vacate the April 4, 2022 default judgment is granted, and the aforesaid default judgment is vacated; and it is further

ORDERED that defendant shall serve a copy of this order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

10/13/2022 DATE	 DAKOTA D. RAMSEUR, J.S.C.		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	