

**East Coast Mech. Contrs., Inc. v Federal Mgt. Co.
Inc.**

2022 NY Slip Op 34268(U)

November 17, 2022

Civil Court of the City of New York, Richmond County

Docket Number: Index No. CV-003979-20/RI

Judge: Matthew P. Blum

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF RICHMOND

-----X
EAST COAST MECHANICAL CONTRACTORS, INC.

Index No. CV-003979-20/RI

Plaintiff,

-against-

FEDERAL MANAGEMENT COMPANY INC.

Defendant,
-----X

DECISION AND ORDER

**HON. MATTHEW P. BLUM
JUDGE CIVIL COURT**

Papers Numbered

Defendant’s Order to Show Cause to Vacate the Judgment, Exhibits Attached.....	1
Plaintiff’s Opposition to Defendant’s Order to Show Cause, Exhibits Attached.....	2

Upon the foregoing cited papers, the Decision/Order on the motions is as follows:

I: PROCEDURAL HISTORY

On or about October 29, 2020, East Coast Mechanical Contractors, Inc. (hereinafter, Plaintiff) filed a summons and complaint against Federal Management Company Inc. (hereinafter, Defendant) for breach of agreement for work and labor services in the amount of \$15,151.25 plus interest from July 5, 2018. Pursuant to the affidavit of service from process server, James Philipps, said summons and complaint were served personally on the Secretary of State at the Office of the Department of State in Albany, New York on November 23, 2020 at 2:15 P.M.. Furthermore, according to the affidavit of service from Kim Sciacca, Plaintiff served Defendant with a summons and complaint by mail on December 1, 2020. On June 16, 2022, after no answer being interposed by the Defendant, a default judgment was entered against Defendant for \$20,748.46.

On August 15, 2022, the Defendant filed an Order to Show Cause to vacate the default judgment. On August 31, 2022, the matter appeared before the Honorable Robert Helbock in Richmond County Civil Court. On that date, the motion to vacate the default judgment was withdrawn. On October 24, 2022, Defendant re-filed the Order to Show Cause with an Affidavit of Service. In the Defendant's Order to Show Cause, Defendant states that it was not properly served with a summons and complaint and only became aware of this lawsuit upon receiving a copy of the judgment. On November 2, 2022, Plaintiff filed opposition to Defendant's motion to vacate the default judgment. Oral arguments were heard by Your Honor on November 14, 2022 and the motions were taken on submission by the Court.

II: DISCUSSION

Defendant's Order to Show Cause to vacate the default judgment is denied.

In Defendant's Order to Show Cause to vacate the default judgment, Defendant argues an excusable default pursuant to CPLR §317 and CPLR §5015(a)(1). Pursuant to CPLR §317, Defendant argues that it was never served with the summons and complaint. Furthermore, pursuant to CPLR §5015(a)(1), Defendant argues that it has a reasonable excuse for failing to answer or appear in that it was never served and it has a meritorious defense in that it denies knowledge of the transaction. In support of its motion, Defendant attaches an affidavit from Kenneth Parker, an officer and shareholder of the Defendant corporation. In sum and substance, Mr. Parker simply states that based on his personal knowledge, Defendant was never served with the summons and complaint and only became aware of the matter when he received a copy of the judgment. He further acknowledges that Defendant's address, 1 Rose Avenue, Staten Island, New

York 10306, is registered with the Secretary of State. Lastly, Mr. Parker states that he is not aware of any debt owed.

Plaintiff opposes Defendant's Order to Show Cause to vacate the default judgment. Plaintiff argues that Defendant was served properly pursuant to CPLR §311(a)(1) and BCL §306(b) in that Plaintiff personally served the summons and complaint upon the Secretary of State. Furthermore, Plaintiff maintains that Defendant fails to present a reasonable excuse for failing to appear because Plaintiff properly served Defendant and Defendant also fails to present a potentially meritorious defense. Plaintiff argues that Defendant did not have a reasonable excuse for default based on the presumption of validity of a process server's affidavit of service of the summons and complaint. Additionally, Plaintiff points out that the address on file with the Secretary of State is the same address that Plaintiff also mailed the summons and complaint to as well as the same address that the copy of the judgment was mailed to which the Defendant acknowledges receipt. In support of its motion, Plaintiff attaches an affidavit of service from process server, James Philipps, stating that he personally served Amy Lesch, a person authorized by the Secretary of State to receive service, at the office of the Department of State in Albany, New York on November 23, 2020 at 2:15 P.M..

**II-A: Plaintiff Properly Served the Summons and Complaint on Defendant by
Personally Serving the Office of Secretary of State**

Defendant's Order to Show Cause argues CPLR §317 and contends that it was not properly served and thus, this Court does not have jurisdiction to render a judgment against Defendant. Plaintiff opposes this motion by arguing that Defendant was properly served pursuant to CPLR §311(a)(1) and BCL §306(b) in that Plaintiff personally served the summons and complaint upon the Secretary of State and thus, this Court has jurisdiction over the Defendant.

The burden of proving that personal jurisdiction was acquired over a defendant rests with a plaintiff. Absent sworn specific factual allegations to the contrary to refute it, a process server's affidavit of service constitutes rebuttable prima facie evidence of proper service. See: Federal Natl. Mtge. Assn. v. Castoldi, 187 A.D.3d 988, 989 (2d. Dep't 2020); Nationstar Mtge., LLC v. Einhorn, 185 A.D.3d 945, 946 (2d. Dep't 2020); HSBC Bank USA, N.A. v. Assouline, 177 A.D.3d 603, 604 (2d. Dep't 2019). An evidentiary traverse hearing to determine the validity of service of process is required when a defendant asserts specific and detailed facts to rebut the statements in the process server's affidavit. OneWest Bank FSB v. Perla, 200 A.D.3d 1052, 1055 (2d. Dep't 2021); HSBC Bank United States, N.A. v. Rahmanan, 194 A.D.3d 792 (2d. Dep't 2021); Wells Fargo Bank, N.A. v. Enitan, 200 A.D.3d 736, 738 (2d. Dep't 2021). When a defendant seeks to vacate a default judgment by raising a jurisdictional objection, the court is required to resolve the jurisdictional question before determining whether to vacate the default judgment. Canelas v. Flores, 112 A.D.3d 871 (2d. Dep't 2013); Emigrant Mtge.Co.v. Westervelt, 105 A.D.3d 896,897 (2d. Dep't 2013); Roberts v. Anka, 45 A.D.3d 752, 753 (2d. Dep't 2007).

According to CPLR §311(a)(1), personal service upon a corporation shall be made by delivering the summons upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to BCL §306. BCL §306 states that service of process on the Secretary of State as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee. Service of process on such corporation shall be complete when the secretary of state is so served.

Here, Plaintiff provides a signed affidavit of service indicating that personal service was effectuated as proscribed under BCL §306(b) on the Office of the Secretary of State. Defendant cites no specific facts that rise to the level of rebutting the presumption of validity the affidavit of service. In fact, Defendant's factual allegation only serve to corroborate service in that the 1 Rose Avenue, Staten Island, New York address remains consistent. The facts proffered by Defendant do not rebut the presumption of the affidavit of service of the process server and do not necessitate a traverse hearing to resolve any jurisdictional issue.

II-B: Defendant's Motion to Vacate the Default Judgment Pursuant to CPLR

§5015(a)(1) is Denied as Defendant Does Not Proffer a Reasonable Excuse for Default.

On a motion to vacate a default pursuant to CPLR §5015(a)(1), the movant is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious defense to the action. Gray v. B.R. Trucking Co., 59 N.Y.2d 649, 650 (1983); Rekhtman v. Clarendon Holding Co., Inc., 165 A.D.3d 856, 857 (2d Dep't. 2018). It is within the sole discretion of the Court to determine the reasonableness of the excuse provided by the defaulting party. Torres v. DeJesus, 197 A.D.3d 1260, 1261 (2d. Dep't. 2021) quoting Harczark v. Drive Variety, Inc., 21 A.D.3d 876, 876-877 (2d. Dep't. 2005); HSBC Bank USA, N.A. v. Izzo, 177 A.D.3d 648, 649 (2d. Dep't. 2019). In assessing the reasonableness of the excuse, Courts must weigh all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits. Patel v. New York City Tr. Auth., 199 A.D.3d 925, 927 (2d. Dep't 2021); Nowakowski v. Broadway Stages, 179 A.D.3d 824, 825 (2d. Dep't 2020); Fried v. Jacob Holding, Inc., 110 A.D.3d 56, 60 (2d. Dep't 2013). Though less stringent than opposing a motion for summary judgment, the defaulting party must submit evidence in admissible form establishing both the reasonable excuse and potentially meritorious defense. Global Liberty Ins. Co. v. Shahid Mian, M.D., P.C., 172 A.D.3d 1332, 1333 (2d. Dep't 2019); OneWest Bank, FSB v. Singer, 153 A.D.3d 714, 716 (2d. Dep't 2017); King v. King, 99 A.D.3d 672, 673 (2d. Dep't 2012). Generally, defendants seeking to vacate the judgment based on excusable default must make their motion to vacate a default judgment within one year after service of a copy of the judgment. CPLR §5015(a)(1). However, courts are permitted to exercise discretion in extending that time period. Levine v. Berlin, 46 A.D.2d 902, 903 (2d. Dep't 1974).

Here, the Court does not believe that Defendant has a reasonable excuse for default. Service of process on a corporation is complete when the Secretary of State is personally served as stated in BCL §306(b). From there the Secretary of State notifies the corporation. As detailed above, service of process was done properly in 2020. In addition to the service on the Secretary of State, Plaintiff also mailed a subsequent notice a few days later. Subsequently, the judgment was mailed to the Defendant in 2022. Coincidentally, all of these mailings were sent to the same address that Defendant admits and acknowledges is the proper address. Absent any specific facts that were not argued by Defendant, it is unreasonable to believe that of all three mailings, the only item that actually made it to the Defendant was the one with the worst consequences, the judgment. The Court does not agree with Defendant's argument that there was no delay in seeking to vacate the default. After presumably ignoring the summons and complaint for two years, Defendant still waited almost two months to bring the Order to Show Cause. Even when they did, they needed to withdraw it because it did not contain an affidavit of service.

Whether the Defendant has a potentially meritorious defense is irrelevant as Defendant fails to meet its burden of showing a reasonable excuse for default. Accordingly, the Court will not proceed to that part of the analysis.


III: CONCLUSION

Based on the foregoing, Defendant's Order to Show Cause to vacate the judgment is hereby denied.

This foregoing constitutes the Decision and Order of the Court.

Dated: Staten Island, New York

November 17, 2022



HON. MATTHEW P. BLUM, J.C.C.

Hon. Matthew P. Blum
Judge, Civil Court

ASN by FP on 11/17/2022