

<b>Eastern Funding, LLC v 131 Manhattan Deli Grocery Corp.</b>
2022 NY Slip Op 33958(U)
November 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 524456/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 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 7<sup>th</sup> day of November, 2022.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
EASTERN FUNDING, LLC,

Index No.: 524456/2019

*Plaintiff(s),*

- against -

DECISION AND ORDER  
Motion Sequence #1

131 MANHATTAN DELI GROCERY CORP  
MARIA VELASQUEZ, KIARA HERNANDEZ,  
JOSE D'ANTIGUA a/k/a JOSE D'ANTIGUA,  
GREEN TREE SUPERMARKET CORP.,  
VILLA TAPIA CITI FRESH SUPERMARKET CORP.  
&VILLA TAPIA GROCERY NY CORP.

*Defendants.*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	13-22,
Opposing Affidavits (Affirmations).....	24-38,
Reply and Sur-Reply Affidavits (Affirmations).....	40-42

After oral argument and a review of the submissions herein, the Court finds as follows:

This action has been commenced by the Plaintiff, Eastern Funding, LLC (hereinafter the "Plaintiff") against the Defendants for breach of contract, an accounting, unjust enrichment, replevin and breach of the guaranties.

Defendant Villa Tapia Grocery Corp (hereinafter "Defendant Villa Tapia") now moves (motion sequence #1) for an order, pursuant to CPLR 5010, to vacate the default judgment and thereafter, dismissal of the Complaint against Defendant Villa Tapia pursuant to CPLR

§3211(a)(1). Alternatively, Defendant Villa Tapia seeks leave to interpose a late answer pursuant to CPLR 3025.

The dispute at issue relates to a \$200,000 note executed by Defendant Maria Velasquez on behalf of one of her companies, 131 Manhattan Deli Grocery Corp. Defendant Villa Tapia contends that although a purported guarantor of the debt, Defendant Kiara Hernandez, signed a guaranty obligating Villa Tapia as a guarantor, it should not be bound thereby as Defendant Kiara Hernandez had no relationship with Defendant Villa Tapia at the time the agreement was purportedly signed. As such, Villa Tapia contends that Hernandez had no authority to sign on behalf of Villa Tapia. In support of its position Defendant Villa Tapia relies on the affidavit of Randy Espinal Nunez who purports to be the President of Defendant Villa Tapia. Mr. Nunez states in his affidavit that “[o]n or about July 1, 2018, more than seven (7) months before it is claimed that Kiara Hernandez signed The Agreement, Kiara Hernandez sold the business and all of her shares in Villa Tapia Grocery to me.” (See Defendant Villa Tapia Motion, Affidavit of Randy Espinal Nunez, Paragraph 6). Defendant Villa Tapia has also annexed what it purports to be the a copy of the General Bill of Sale of Villa Tapia Grocery from Kiara Hernandez to Randy Espinal Nunez.

Defendant Villa Tapia contends that it was never served with of the Summons and Complaint. Defendant Villa Tapia also annexes an affidavit from Defendant Kiara Hernandez. Hernandez stated that she “never signed that document.” She also states that she “sold all of [her] interest in the company in July 2018 as [sic] was removed as the President of the company. As of February 2019, I had no interest in Villa Tapia Grocery NY Corp. of whatever nature.” Defendant Kiara Hernandez further stated that “[t]he only loan proceeds that Villa Tapia NY Corp, ever received was from a \$200,000.00 loan in 2016. As of July 1, 2018, when I sold Villa Tapia Grocery

NY Corp. to its present owner I had timely made every installment payment on the loan.” (See Defendant Villa Tapia Motion, Affidavit of Kiara Hernandez, Paragraphs 4-5).

The Plaintiff opposes the motion. Specifically, the Plaintiff contends that the application should be denied as Defendant Villa Tapia was properly served pursuant to CPLR § 311 and New York Business Corporation Law § 306(b)(1). The Plaintiff also argues that Defendant Villa Tapia’s application should be denied as it does not have a meritorious defense. The Plaintiff argues that the debt at issue pre-dates the purported 2019 sale and as a result the prior agreement(s) would serve to bind Defendant Villa Tapia.

A motion pursuant to CPLR 5015 must be made within one year of service of the order on the moving party (see CPLR 5015 (a)(1)).

**A party seeking to vacate an order entered upon his or her failure to [appear] is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion (see *Bhuiyan v. New York City Health & Hosps. Corp.*, 120 AD3d 1284, 993 N.Y.S.2d 62 [2d Dept 2014]). The determination of what constitutes a reasonable excuse lies within the Supreme Court’s discretion (see *Lyubomirsky v. Lubov Arulin, PLLC*, 125 AD3d 614, 3 N.Y.S.3d 377 [2d Dept 2015]). In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits.**

*Hamilton v. New York Hospital Queens*, 183 AD3d 621, 622, 123 N.Y.S.3d 172, 173-174 [2d Dept 2020].

CPLR 317 “permits a defendant who has been ‘served with a summons other than by personal delivery’ to seek relief from a default upon a showing that it did not receive actual notice of the summons in time to defend and has a meritorious defense.” *Franklin v. 172 Aububon Corp.*, 32 AD3d 454, 455, 819 N.Y.S.2d 785, 786–87 [2d Dept 2006]. The defendant meets its burden by

“showing that it did not receive actual notice of the summons in time to defend.” *New York & Presbyterian Hosp. v. Allstate Ins. Co.*, 29 AD3d 968, 968, 815 N.Y.S.2d 478, 479 [2d Dept 2006].

The Court finds that Defendant Villa Tapia’s motion is timely however, Mr. Nunez’s excuse for not answering timely constitutes a conclusory denial. An application made pursuant to CPLR 5015 must be made within one year after the Judgment is entered. As part of his affidavit, Randy Espinal Nunez states that although the affidavit of service reflects service on Defendant Villa Tapia by service on the New York State Secretary of State, “[f]or reasons unknown, we only just learned of this and several other cases instituted by Plaintiff against our company.” Mr. Nunez then states “[h]ad we known of the Complaint, we surely would have appeared as we have an absolute defense to this case.” (See Plaintiff’s Motion, Affidavit of Randy Espinal Nunez, Paragraph 14).

These statements do not establish the basis for a reasonable excuse. There is no discussion why service was not received. Nunez, on behalf of Defendant Villa Tapia, does not address the service affidavit or indicate any reason why service would have not been received in time for him to interpose a timely answer. He does not challenge the statement made in the affidavits of service proffered by Plaintiff. “The evidence demonstrating that copies of the summons and complaint were mailed to the defendant at the correct residential address created a presumption of proper mailing and of receipt, and the defendant’s mere denial of receipt was insufficient to rebut that presumption” *Williamson v. Marlou Cab Corp.*, 129 AD3d 711, 9 N.Y.S.3d 410 [2d Dept 2015]. “The bare conclusory denial of receipt was insufficient to establish a reasonable excuse for the default, or lack of notice of the action.” *Gray v. Goodluck-Hedge*, 208 AD3d 1221, 1223, 175 N.Y.S.3d 253, 256 [2d Dept 2022]. “Since the defendant failed to establish a reasonable excuse for her default in answering the complaint, it is unnecessary to consider whether she established

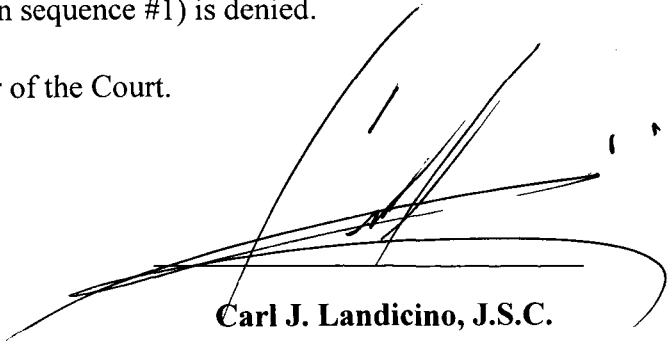
the existence of a potentially meritorious defense based on lack of standing.” *Am. Home Mortg. Servicing, Inc. v. Arklis*, 189 A.D.3d 1141, 1143, 134 N.Y.S.3d 258 [2d Dept 2020]. As such, there is no need to address the purported meritorious defense.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Villa Tapia’s motion (motion sequence #1) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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