

**State Farm Mut. Auto. Ins. Co. v Protection Physical  
Therapy, P.C.**

2023 NY Slip Op 34235(U)

December 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154083/2020

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.



New York, 10457 (*id.*, ¶ 13). Elmandouh further avers that his business operations were shut down due to the COVID-19 pandemic and no one was available to accept service or receive delivery of the summons and complaint even if the Secretary of State had the correct address (*id.*, ¶ 14). Elmandouh claims that he learned about this action after counsel for defendant received a copy of the default judgment on or about August 10, 2021 (*id.*, ¶ 11). Defendant's counsel's affirmation is silent as to when and how they learned or received a copy of the default judgment.

Defendant also submitted the affidavit of Katrina Brandon, a paralegal in the declaratory judgment department at The Rybak Firm, PLLC ("firm") (NYSCEF Doc. No. 26). Brandon avers that she contacted a representative of the Secretary of State's office on June 1, 2022, who informed her there was a backlog of 2.5 months of delay in service of summons and complaints (*id.*, ¶ 6). She further avers that the representative informed her that at the time of the onset of the COVID-19 pandemic, which began in March 2020, the Secretary of State's office was not processing summons and complaints (*id.*). According to Brandon, once the firm receives a summons and complaint from the provider, she then prepares an Answer, e-files it and serves it by first-class mail to a plaintiff's counsel (*id.*, ¶ 9). However, in the present case, the firm did not learn of or receive the summons and complaint until after default judgment against defendant (*id.*, ¶ 10). The affidavit does not state how the firm learned of or received the default judgment.

Plaintiffs in opposition affirm that defendant was properly served with the summons and complaint on August 20, 2020, through the Secretary of State, and service of process on defendant was completed when the Secretary of State was served (NYSCEF Doc No. 32, *Barcsansky Affirmation in Opposition*, ¶¶ 11-13). Additionally, pursuant to CPLR 3215(g)(4)(i), plaintiffs' counsel sent an additional copy of the summons with notice and notice to corporation in this action to defendant on February 3, 2021<sup>1</sup> (*id.*, ¶ 6). Plaintiffs further argue that defendant submitted only a cursory, self-serving affidavit from its owner (*id.*, ¶ 16). The Elmandouh affidavit does not state 4226 Third Ave, Bronx, New York is not the defendant's current or prior address of service used by defendant with the Secretary of State and did not provide any time frame for when defendant's business was located at 750 56<sup>th</sup> St, Brooklyn, New York (*id.*). Furthermore, the Elmandouh affidavit does not refute that 4226 Third Ave has been and currently is the registered address of defendant, and fails to substantiate any efforts undertaken to update or revise defendant's registered address with the Secretary of State (*id.*, ¶ 17). Additionally, plaintiffs argue that the Brandon affidavit is conclusory and should not be accepted by the court. Specifically, the Brandon affidavit fails to demonstrate who she spoke with at the Secretary of State; whether the summons and verified complaint in this case was one of the complaints the Secretary of State allegedly delayed serving; or the date on which the Secretary of State served the Summons and Verified Complaint on defendant (*id.*, ¶ 20). Plaintiffs also argue that Brandon contacted the Secretary of State on June 1, 2022, when she was advised that the Secretary of State had a backlog of 2.5 months in serving summons and complaints, whereas the summons and complaint in this case was served in 2020 (*id.*, ¶ 21). Lastly, plaintiffs argue that defendant waited two years after proper service of the summons and verified complaint, and one year after entry of default judgment to file the instant motion, despite defendant's counsel being aware of the default judgment on or about August 10, 2021 (*id.*, ¶ 31).

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<sup>1</sup> Plaintiff refers to the affidavit of service sworn to on February 3, 2021, and e-filed on February 4, 2021. (NYSCEF Doc. No. 4.)

“A defendant seeking to vacate a default under [CPLR 5015 (a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action” (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986] [citations omitted]). “The court may grant a motion to vacate a default on grounds of excusable default and a showing of a meritorious defense, if the motion is made within one year after service of the order entered on default, with written notice of its entry” (*Marston v Cole*, 147 AD3d 678, 678 [1st Dept 2017] [citations omitted]). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court (see *Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 [1st Dept 2011].)

Here, defendant failed to demonstrate a reasonable excuse for its delay in answering the verified complaint. “Service of process was complete when plaintiff served the Secretary of State . . . ‘irrespective of whether the process subsequently reached the corporate defendant’” (*Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020], quoting *Associated Imports, Inc. v Amiel Publ.*, 168 AD2d 354, 354 [1st Dept 1990], *lv dismissed* 77 NY2d 873 [1991]). A defendant not receiving the summons and complaint because “it failed to keep a current address on file with the Secretary of State does not constitute a reasonable excuse” (*Castillo v 2460 Tiebout Ave. Assoc., LLC*, 209 AD3d 518, 519 [1st Dept 2022], citing *John v Arin Bainbridge Realty Corp.*, 147 AD3d 454, 455 [1st Dept 2017]). Defendant’s “bare denial of receipt of the summons and complaint does not address the additional mail service of the summons and complaint that plaintiff made in [February 2021] pursuant to CPLR 3215(g)(4), and otherwise does not avail to show a reasonable excuse when the service was made on the Secretary of State and was concededly proper” (*Crespo v Kynda Cab Corp.*, 299 AD2d 295, 295 [1st Dept 2002][internal quotation marks and citation omitted]).

Defendant failed to substantiate that the Secretary of State delayed forwarding the summons and verified complaint and, as a result, caused defendant’s failure to timely answer. The Brandon affidavit consists of hearsay statements from a representative of the Secretary of State. Defendant’s affidavits contain only conclusory denials that it never received the summons and complaint from the Secretary of State, and it is well established that “[a] conclusory denial of receipt of process does not constitute a reasonable excuse” (*Country-Wide Ins. Co. v Power Supply, Inc.*, 179 AD3d 405, 407 [1st Dept 2020]). There is a “presumption of service created by the affidavit of service reflecting service through the Secretary of State” (*Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431, 431 [1st Dept 2017] [affirming denial of motion to vacate default judgment because defendant made conclusory denial that it received summons and complaint]).

Defendant’s counsel merely stated that its failure to appear in the matter was due to law office failure. Law office failure may amount to a reasonable excuse (see *Heijung Park v Nam Yong Kim*, 205 AD3d 429, 429 [1st Dept 2022]). However, “[c]onclusory references to law office failure . . . , without detail or evidentiary support, do not rise to the level of a reasonable excuse for the default” (*Urban D.C. Inc. v 29 Green St. LLC*, 205 AD3d 634, 634 [1st Dept 2022] [internal quotation marks and citation omitted]). None of the affidavits submitted by defendant are from an individual addressing law office failure.

Considering that defendant did not demonstrate a reasonable excuse, the court need not consider whether a potentially meritorious defense exists (see *Aetna Life Ins. Co. v UTA of KJ*

Inc., 203 AD3d 401, 402 [1st Dept 2022]; see also *Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016][“Absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense.”)].

Unlike CPLR 5015, to vacate a default judgment pursuant to CPLR 317, a defendant must demonstrate that it did not receive notice of the summons in time to defend and that it had a meritorious defense (*Country-Wide Ins. Co.*, 179 AD3d at 406). “[T]here is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay” (*Eugene Di Lorenzo Inc.*, 67 NY2d at 141 [internal quotation marks and citations omitted]). “It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR 318” (*id.* at 142 [internal quotation marks omitted]). “[C]orporate defendants . . . have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend” (*id.* [citations omitted]). “A conclusory and unsubstantiated denial of receipt of the summons and complaint is insufficient to establish lack of notice” (*Gray v Goodluck-Hedge*, 208 AD3d 1221, 1223 [2d Dept 2022] [internal quotation marks and citation omitted]).

Here, defendant failed to establish that it did not personally receive notice of the summons in time to defend the action. The affidavits submitted by defendant “[a]mounted to nothing more than a denial of receipt of the summons and complaint, which is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317” (see *Xiao Lou Li v China Cheung Gee Realty, LLC*, 139 AD3d 724, 726 [2d Dept 2016] [citations omitted]). There is no date certain when defendant established its business at the Brooklyn address, and the Elmandouh affidavit is “only a conclusory affidavit denying receipt of the pleadings, without further explanation, which [is] insufficient to rebut the presumption of service created by the process server’s affidavit” (*Gonzalez v City of New York*, 106 AD3d 436, 437[1st Dept 2013]). Simply put, defendant’s affidavits “do not contain sufficient detail to permit a finding that [it] did not personally receive notice of the summons in time to defend” (*Crespo*, 299 AD2d at 295 [1st Dept 2002][internal quotation marks and citation omitted]). Therefore, “it is unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense for purposes of either CPLR 317 or 5015(a)(1)” (*Dunn v Law Offs. of Evans & Al-Shabazz, LLP*, 189 AD3d 776, 779 [2d Dept 2020]). Accordingly, it is hereby

**ORDERED** that defendant’s motion is denied in its entirety; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded, 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.

December 6, 2023

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	OTHER