Bach v Columbia Univ.
2023 NY Slip Op 33473(U)
October 5, 2023
Supreme Court, New York County
Docket Number: Index No. 157412/2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Jonathan Bach

- v -

Columbia University, et. al.

INDEX NO. 157412/2021

MOT. DATE

MOT. SEQ. NO. 002

The following papers were read on this motion to/for confirmation

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 43-52
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 53-57
Replying Affidavits	NYSCEF DOC No(s). N/A

This is a motion submitted by defendant Samascott Orchard, LLC ("SO LLC") to vacate the court's order and decision dated January 3, 2023 pursuant to CPLR §§ 317 and 5015. The January 3, 2023 order granted Jonathan Bach's ("Bach") motion for default judgment against SO LLC on liability with damages to be determined an inquest to be held at the time of trial. Plaintiff, Jonathan Bach ("Bach") opposes the motion. There is no opposition from codefendants Columbia University or GrowNYC a/k/a Greennmarket. For the reasons stated below, the motion is granted.

This is a personal injury action. Plaintiff alleges that he was standing on a public sidewalk abutting the premises located at 2920 Broadway, New York, NY 10027 while he was waiting to purchase goods from a stall operated by SO LLC. Plaintiff claims that he was directed to stand in a certain area marked by chalk and tape and that, while standing in that area, ice and/or snow fell from the building above him and struck him, causing injury. Plaintiff alleges that SO LLC is liable for his injury because he was directed to stand in a dangerous area while waiting to make a purchase from SO LLC's stand at the market.

SO LLC argues that the prior decision should be vacated pursuant to CPLR § 5015(a)(1) and CPLR § 317 because it never received service of the summons and complaint and it has a meritorious defense. SO LLC contends that vacatur is appropriate because it is timely, SO LLC did not receive the summons and complaint and SO LLC has a meritorious defense. Regarding the latter, SO LLC maintains that it was not responsible for determining where patrons stood in line while waiting to make purchases at the market. Rather, defendant GrowNYC a/k/a Greennmarket oversaw the farmer's market and marked sidewalks for patrons to wait in line and directed patrons to stand within the designated areas where plaintiff claims he was struck by falling ice.

In support of its motion, SO LLC submits the sworn affidavit of Lucas Samascott, a member of SO LLC. Samascott states, based on personal knowledge, the following. At no time prior to the court's

Dated: 10/5/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

decision granting a default judgment against SO LLC was he, or anyone employed by SO LLC, aware that an action had been filed against SO LLC. Samascott further claims that SO LLC never received a summons and complaint in this action, nor did it receive the motion documents for the default judgment motion. Samascott also states that on the day that plaintiff alleges he was struck by falling ice neither he, nor anyone employed by SO LLC, created the marked area on the sidewalk where plaintiff was directed to stand nor directed patrons where to stand.

Bach responds that the default should not be vacated because SO LLC received service of the summons and complaint and does not have a meritorious defense. Bach states that SO LLC was served through the Secretary of State which creates a presumption of proper service that cannot be overcome by a "conclusory denial of receipt of the summons and complaint." He also argues that SO LLC has failed to present a meritorious defense because it relies solely on the affidavit of Mr. Lucas Samascott who does not unequivocally state that he was present on the day of plaintiff's accident. Therefore, plaintiff maintains that Samascott cannot say based on personal knowledge that an employee of SO LLC did not direct plaintiff to stand under the snow/ice accumulation that fell and struck him. Finally, Bach argues that vacating the default at this advanced stage of litigation would prejudice the remaining parties because most discovery has been completed and the parties will be ready to file note of issue within the month. Bach argues that permitting SO LLC to vacate its default now would delay the case, effectively restart discovery, and would cost all other parties money.

DISCUSSION

In an exercise of discretion, the court will first consider the movant's CPLR § 5015 argument. CPLR § 5015(a)(1) states that:

> "The 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.

In order for a party to move to vacate a default pursuant to CPLR § 5015(a)(1), it must demonstrate that it had a reasonable excuse for the default and a meritorious claim or defense (*See* CPLR 5015[a][1]; *Gray v. B.R. Trucking Co.*, 59 NY2d 649 [1983]). "What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court"(*Gecaj v. Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600 [1st Dept 2017]). "This determination is 'sui generis and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits'" (*SOS Capital v. Recycling Paper Partners of PA, LLC*, 2023 NY Slip Op 04480 [1st Dept 2023] quoting *Chevalier v. 368 E. 148th St. Assoc., LLC*, 80 AD3d 411 [1st Dept 2011]).

For the purposes of CPLR § 5015, a defendant does not need to establish its meritorious defense as a matter of law in order to succeed on the motion (*Tat Sang Kwong v. Nudge-Wood Laundry Service, Inc.*, 97 Ad2d 691 [1st Dept 1983]; *see Bilodeau-Redeye v. Preferred Mutual Inc., Co.*, 38 AD3d 1277 [4th Dept 2007] ["[t]he quantum of proof required to prevail on a motion to vacate a default order or judgment is not as great as is required to oppose summary judgment"]; *see also Law Off. of Civardi & Obiol, P.C. v. Weisberg & Weisberg*, 137 AD3d 1226 [2d Dept 2016]). Rather, a defendant must establish a potentially meritorious defense (*American Reliable Insurance Company v. Delmonte*, 189 AD3d 663 [1st Dept 2020]; see *Chen v. Romona Keveza Collection LLC*, 208 AD3d 152 [1st Dept 2022] [stating that a question of whether or not plaintiff was an employee was sufficient to establish a meritorious defense in an employment action]); *Toos v. Leggiadro Intl., Inc.*, 114 AD3d 559 [1st Dept 2014] [stating that a "potentially meritorious action" was sufficient to vacate a default pursuant to CPLR § 5015]).

The decision and order that this motion seeks to vacate was entered on January 3, 2023. This motion was filed on May 12, 2023. Therefore, the motion was made well within the one-year permitted by CPLR § 5015.

SO LLC states that its default is excusable because it never received service of the complaint. The affidavit of service of the summons and complaint filed by plaintiff in this case alleges service upon SO LLC via personal service to Ms. Sue Zouky, an authorized agent of the Office of the Secretary of State of the State of New York. When a defendant is served with a summons and complaint through the secretary of state, defendant's statement that it did not personally receive the notice in time to defend is sufficient to excuse its failure to appear (see *Crooks v. Lear Taxi Corp.*, 136 AD2d 452 [1st Dept 1988]; *Purdy v. Kutsher's, Inc.*, 468 NYS2d 383 [2nd Dept 1983]). In his affidavit, Samascott states that SO LLC never received service of the summons and complaint in this action, nor was he, or any employee of SO LLC even aware that an action was being brought against SO LLC until after the January 3, 2023 order was issued. Therefore, SO LLC has proffered a sufficient excuse for its default.

Next, SO LLC states that it has a meritorious defense based upon the sworn affidavit of Samascott. In his affidavit, Samascott states that on the day that plaintiff alleges that he was struck by falling snow/ice neither he, nor anyone employed by SO LLC, created the marked area on the sidewalk where plaintiff was directed to stand. He states that Grow NYC a/k/a Greenmarket created the chalk/taped markings. This is a meritorious defense because, if SO LLC can prove it, it would absolve SO LLC from any liability for plaintiff's injuries.

In opposition to SO LLC's motion, Bach argues that Samascott's affidavit could not have been based upon personal knowledge because Samascott does not establish that he was present at the market on the day of the alleged incident. However, an individual's personal knowledge may be implied based upon their employment position (see *Sea Modes, Inc. v. Cohen*, 309 NY 1 [1955]; *Bonghi v. Firstcent Shopping Center, Inc.*, 116 AD2d 502 [1st Dept 1986]). "Where it is apparent that an affiant is in position to have personal knowledge of the facts, his positive affidavit will be accepted" (*In re An Order to Strike from the Enrollment Book of the Twentieth Election Dist. Of the Twenty Fifth Assembly Dist. In the N.Y. the Name of Henry Titus*, 117 AD 621 [1st Dept 1907]). On this record, the court finds that SO LLC has stated a meritorious defense based upon Samascott's affidavit.

Finally, Bach asserts that vacating the default at this advanced stage of litigation would prejudice the remaining parties because it would effectively restart the discovery process. Upon the court's review of the file on NYSCEF, depositions are not complete. Moreover, this action was filed less than two years before SO LLC made this motion. Given that discovery is outstanding, the court is not persuaded by plaintiff's arguments. Even assuming *arguendo* that discovery had to be restarted as a result of vacatur of the default against SO LLC, New York's strong public policy in favor of deciding cases on their merits outweighs the otherwise unspecified inconvenience claimed by counsel (*Johnson-Roberts v. Ira Judelson Bail Bonds*, 140 AD3d 509 [1st Dept 2016]).

Based on the foregoing, the motion to vacate the January 3, 2023 order is granted pursuant to CPLR § 5015. In light of this result, the court declines to consider the balance of the parties' arguments relating to CPLR 317as moot.

In accordance herewith, it is hereby

ORDERED that the motion is granted in its entirety; and it is further

ORDERED that the decision and order dated January 3, 2023 is vacated; and it is further

ORDERED that defendant Samascott Orchard, LLC has 30 days from the date of this order to file an answer in this action; and it is further

ORDERED that the parties in this action will submit a stipulation to the court outlining the remaining discovery and setting deadlines for the same on or before November 21, 2023.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/5/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.