

133 Second Ave. LLC v Peng's Body Work, Inc.

2022 NY Slip Op 34053(U)

November 29, 2022

Supreme Court, New York County

Docket Number: Index No. 155623/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO

Justice

PART 33M

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133 SECOND AVENUE LLC,
Plaintiff,

INDEX NO. 155623/2021
MOTION DATE 09/13/2022
MOTION SEQ. NO. 002

- v -

PENG'S BODY WORK, INC., TAIJI BODY WORK, RUTIE
PENG, ABC CORP., JOHN DOE, JANE DOE
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Upon the foregoing documents, and after oral argument, which took place on November 22, 2022 where Phillip Wartell, Esq. appeared for Plaintiff 133 Second Avenue LLC (“Landlord”) and Daniel Chu, Esq. appeared for Defendants Peng’s Body Work, Inc. (“Peng’s Body Work”), Taiji Body Work (“Taiji Body Work”), and Rutie Peng (“Guarantor”) (collectively “Defendants”), the Defendants’ motion seeking to vacate this Court’s Decision and Order dated June 29, 2022 which granted Landlord default judgment against Defendants (NYSCEF Doc. 33) is denied.

I. Factual and Procedural Background

Landlord commenced this action on June 11, 2021 by filing a summons and Complaint seeking ejectment, a money judgment, and an award of attorneys’ fees (NYSCEF Doc. 1).

Defendant Peng’s Body Work was served via the Secretary of State on June 28, 2021 (NYSCEF Doc. 7). Landlord also provided an affidavit of service on Guarantor, Taiji Body Work, and Peng’s Body Work by personally serving a “Jane Doe” at 133 Second Avenue, Second Floor, New York, New York on June 16, 2021 (NYSCEF Doc. 6). That affidavit of service also claims

that on June 17, 2021, a copy of the summons and verified complaint were sent via first class mail to Peng's Body Work, Taiji Body Work, and Guarantor at 133 Second Avenue, Second Floor, New York, New York on June 16, 2021 (*id.*) On August 2, 2021, a copy of the summons and Complaint was also sent via first class mail to Guarantor at 133 Second Avenue, Second Floor, New York, New York on June 16, 2021, as well as to Guarantor's residential address of 200 Rector Place, #7U, New York, New York 10280 (NYSCEF Doc. 9). Another copy of the summons and complaint was sent via first class mail on August 2, 2021 to Siuling Pun, Esq., who was purportedly attorney for Defendants, at the address of 55-59 Chrystie Street, New York, New York 10002 (*id.*). Finally, Peng's Body Work also received an additional mailing of the summons and complaint via first class mail on August 2, 2021 (NYSCEF Doc. 8).

No Defendant timely answered or otherwise appeared, so Landlord moved for default judgment on October 18, 2021 (NYSCEF Doc. 10). The notice of motion was sent via first class mail on October 26, 2021 to all Defendants at the multiple addresses referenced above (NYSCEF Doc. 30). Despite the multiple affidavits of service, Defendants still never answered or otherwise appeared. As such, on June 29, 2022, this Court granted Landlord default judgment including a warrant of ejectment (NYSCEF Doc. 33). A money judgment was entered by the County Clerk on July 27, 2022 (NYSCEF Doc. 38).

On September 13, 2022, Defendants then filed an order to show cause seeking to vacate this Court's default judgment, seeking leave for Peng's Body Work and Guarantor to interpose a late answer and counterclaim, and to stay the enforcement of the money judgment entered (NYSCEF Doc. 40). Guarantor claims in a sworn affidavit that he never had any notice of the eviction action until July 2022, "when a package of legal papers was delivered to my personal

residence address at 200 Rector Place, #7U, New York, New York 10280” (NYSCEF Doc. 42 at ¶ 4). Guarantor also disputed service on Defendant Peng’s Body Work (*id.*).

Landlord opposes by arguing that none of the Defendants have presented a reasonable excuse for their respective defaults nor do they have any meritorious defenses which would warrant vacating the default (NYSCEF Doc. 53). In any event, Guarantor’s testimony is flatly contradicted by a letter from Guarantor dated November 5, 2021, wherein Guarantor admits he received the summons, verified complaint, and notice of motion for default judgment, and attempts to negotiate a settlement with Landlord (NYSCEF Doc. 60). None of the Defendants filed any reply to Landlord’s opposition, and when questioned about the letter at oral argument, counsel for Defendant did not recall ever seeing the letter wherein receipt of the summons and complaint in November of 2021 was admitted.

II. Discussion

To successfully vacate an order granting default judgment, a defendant must demonstrate both a reasonable excuse for the default and a meritorious defense to a plaintiff’s claims (*Genao v Salcedo Maintenance Corp*, 168 AD3d 528. 528-529 [1st Dept 2019]). Whether a defendant demonstrates a reasonable excuse for default and a meritorious defense is within the discretion of the Court (*Oberon Securities v Parmar*, 135 AD3d 446 [1st Dept 2016]).

The Court finds that there is no reason to vacate the default judgment entered as Defendants have failed to proffer a reasonable excuse for their default (*Buro Happold Consulting Engineers, PC v RMJM*, 107 AD3d 602 [1st Dept 2013]). The only affidavit in support of its motion which offers any kind of excuse for default is that of Rutie Peng (NYSCEF Doc. 42). In that affidavit, there is no excuse for default other than a conclusory and self-serving paragraph stating “I never had any notice of the aforementioned eviction action until July 2022, when a package of legal

papers was delivered to my personal residence address at 200 Rector Place...” (*id.* at ¶ 4). The affidavit goes on to state that nobody at Peng’s Body Work was authorized to accept service. However, the affidavit blatantly ignores the fact that service was made on Peng’s Body Work via the Secretary of State on June 28, 2021, over a year prior to entry of default judgment (NYSCEF Doc. 7). Further, the affidavit is flatly contradicted by a letter dated November 5, 2021 wherein Rutie Peng admits he received the motion papers for default judgment as well as the Summons and Complaint. Rather than object to or explain the existence of this letter, Defendants have chosen to ignore it completely.

As such, the Court finds that Defendants have failed to proffer any reasonable excuse for their default, and therefore the Court need not reach whether or not Defendants have a meritorious defense (*U.S. Bank Trust N.A. as Trustee for LSF9 Master Participation Trust v Rivera*, 187 AD3d 624, 625 [1st Dept 2020] quoting *Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016] [“Absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense”]). Given the barebones, conclusory, and self-serving affidavit submitted in support of their motion to vacate default judgment, and being bound by precedent and the CPLR, this Court is unable to grant Defendants the relief they seek.

Accordingly, it is hereby,

ORDERED that Defendants’ motion to vacate their default herein is denied; and it is further

ORDERED that any restraints put in place related to the judgment entered by the County Clerk on July 27, 2022 by Defendants’ Order to Show Cause are hereby vacated; and it is further

ORDERED that within 30 days of entry of this decision and order, Plaintiff 133 Second Avenue LLC shall serve a copy of this Order with notice of entry upon all parties to this action and the Clerk of the Court; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

11/29/2022

DATE

Mary V Rosado

HON. MARY V. ROSADO, 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