

**Metro Global Group, Inc. v Queens Blvd 40th
Owners Corp.**

2022 NY Slip Op 34367(U)

December 20, 2022

Supreme Court, New York County

Docket Number: Index No. 653165/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

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METRO GLOBAL GROUP, INC., RAMI YAZER,
Plaintiff,

INDEX NO. 653165/2018

MOTION DATE 07/29/2022

MOTION SEQ. NO. 005

- v -

QUEENS BLVD 40TH OWNERS CORP. D/B/A QUEENS
BLVD 40TH ASSOCIATES, D/B/A SUNNYSIDE
ASSOCIATES, SUNNYSIDE 40TH, LLC, and MODESTA
MEDRANO,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 005) 41, 42, 43, 44, 45, 46, 47, 49, and 50

were read on this motion to VACATE JUDGMENT.

Upon the foregoing documents, the motion by defendant Sunnyside 40th LLC (“Sunnyside”) to vacate the default judgment entered against it is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 42-44, 50) and the exhibits annexed thereto, in which the court concurs. The court assumes familiarity with the facts and prior procedure of this action as set forth in its prior orders of March 30, 2020, and June 6, 2022 (NYSCEF Doc. Nos. 25, 36).

As set forth more specifically in Sunnyside’s papers, it established entitlement to vacatur of the default order pursuant to CPLR 317 by establishing that it was not personally served with the summons and complaint (Affidavit of Service pursuant to Limited Liability Company Law § 303, NYSCEF Doc. No. 13); that it did not receive notice of the action in time to defend (Oh aff., NYSCEF Doc. No. 43, ¶¶ 3-4; Medrano aff., NYSCEF Doc. No. 44, ¶¶ 13-20); and that it has a meritorious defense to the action. Sunnyside first became aware of the action in August of 2021,

and moved to vacate on July 29, 2022, within the one-year time frame established for making the motion (CPLR 317). Plaintiffs argue that Sunnyside in fact received notice of the action in April 2021 when it served Sunnyside with notice of entry of the default judgment, however no affidavit of such alleged service was filed on the electronic docket (*Diane v Ricale Taxi, Inc.*, 64 AD3d 432, 432-33 [1st Dept 2009] [“The only exhibits attached to plaintiff’s opposition are an order granting a default judgment and directing an inquest, with no notice of entry or affidavit of service”]). Moreover, and contrary to plaintiffs’ argument, a reasonable excuse is not necessary to vacate a default judgment pursuant to CPLR 317 (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., Inc.*, 67 NY2d 138, 141 [1986]).

Further, Sunnyside has stated a meritorious defense to plaintiffs’ remaining claim for conversion. “Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [2002] [internal quotation marks and citation omitted]). Sunnyside, through the affidavit of its property manager, asserts that plaintiffs vacated the premises voluntarily and have never identified what property was allegedly left behind (NYSCEF Doc. No. 44, ¶¶ 8-12). Moreover, the complaint does not allege that plaintiffs ever demanded the property be returned. A claim for conversion requires both the identification of specific property unlawfully possessed (*Giardini v Settanni*, 159 AD3d 874, 875 [2d Dept 2018]) and a demand for return of that property (*SH575 Holdings LLC v Reliable Abstract Co., L.L.C.*, 195 AD3d 429, 430 [1st Dept 2021]). Thus, Sunnyside’s assertions, if proven true, would constitute a defense to the claim.

Finally, the court cannot overlook plaintiffs’ own lack of diligence in prosecuting this action, having waited more than a year from the court’s original decision granting default to

serve defendants with notice of entry, and then failing for more than another year to commence inquest proceedings with the Special Referee Clerk. The court's prior order directed that plaintiffs commence inquest proceedings within 60 days of the date of the order (NYSCEF Doc. No. 25). Plaintiffs' explanation for their delay is largely nonspecific and invokes the ongoing COVID-19 pandemic without explaining why, following the end of the litigation stay imposed by the Governor's Executive Orders in November 2020, they continued to be dilatory in asserting their rights. In light of such dilatory prosecution of the action, and in accordance with our well-established preference for deciding matters on the merits (*e.g., Naber Electric v Triton Structural Concrete, Inc.*, 160 AD3d 507, 508 [1st Dept 2018]), the court perceives no undue prejudice to plaintiffs in vacating the default and allowing Sunnyside to defend the action.

Accordingly, it is

ORDERED that defendant Sunnyside 40th LLC's motion to vacate its default herein is granted on condition that said defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the reference to a Special Referee for a damages inquest provided in this court's prior order of March 30, 2020 (NYSCEF Doc. No. 25), is vacated; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon 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); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166,
111 Centre Street, on February 8, 2023, at 10:00 AM.

This constitutes the decision and order of the court.



<u>12/20/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE