

<b>Telx, LLC v Global Broker Leasing Sys. Inc.</b>
2023 NY Slip Op 30126(U)
January 4, 2023
Supreme Court, New York County
Docket Number: Index No. 652764/2021
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

TELX, LLC, F/K/A THE TELX GROUP, INC.,

Plaintiff,

- v -

GLOBAL BROKER LEASING SYSTEMS INC.,

Defendant.

-----X

INDEX NO. 652764/2021

MOTION DATE 06/08/2022, 09/29/2022

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53, 54, 55, 56, 57, 58, and 59

were read on this motion for CONTEMPT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, and 81

were read on this motion to VACATE DEFAULT JUDGMENT.

Upon the foregoing documents, it is ORDERED that the plaintiff's motion to punish defendant and its president, Philip Dushey, for contempt or to compel compliance with subpoenas (Mot. Seq. No. 002) is granted to the extent set forth below. The parties do not contest that Mr. Dushey, the recipient of one of the two information subpoenas that are the subject of the motion for contempt, was deposed on August 11, 2022 (Dushey EBT transcript, NYSCEF Doc. No. 79). Plaintiff also contends that the subpoenas served on defendant and Dushey sought substantial categories of documents which have not yet been produced. In opposition, defendant does not challenge the propriety of any of the documents sought in the subpoenas; but contends that the application is mooted by its belated response thereto, attached to the opposition papers (response to subpoena duces tecum, NYSCEF Doc. No. 59). However, the record does not make clear that any documents promised in the response were actually produced. Because the subpoenas were not returnable in court, the court must first order

compliance therewith before the failure to produce documents can be punished as contempt (CPLR 2308[b]; *Dias v Consolidated Edison Co. of New York, Inc.*, 116 AD2d 453, 454 [1st Dept 1986]). Accordingly, the court directs defendant and Philip Dushey to produce any and all documents responsive to the subpoenas in their possession, to the extent not already produced, on or before February 3, 2023. Failure to comply may be punishable by further contempt proceeding. The motion is otherwise denied.

AND IT IS FURTHER

ORDERED that the motion to vacate the default judgment is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 74-80), in which the court concurs. As set forth more specifically therein, defendant offers three grounds to vacate the default judgment entered against it: that it did not receive notice in time to defend the action (CPLR 317); that it has a reasonable excuse and a meritorious defense (CPLR 5015[a][1]); and that the default judgment was procured by fraud or misrepresentation (CPLR 5015[a][3]). To establish failure to receive notice under CPLR 317, a defendant must do more than allege that it did not receive process to rebut the presumption of proper service or establish lack of actual notice (*Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1081-82 [2d Dept 2011]). Here, plaintiff served defendant by service on the Secretary of State pursuant to Business Corporation Law § 306 (affidavit of service, NYSCEF Doc. No. 77).

While defendant asserts that it was no longer resident at the licensed premises at the time of service, it does not deny that it failed to change its address with the Secretary of State. Indeed, Dushey testified that presently defendant has no address (Dushey EBT transcript at 74). Additionally, defendant participated in post-judgment proceedings for several months before moving to vacate the default, which militates against vacating the judgment (*see Union Indem.*

*Ins. Co. of New York v 10-01 50th Ave. Realty Corp.*, 102 AD2d 727, 728 [1st Dept 1984] [granting relief under CPLR 317 where defendant, inter alia, “promptly moved to vacate the default” despite failing to update its address with the Secretary of State]). In addition, a party that fails to keep its address updated with the Secretary of State cannot demonstrate a reasonable excuse for purposes of vacating a default judgment under CPLR 5015(a)(1) (*Cedeno v Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 [1st Dept 1994] [“But it is a corporation's obligation to keep on file with the Secretary of State the current address of an agent to receive service of process, and failure to meet that obligation will not constitute reasonable excuse to vacate a default judgment”] [internal citations omitted]).

Regarding CPLR 5015(a)(3), a motion to vacate upon grounds of fraud or misrepresentation must be made within a reasonable time (*Mark v Lenfest*, 80 AD3d 426, 426 [1st Dept 2011]). Where no excuse is proffered for the delay in making the application, the motion should be denied (*id.*). Here, defendant offers no excuse for why it waited nine months after learning of the default judgment and the alleged fraud upon which it was based to make the motion, during which time it participated in post-judgment enforcement proceedings; and it is further

ORDERED that counsel shall appear for a status conference in Room 1166, 111 Centre Street, New York, New York on February 8, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

*Louis L. Nock*

<u>1/4/2023</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<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