SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 151969/2020

SAVOY BANK,

Plaintiff,

MOTION SEQ. NO. 003

- v -

MAHMOUD DOLAH aka MAHMOOD DOLAH,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for **VACATE**.

On February 24, 2020, plaintiff commenced this action against defendant by summons and complaint seeking a money judgment for the unpaid sum of $678,735.57 due under three (3) Protective Advances of which defendant is the guarantor, and reasonable attorney's fees. (NYSCEF Doc. No. 56, *Exhibit 1 – Summons and Verified Complaint*, ¶15). A default judgment was entered upon defendant's failure to answer or appear. Thereafter, in March 2022, defendant moved by order to show cause requesting that the judgment be vacated and that a temporary restraining order ("TRO") be issued to stay enforcement or collection proceedings. This court granted temporary relief in the form of a TRO. (NYSCEF Doc. No. 53, *Order to Show Cause with Temporary Restraint*).

The balance of relief sought by defendant is vacatur of the default judgment, pursuant to CPLR 5015(a)(1) and (a)(4) and CPLR 317, on the ground that defendant was never served with the summons and complaint in this action; that he has an excusable default and a meritorious defense to the action, and finally, that the court should use its discretionary powers to dispose of the case on its merits. (NYSCEF Doc. No. 36, *Memo in Support*).

The facts pertinent to the instant motion are as follows. On March 2, 2020, plaintiff filed an affidavit of service indicating that a copy of the summons and complaint was served upon a person of suitable age and discretion at defendant's last known address at 65 83rd Street, Brooklyn, New York 11209 on February 25, 2020. (NYSCEF Doc. No. 56, *Exhibit 1 – Affidavit of Service)*. Same was mailed to defendant's address on February 27, 2020, through the United States Postal Service. (*Id.*). On August 19, 2020, plaintiff's counsel filed a motion for a default judgment against defendant based on his failure to answer or otherwise appear in this action and served the motion upon defendant by first class mail to his residence at the 83rd Street address. By decision and order dated November 16, 2020, this court (Marin, J.) granted plaintiff's motion for a default judgment against defendant and, the following day, on November 18, 2020, plaintiff's counsel served said order on defendant with notice of entry by first class mail to the

83rd Street address. (NYSCEF Doc. No. 60, Exhibit 5—*Notice of Entry and Affidavit of Service by mail*). The judgment was entered on February 8, 2021, and, on February 17, 2021, plaintiff's counsel served the judgment with notice of entry on defendant by first class mail to the same address. (NYSCEF Doc. Nos. 61, *Exhibit 6—Default Judgment;* 62, *Exhibit 7—Affidavit of Service by mail).* On November 15, 2021, plaintiff served defendant with an information subpoena via certified mail, return receipt requested, and by regular mail to the 83rd Street address. (NYSCEF Doc. No. 63, *Exhibit 8*). The certified mailing was refused at the defendant's residence. (NYSCEF Doc. No. 64, *Exhibit 9*).

In moving to vacate the default judgment, defendant avers that he was never served with a summons and complaint on February 25, 2020, or on any other date as plaintiff claims. (NYSCEF Doc. No. 39, *Affidavit of M. Dolah*, ¶4). Defendant further presents the affidavit of his wife, Olga Dolah, who denies being served with the summons and complaint at any time. However, in her affidavit, Olga Dolah provides information suggesting that her daughter-in-law, who lived with them during the relevant period, may have been the person served at the address. (NYSCEF Doc. No. 35, *Affidavit of O. Dolah*, ¶5).

As for an excusable default, defendant contends that service of the summons and complaint was improper because neither he nor his wife received the pleadings in person or by mail. Defendant claims he first received notice of this action in December 2021 when he received the information subpoena and that he did not understand the nature of the subpoena or the magnitude of the situation until he spoke to his attorney. (NYSCEF Doc. No. 39, *Affidavit of M. Dolah*, ¶13). He credits his default, in part, to his age and the fact that English is not his first language. Furthermore, plaintiff avers that during the COVID-19 pandemic, his family members were hospitalized, leading to the death of a son. (*Id.* at ¶8-13).

Defendant claims a meritorious defense disputing that he owes money arising out of the purported guaranties, claiming that he would not have guaranteed loans made to his sons' business, in which he has no financial interest. (NYSCEF Doc. No. 39, *Affidavit of M. Dolah*, ¶18). Moreover, defendant questions whether there was any consideration for the guaranties since they were executed in 2018, well after an SBA loan was executed in 2017. (*Id.* at ¶19). Defendant further argues that he owes a mortgage on his properties with a balance similar to that contained in the first guaranty and that, perhaps, plaintiff has mistaken that amount owed under the mortgage on his properties for the first guaranty amount in question. (*Id.* at ¶20).

Lastly, defendant urges this court to use its discretionary powers to vacate the judgment and afford him an opportunity to present defenses and examine plaintiff regarding its alleged claims and damages, especially in light of the strong public policy in New York to dispose of cases on their merits. (NYSCEF Doc. No. 36, *Def Memo in Support*).

In reply, plaintiff maintains that defendant's contentions are mere smokescreens to avoid liability. First, it argues that defendant's bald assertions that the summons and complaint and other documents sent to the defendant's address were never received are insufficient to rebut the presumption that, as affirmed in the affidavit of service, they were delivered to someone of suitable age and discretion, pursuant to CPLR 308(2). That the mere denial of receipt of the

summons and complaint is not sufficient to establish lack of personal jurisdiction over defendant. (NYSCEF Doc. No. 75, *Opposition to Motion*).

Plaintiff also challenges defendant's stated excuse arguing that for a period of at least one year, numerous notices were sent to defendant's residence notifying him of the ongoing litigation. (*Id.*) Thus, plaintiff contends that defendant's claim of being unaware of this litigation is inconceivable unless he purposefully failed to either open and/or read his mail. (*Id.*).

Additionally, plaintiff argues that no meritorious defense is asserted as defendant's contention that the three personal guaranties were executed in 2018, after a $3.5 million SBA loan was extended to his sons' business in 2017, is neither here nor there. Plaintiff provides notarized copies of the three Protective Advances, each bearing defendant's signature. (NYSCEF Doc. Nos. 48-50, *First Guaranty, Second Guaranty, Third Guaranty*). The SBA loan was furnished to defendant's sons' business in 2017, but the business experienced financial difficulties in 2018, at which point the defendant's sons requested the Protective Advances. The first Protective Advance in the amount of $450,850.00 was requested and provided so that the business could pay its ground lease; the second Protective Advance was provided to cure another default under its lease with the landlord and to pay rent that would become due; and the third Protective Advance was to pay Consolidated Edison the amount of $60,000.00 (NYSCEF Doc. No. 66, *Affidavit of Zambrovsky*, ¶9, 16, 23). The plaintiff asked defendant's sons for a guarantor on these advances. Defendant agreed to act as guarantor and signed each advance. Plaintiff avers it would not have made the three Protective Advances without the guaranty signed by defendant.

Plaintiff further avers that, while it is true that defendant entered into two commercial real estate mortgage loans with plaintiff and has personally guaranteed them, these commercial real estate loans are separate and distinct from the SBA loan made to the defendant's sons' business and distinct from the three Protective Advances at issue here. (NYSCEF Doc. No. 66, *Affidavit of Zambrovsky*, ¶34,38).

Finally, plaintiff requests that the temporary restraining order be vacated because defendant has not asked that it remain in effect beyond the hearing of the motion. (NYSCEF Doc. No. 75, *Opposition to Motion*).

CPLR 5015(a)(4) states that the court may prevent the enforcement of a judgment upon a finding that there was a lack of jurisdiction to render the judgment or order. "Pursuant to CPLR 5015(a)(4), a default must be vacated once a movant demonstrates lack of jurisdiction." (*Mortgage Electronics Registration Systems, Inc. v Mercado*, 194 AD3d 420, 421 [1st Dept 2021].) Here, defendant has failed to make such a showing. Plaintiff served defendant with the summons and complaint through substitute service by delivering a copy of the pleadings to a person of suitable age and discretion at his residence, pursuant to CPLR 308(2). In her affidavit, Olga Dolah explains that the individual befitting the description mentioned by the process server in his affidavit matches that of her daughter-in-law who, at the time of service, lived in the residence. She does not deny that the person served was of suitable age and discretion.

CPLR 5015 provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." (CPLR 5015[a][1]).

As an initial matter, this court notes that defendant's motion, pursuant to CPLR 5015, is untimely. Defendant's motion to vacate was made on March 4, 2022, more than a year after service of the judgment with notice of entry, which was served upon defendant on February 17, 2021. Defendant has not provided any reasonable explanation for his long delay in appearing in this action. (see CPLR 5015[a][1]; *Matter of Carmit D. v Gil D.*, 178 AD3d 470, 472 [1st Dept 2019]; *Posadas De Puerto Rico, Inc. v Gruberman,* 226 AD2d 249 [1st Dept 1996].) However, notwithstanding the timeliness issue, plaintiff fails to establish an excusable default.

The well-recognized requirements for vacating a default judgment under CPLR 5015(a)(1) are that the movant establish the existence of a reasonable excuse for the default, as well as, a meritorious cause of action or defense. (see *Terrapin Indus., LLC v Bank of N.Y.,* 137 AD3d 569, 570 [1st Dept 2016].) Here, defendant does not deny that the address where the pleadings were delivered is his residence. There is also no indication that the documents were returned as undeliverable, except for the information subpoena delivery that was refused. Moreover, defendant acknowledges that he received the information subpoena sent to the 83rd Street address and, therefore, it is appropriate to infer that the other documents were also properly mailed to said address, giving defendant notice of this litigation.

While it is not lost on this court the devastating effects of the COVID-19 pandemic on defendant's family, this court finds defendant's stated excuses unavailing. A copy of the summons and complaint was served upon defendant, pursuant to CPLR 308(2), on February 25, 2020. On August 19, 2020, plaintiff's counsel served the motion for a default judgment upon defendant by first class mail to his residence at the 83rd Street address. The court granted plaintiff's motion for a default judgment against defendant on November 17, 2020, and the following day, on November 18, 2020, plaintiff's counsel served notice of entry with the order on defendant by first class mail to his residence at the 83rd Street address. It was not until January 2021 that defendant's household was hospitalized in connection with the COVID-19 virus. Furthermore, it was in December 2021 that defendant claims to have received a copy of the information subpoena that was mailed to his address, and he subsequently consulted with counsel. There was no justification for defendant's inaction until confronted with the possibility of losing his assets to satisfy the default judgment. Thus, this court finds it inconceivable that for such an extended period of time defendant had no knowledge of what was transpiring, particularly since there was substantial activity occurring in this matter of which plaintiff endeavored to keep defendant abreast. (see *McCaffrey v Persuad*, 195 AD2d 344, 345 [1st Dept 1993]; *Emigrant Bank v Rosabianca*, 156 AD3d 468, 474 [1st Dept 2017].)

Furthermore, the argument that defendant's limited proficiency of the English language excuses his default is rejected insofar as he is a sophisticated businessman who is the president and sole shareholder of a New York corporation known as 126 82nd St. Realty Corp. More so, he

signed the three Protective Advances. Absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense. (see *Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016].)

CPLR 317 permits a defendant who has been served with a summons and complaint other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons and complaint in time to defend and has a potentially meritorious defense. (see *Grobman v Etoile 660 Madison LLC,* 126 AD3d 583 [1st Dept 2015]; *Foster v Jordan*, 269 AD2d 152, 153 [1st Dept 2000].) However, mere denial of receipt of the summons and complaint, as is the case here, is insufficient to establish a lack of actual notice for the purpose of CPLR 317. (see *Al Fayed v Barak,* 39 AD3d 371, 372 [1st Dept 2000]). Based on the foregoing, the motion is denied. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that the motion brought by defendant MAHMOUD DOLAH to vacate the default judgment entered against him is denied; and it is further

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

This constitutes the decision and order of this court.

February 6, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**