

ZDG, LLC v 174-176 1st Ave. Owner LLC

2023 NY Slip Op 30772(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652020/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **14**

Justice

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ZDG, LLC,

Plaintiff,

- v -

174-176 1ST AVENUE OWNER LLC, MQ CONSULTING,
LLC, PINNACLE BUILDING MAINTENANCE
INC., STERLING NATIONAL BANK

Defendant.

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INDEX NO. 652020/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Defendant 174-176 1st Avenue Owner LLC’s motion to vacate is granted.

Background

In this action concerning a mechanic’s lien, plaintiff previously obtained a default judgment against defendant 174-176 1st Avenue Owner LLC (“174”) in the amount of \$320,438.25 (NYSCEF Doc. No. 20). That order also ordered a sale of the property and appointed a referee to conduct the sale of the property (*id.*). 174 now moves to vacate that default on the ground that its address with the Secretary of State was not accurate and it therefore did not get notice of the instant action. It also contends that it has meritorious defenses to this action, a dispute about a construction project. 174 argues that plaintiff was selected for the job based upon a bid for \$175,000 and that plaintiff soon demanded increases in the price. 174 argues that it agreed to a new contract price of \$243,645 but that plaintiff refused to formally sign a contract

for this new price and later plaintiff stopped working on the project before later demanding \$320,438.25 as well as filing a mechanic's lien.

In opposition, plaintiff contends that 174 deliberately failed to keep a current address with the Secretary of State and service directed toward the address on file with that agency (20 West 22nd Street- Suite 1601 in Manhattan) constitutes proper service. It questions how vacatur is appropriate where 174 had the wrong address for at least five years. Plaintiff argues that it was 174's obligation to ensure its address with the Secretary of State was correct and even points to other litigation involving 174, which plaintiff asserts should have put 174 on notice its address was incorrect. Plaintiff also argues that 174 failed to assert a meritorious defense.

The Court did not consider the letters filed in relation to this motion, NYSCEF Doc. Nos. 49, 50.

Discussion

“As to vacating the default, a party seeking to vacate a default judgment must demonstrate both a reasonable excuse for the default and a meritorious defense” (*Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 401, 160 NYS3d 590 [1st Dept 2022]).

As an initial matter, the Court observes that plaintiff is correct that 174 had an obligation keep a current address with the Secretary of State. However, the circumstances of this case compel the Court to find that 174 has a reasonable excuse—that it did not receive service. 174 claims that the correct address is 64 Second Avenue, 2nd Floor, New York, NY 10003 (NYSCEF Doc. No. 26, ¶ 31). It argues that plaintiff's principals visited 174's office at this location (*id.* ¶ 32). Moreover, the Court observes that the contract that forms the basis of the instant dispute also lists 174's address as 64 Second Avenue, Second Floor (NYSCEF Doc. No. 12 at 22).

In other words, while 174 should have kept a current address with the Secretary of State, this is not a situation in which it hid its location or prevented plaintiff from finding it. And although plaintiff was not under any obligation to serve defendant at the location plaintiff allegedly knew to be defendant's actual, current address – or even to drop a copy in the mail – perhaps both this motion and the default motion could have been avoided if plaintiff had taken that extra, although not required, step. Given that the default judgment entitles plaintiff to sell the property and this state's preference for deciding cases on the merits (*Santiago v Valentin*, 125 AD3d 459, 459, 4 NYS3d 2 [1st Dept 2015]), the Court finds that 174 demonstrated a reasonable excuse for its default – that it did not know about the case.

The Court also finds that 174 cited a meritorious defense as its version of events raised material factual issues about the parties' dispute. 174 contends that there was fixed price for the contract, the parties attempted to reach an agreement for an increased amount before plaintiff stopped doing work and later filed a mechanic's lien for substantially more than the contract price. That account clearly presents a meritorious defense to plaintiff's claims that must be explored in discovery: i.e., how much, if anything, plaintiff is actually due.

Accordingly, it is hereby

ORDERED that 174-176 1st Avenue Owner LLC's motion to vacate is granted, the judgment and all filings related to the sale are vacated, and movant shall upload its proposed answer as a separately e-filed document on or before March 29, 2023; and it is further


ORDERED that the matter is restored to the active calendar; and it is further

ORDERED that, within 7 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); 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 at the address www.nycourts.gov/supctmanh);] and it is further

ORDERED that upon receipt of the foregoing, the Clerk of the General Clerk’s Office shall immediately restore the case to the active calendar.

Conference: June 22, 2023 at 10:30 a.m. By June 15, 2023, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement about discovery that identifies areas in dispute and 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is appropriate. The failure to upload anything will result in an adjournment of the conference.

<p style="text-align: center;"><u>3/10/2023</u> DATE</p>	 <hr style="border: 0.5px solid black;"/> <p>ARLENE P. BLUTH, J.S.C.</p>													
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