

Merriweather v Enterprise Title Agency, Inc.

2024 NY Slip Op 32610(U)

July 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 535752/2022

Judge: Sharon A. Bourne-Clarke

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This opinion is uncorrected and not selected for official publication.

P R E S E N T:

HON. SHARON A. BOURNE-CLARKE,

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS -DJMP PART

-----X
ALMA G. MERRIWEATHER,
Plaintiff,

DECISION AND ORDER

-against-

Index No.: 535752/2022
Motion Seq. 1, 2, 3

ENTERPRISE TITLE AGENCY, INC., SIAMAK
DAROUVAR and FIRST AMERICAN TITLE
INSURANCE COMPANY,

Defendants.

-----X

The following e-filled papers read herein:

<u>Papers</u>	<u>NYSCEF Nos.:</u>
Summons + Complaint with Exhibits and Answer	1,3,4,23
Notice of Motion	8
Affidavits (Affirmations) Annexed and Exhibits	9-21
Notice of Cross-Motion	25,37
Opposing Affidavits (Affirmations) and Exhibits	26-36, 38-46, 48-60
Affirmation of Service	5-7,47

FACTS

Plaintiff ALMA G. MERRIWEATHER (hereinafter referred to as "MERRIWEATHER") is seller of the real property located at 72 Quincy Street, Brooklyn, New York and is a natural person who resides

in Brooklyn, New York. Defendant ENTERPRISE TITLE AGENCY (hereinafter referred to as “ETA”) is a domestic corporation with offices located at 393 Jericho Turnpike, Mineola, New York 11501. Defendant SIAMAK DAROUVAR (hereinafter referred to as “DAROUVAR”) is the attorney who represented the buyer, 72 QUINCY LLC, in the property sale and has a law office located at 393 Jericho Turnpike, Mineola, New York 11501. Defendant FIRST AMERICAN TITLE INSURANCE COMPANY (hereinafter referred to as “TITLE”) is an American financial service company and has an address at 666 Third Avenue, New York, New York 10017.

On or about April 23, 2021, MERRIWEATHER sold real property located at 72 Quincy Street, Brooklyn, New York to 72 QUINCY LLC. Environmental Control Board (“ECB”) and Department of Buildings (“DOB”) violations (the “ECB/DOB Violations”) existed against the property at the time of sale. As a condition of closing Plaintiff deposited \$252,480.00 (the “ECB/DOB Pool”) for ETA to hold pending resolution of the violations. Plaintiff submitted that these violations had been cured and the Escrow Agent was instructed to disburse funds but refused to do so in violation of the Escrow Agreement. Plaintiff seeks to hold the Defendant’s liable for breach of the escrow agreement, breach of fiduciary duty, and conversion. Additional funds totaling \$225,242.95 were also escrowed, but they are not at issue here. Plaintiff is seeking to hold the Defendants jointly and severally liable for \$252,480.00 with interest thereon owing from entry of judgment at a rate of nine percent per annum, in addition to any further relief that this Court deems just.

PROCEDURAL HISTORY

On December 8, 2022, MERRIWEATHER filed a summons with notice. On December 27, 2022, TITLE was allegedly served by the delivery of the summons with notice to Carlos Ferrera, who according to the affidavit of service, claimed to be an authorized agent. On December 28, 2022, DAROUVAR was personally served the summons with notice. On January 1, 2023, Plaintiff filed the complaint. On January 6, 2023, ETA was served by the delivery of the summons with notice to Joseph Degetano. On February 27, 2023, MERRIWEATHER filed a motion for entry of judgment in their favor due to the Defendants’ default.

On March 3, 2023, ETA and DAROUVAR filed a late answer with crossclaims. On the same day MERRIWEATHER filed a notice of rejection. On March 31, 2023, TITLE filed a notice of cross-motion alleging improper service, denying the court's jurisdiction, and alternatively requesting permission to serve a late answer. On the same day ETA and DAROUVAR filed a notice of cross-motion seeking vacatur of their default, permission to file a late answer, and a dismissal of this action.

ARGUMENTS

MERRIWEATHER argues that it is entitled to a default judgment pursuant to CPLR § 3215(a) due to the Defendants' failure to answer the complaint. Pursuant to CPLR § 3012 a defendant is in default if they do not respond to a summons and complaint within twenty days when personally served and thirty days when not personally served. When a summons is without a complaint a defendant may make a demand for the complaint and will then have twenty days to respond after service of the complaint. TITLE argues that the default judgment should not be granted because service was improperly made upon them pursuant to CPLR § 311 (a)(1), which requires process to be delivered to a statutory or appointed representative of a corporate defendant. Additionally, if the Court finds the service of process to be proper, TITLE argues the Court should grant leave to serve a late answer pursuant to CPLR §3012(d). ETA and DAROUVAR argue that the default judgment should not be granted because the Court should grant leave to serve a late answer and compel the Plaintiff to accept it pursuant to CPLR §3012(d), § 2004, and § 2005.

OPINION

DeStaso v. Bottiglieri, holds that to avoid an entry of default judgment, the defendant must “demonstrate a reasonable excuse and the existence of a potentially meritorious defense”. *DeStaso v. Bottiglieri*, 52 A.D.3d, 453 (App. Div.). Additionally, the “determination of what constitutes a reasonable excuse for a default lies within the [court’s sound discretion]”. *Nan Yang v. Rong Chen*, 2021 NY Slip Op 30754(U) (Sup. Ct.).

The first issue the Court must address is whether TITLE was properly served. The service of the summons and complaint was handed to Carlos Ferrera, a mail clerk for TITLE. The Plaintiff alleges that Mr. Ferrera is an authorized agent, but TITLE claims he is not.

Pursuant to CPLR § 311(a)(1), personal service upon a domestic or foreign corporation to be made to an “officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service”. Designating an agent for service should align with CPLR § 318, requiring writing that appoints an authorized agent to be filed in the county clerk’s office. Per *Fashion Page*, when a process server acts reasonably in serving a corporate employee who displays apparent authority to accept such service, the fault lies with the defendant corporation and the service will be upheld. *Fashion Page*, 50 N.Y.2d 265 270. In *Fashion Page*, the process server went to the corporate office and asked the defendant’s receptionist who could accept the process. *Id.* at 270. Following the receptionist’s instructions, the process server delivered the summons to a vice president’s secretary, who confirmed her authority to accept the process on behalf of the corporation. *Id.* Although the secretary was not an agent for process under CPLR § 311(1), the service was made in a manner that, when objectively viewed, was calculated to give the corporation fair notice of the lawsuit. *Id.* at 273.

Evidence suggests that service given to Mr. Ferrera satisfies notice requirements as service was reasonable and effectuated such that the Defendant should have had a fair notice of the proceeding. *See Fashion Page, Ltd. v. Zurich Insurance Co.*, 50 N.Y.2d 265 (1980). The Plaintiff notes that Mr. Ferrera accepted service on behalf of TITLE in prior cases, including *Davis v. Tiszenkel* (Index No. 156636/2021) and *Amar v. Movtady* (Index No. 155930/2022). Additionally, Mr. Ferrera was the only mail clerk working at TITLE’s office during this time due to COVID-19 protocols. In *Fashion Page*, the Court states, “...a corporation may appoint an agent to accept service without observing the formalities necessary to ‘designate’ an agent pursuant to CPLR § 18.” *Fashion Page*, 50 N.Y.2d 270 272. Since Mr. Ferrera accepted service on behalf of TITLE in the past, and no evidence suggesting a clear revocation of this authority has

been presented, it is reasonable to view that Mr. Ferrera was an authorized agent for TITLE at the time of service. As an authorized agent, service upon Mr. Ferrera is sufficient to provide fair notice of the proceedings to the Defendant.

The second issue the Court must address is whether the Plaintiff's motion for default judgment against TITLE should be granted. Even though service was proper, it is in the interest of justice to deny the plaintiff's motion for default judgment, pursuant to CPLR § 2005. (*See Vita v. Alstom Signaling, Inc.*, 308 A.D.2d 583). The untimely answer was due to a reasonable office failure. Mr. Ferrera was the only mailroom clerk in the New York office following COVID-19 thus one of the only agents at the office that would be able to receive the service in a timely manner. *See Id.* He was tasked with scanning and disseminating all mails and paper received, which can understandably result in delays. Additionally, there has not been a showing of willful or deliberate delay, and the defense presented is sufficient to be deemed meritorious. *See Id.* As such, this Court **DENIES** Plaintiff's motion for default judgment against the Defendant, TITLE.

The third issue this Court must address is whether the Plaintiff's motion for default judgment against ETA and DAROUVAR should be granted. Entering a default judgment against ETA and DAROUVAR but not TITLE could result in inconsistent judgments amongst defendants being held jointly and severally liable. It would be premature to enter a default judgment when it could result in issues regarding liability. *See Woodson v. Mendon Leasing Corp.* 100 N.Y.2d 62 68 (App. Div.) (holding that CPLR § 5015 (a) does not provide an exhaustive list as to when a default judgment may be vacated, rather the courts may exercise their "inherent discretionary power" in situations that warrant vacatur and could not easily be foreseen by the drafters.) Additionally, none of the parties would be prejudiced if this case is decided on its merits, and public policy favors the resolution of this case on its merits. *See Nunez v. Bertram*, 808 N.Y.S.2d 265 [AD 2nd Dept. 2005.]. As such this Court **DENIES** Plaintiff's motion for default judgment against the Defendants, ETA and Darouvar.

The final issue before this Court is whether to grant ETA and DAROUVAR's motion for dismissal of this action. The Plaintiff has presented a well pleaded complaint. As such, this Court **DENIES** Defendants' motion for dismissal.

This constitutes the Decision and Order of the Court.

**Dated: Brooklyn, New York
July 24, 2024**

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