

<b>Rose Containerline, Inc. v Pioneer Home Textile, Inc.</b>
2023 NY Slip Op 30408(U)
January 30, 2023
Supreme Court, New York County
Docket Number: Index No. 656871/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 656871/2021

ROSE CONTAINERLINE, INC., Plaintiff, MOTION SEQ. NO. 001

- v -

PIONEER HOME TEXTILE, INC., Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for VACATE

In December 2021, plaintiff, an entity that provides international freight forwarding and shipping services, commenced this action by summons and complaint against defendant, "a linen manufacturing company", seeking damages for defendant's failure to pay for services rendered (NYSCEF Doc. No. 1, summons and complaint).

Defendant was served, pursuant to Business Corporation Law § 306, via the Secretary of State, on December 27, 2021. (NYSCEF Doc. No. 5, affidavit of service). Plaintiff also filed an affidavit of additional mailing indicating that, on January 25, 2022, a copy of the pleadings was mailed to both 286 5th Avenue, 11th Floor, New York, New York 10001 and 135 E. 65th Street, New York, New York 10065. Both envelopes were returned as undeliverable. (NYSCEF Doc. No. 3, affidavit of additional mailing).

On April 1, 2022, a proposed judgment was presented to the office of the County Clerk, and, on May 3, 2022, a judgment was entered in favor of plaintiff and against defendant in the amount of \$147,113.12 (NYSCEF Doc. No. 9, judgment). A restraining notice was subsequently served on Cathay Bank, directing the bank to restrain defendant's bank account for the amount of the judgment (NYSCEF Doc. No. 14, restraining notice).

Defendant now moves, by order to show cause, pursuant 317, to vacate a judgment in this action, as well as any restraining notices, executions or levies resulting therefrom (NYSCEF Doc. No. 20, OSC), which plaintiff opposes.

Defendant argues that it did not receive actual notice of this action in time to defend itself. Nessim Levy ("Levy"), the chief operating officer for defendant, avers that defendant never received the summons and complaint, either from the Secretary of State or from plaintiff's counsel. Specifically, Levy affirms that LegalInc, the entity designated to accept service on behalf of defendant, received the summons and complaint approximately three (3) months after plaintiff served the Secretary of State. However, Levy maintains that LegalInc did not have the correct address on file for defendant to forward the pleadings to it. Moreover, insofar as Levy was not the individual listed in the 2017 filing with the Secretary of State, LegalInc refused to

forward the papers to Levy. As for plaintiff's additional mailings, Levy avers that defendant vacated the 286 5th Avenue address in October 2020 and moved into 135 East 65th Street address, where it stayed for one year until October 2021. As such, Levy asserts that defendant never received copies of the summons and complaint mailed to those addresses in January 2022. (NYSCEF Doc. No. 13 ¶ 4, 5, *Levy's affidavit*).

Defendant also submits the affidavit of Yigal Barmucha ("Barmucha"), consultant for defendant, who asserts, *inter alia*, that the amounts plaintiff seeks is inaccurate insofar as they were improperly billed and do not account for payments already made (NYSCEF Doc. No. 16, *Barmucha's affidavit*; 18, *list of payments to Rose Containerline*). Barmucha affirms that defendant worked with plaintiff until mid-2019, when it decided to work with two competitors of plaintiff. In the third quarter of 2019, defendant had billing arrears due to plaintiff and, following negotiations with plaintiff's president, the parties agreed that defendant would make payments to Rose in \$5,000.00 increments per month and that, going forward, plaintiff would add \$2,000.00 per invoice to pay down the prior arrears. Notwithstanding the arrangement, there were discrepancies between the new invoices and the balance sheet and Barmucha avers that he noticed incorrect or inflated charges. Concerns regarding the "double dipping" issue were raised during a meeting between the parties in September 2021, and the parties agreed that plaintiff would provide revised invoices to reflect a reduction of \$84,000.00 of the past-due amount. Plaintiff failed to make the revisions. Barmucha also states that \$45,710.00 paid to plaintiff since the date of the first invoice are not accounted for. (NYSCEF Doc. No. 16).

In opposition to the motion, plaintiff argues the defendant fails to establish entitlement to vacatur of the judgment because, although defendant admits to moving twice in the two years prior to its current address of 2 East 28<sup>th</sup> Street, #247, New York, New York 10016, it nevertheless failed to notify the Secretary of State or its agent of service of process of its new address. Moreover, plaintiff highlights that, as of the filing of the opposition papers, defendant had not yet filed a statement as required by Business Corporation Law § 408, which was due on March 31, 2019 (NYSCEF Doc. No. 23, *entity information from Secretary of State*).

Plaintiff also submits the affidavit of its president, Neal Rosenberg, who affirms that there is no meritorious defense in this action. According to Rosenberg, as of September 13, 2021, "Barmucha agreed that defendant would pay to the plaintiff \$5,00.00 (sic) per month to retire arrears", but defendant was two months behind in those payments. Defendant failed to make the remaining payments in 2021. Addressing the argument about "double dipping" on the bills, Rosenberg asserts that this was inadvertent and unintentional and that, when brought to plaintiff's attention, was corrected and that defendant was given a credit of \$31,900.00. According to plaintiff, a statement of February 2, 2021, shows a balance due of \$172,966.98. With the credit applied to that balance, defendant's outstanding balance was reduced to \$141,066.98. By March 1, 2021, some of the invoices sued on had been paid and, therefore, plaintiff withdrew its first and second causes of action. Thus, plaintiff maintains that defendant fails to establish a meritorious defense warranting vacatur of the judgment and restraining notice on defendant's bank account (NYSCEF Doc. No. 22, *Rosenberg's affidavit*).

CPLR 317 provides:

“A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.”

It is well-settled that, unlike the standard set forth in CPLR 5015, no showing of a reasonable excuse is required under CPLR 317 (see *Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138 [1986].) However, “denial of relief under CPLR 317 might be appropriate where, for example, a defendant’s failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice.” (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138, 143 [1986]; see *Pena v Mittleman*, 179 AD2d 607, 610 [1st Dept 1992].)

Here, Levy’s affidavit establishes that defendant did not have actual notice of this action in time to defend. Specifically, defendant was not residing at either of the two addresses where plaintiff mailed the pleadings in January 2022 and Levy affirms that defendant did not receive the pleadings in this action, due, in part, to LegalInc’s failure to maintain an address on file for defendant to forward the pleadings (see *U.S. Bank N.A. as Legal Tit. Trustee for Truman 2013 SC4 Legal Tit. Trust v Nassau County Pub. Adm’r, as Adm’r of the Estate of Kathleen Bestany*, 171 AD3d 560 [1st Dept 2019]; *Figueroa v Relgold, LLC*, 178 AD3d 425, 426 [1st Dept 2019]; *Giraldo v 99-27 Realty, LLC*, 62 AD3d 659, 660 [2nd Dept 2009].) This court notes plaintiff’s assertion that “by not notifying the Secretary of State or Legal[Inc] or the Postal service that it had moved, not once but three times, that defendant was making a conscious effort to avoid service” (NYSCEF Doc. No. 21 ¶ 15). Defendant has not complied with Business Corporation Law § 408, which requires the filing of a biennial statement with the Secretary of State, and, although this court finds defendant’s failures to update its address with the Secretary of State, LegalInc and the Post Office to be careless, there is no basis to conclude that defendant deliberately attempted to evade service. (See *Gomez v Karyes Realty Corp.*, 211 AD3d 576, 576 [1st Dept 2022]; *Olivaria v Lin & Son Realty Corp.*, 84 AD3d 423, 425 [1st Dept 2011]; compare *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007].)

Furthermore, defendant sets forth a colorable defense in this action insofar as the affidavit of Barmucha disputes the outstanding balanced owed. Thus, in accordance with the strong public policy of this state of resolving cases on the merits (see *Gomez v Karyes Realty Corp.*, 211 AD3d at 576), it is hereby

**ORDERED** that defendant’s motion, pursuant to CPLR 317, is granted and the default judgment entered against defendant in this action and all restraining notices, executions and levies resulting therefrom are hereby vacated; and it is further

**ORDERED** that defendant’s answer, in the form annexed to the moving papers is deemed timely filed and served *nunc pro tunc* (NYSCEF Doc. No. 12); and it is further

**ORDERED** that within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of

entry, upon defendant, as well as the Clerk of the Court and the General Clerk’s Office, who shall mark this matter restored; and it is further

**ORDERED** that service upon the Clerk of the Court and 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 at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

**ORDERED** that the parties are directed to participate in a preliminary conference on March 22, 2023, details which shall be provided no later than March 20, 2023.

This constitutes the decision and order of this court.

January 30, 2023

  
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**HON. VERNA L. SAUNDERS, JSC**

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER