Diaz v 617 Warren LLC
2024 NY Slip Op 33270(U)
August 29, 2024
Supreme Court, Kings County
Docket Number: Index No. 531910/2021
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of August, 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

--X

ALEXANDER BIENVENIDO DIAZ,

Plaintiff,

-against-

617 WARREN LLC, HLB CONSTRUCTION CORP. and WERIZE, INC.

Defendants.

--X

Index No.: 531910/2021

DECISION AND ORDER

Motion #5

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Memorandum of Law/Affirmation/Exhibits....................	80 – 85
Affirmation in Opposition/Exhibits..	90 – 94
Reply Brief/Affirmation/Exhibit..	99 – 101

Defendant 617 Warren LLC ("Defendant") moves for an order pursuant to CPLR 5015 and 317 to vacate the judgment entered against it (Mot. Seq. No. 5). Plaintiff Alexander Bienvenido Diaz ("Plaintiff") opposes the motion.

Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained on July 20, 2021, at a construction site located at 617 Warrant Street in Brooklyn, New York. In his complaint, Plaintiff alleges that his employer Consolidated Scaffold Co. ("Consolidated") was acting as a contractor at the site on the date of the accident and that he was injured while acting within the scope of his employment. Plaintiff served the defendants through New York's Secretary of State on December 20, 2021. Plaintiff moved for a default judgment against Defendant 617 Warren and an order granting such motion was entered on or about January 25, 2023. After defendants HLB Construction Corp. ("HLB") and Werize Inc. ("Werize") interposed an answer, their attorney's order to show cause to withdraw as counsel was granted and

a stay was instituted (NYSCEF Doc No. 45). Thereafter, Justice Leon Ruchelsman granted Plaintiff's motion to strike HLB and Werize's answer (NYSCEF Doc No. 71).

Defendant claims that the default judgment "cannot be permitted to stand" because it did not timely receive notice of Plaintiff's complaint. Plaintiff served the Defendant through New York's Secretary of State on December 20, 2021. According to Defendant, the subsequent mailing of the summons and complaint from the Secretary of State went to a Florida address to which Defendant allegedly no longer has a connection. In opposition, Plaintiff argues that the Defendant failed to establish a reasonable excuse for its default and has not set forth a meritorious defense.

To successfully oppose a motion for leave to vacate a default judgment based on failure to appear or timely serve an answer, the party is required to demonstrate a reasonable excuse for their default and the existence of a potentially meritorious defense to the action (CPLR 5015 [a] [1]; *Cartessa Aesthetics, LLC v Demko*, 217 AD3d 821 [2d Dept 2023]; *Sharestates Investment, LLC v Hercules*, 166 AD3d 700 [2d Dept 2018]). The determination of what constitutes a reasonable excuse lies within the discretion of the court (*Jing Shan Chen v R & K 51 Realty, Inc.*, 148 AD3d 689 [2d Dept 2017]; *New York Hosp. Medical Center of Queens v Nationwide Mut. Ins. Co.*, 120 AD3d 1322 [2d Dept 2014]).

At oral argument, Defendant conceded that it did not have a reasonable excuse and is thus not entitled to vacatur under CPLR 5015 (a) (1) but argued that it is entitled to vacatur under CPLR 317 which, unlike CPLR 5015 (a) (1), does not require a reasonable excuse. CPLR 317 provides as follows:

> A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, **upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense** (CPLR 317 [emphasis added]).

Service on the Secretary of State does not constitute personal delivery on a limited liability company or to an agent designated under CPLR 318 (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138, 142 [1986]; *Solomon Abrahams, P.C. v Peddlers Pond Holding Corp.*, 125 AD2d 355, 356 [2d Dept 1986] ["From the plain language of CPLR 317 and CPLR 318, the Secretary of State is not to be considered an agent pursuant to CPLR 318"]; *see also Andrews v Wartburg Receiver, LLC*, 203 AD3d 1000, 1001 [2d Dept 2022]; *Selmon v B&H Dev. 1 Corp.*,

208 AD3d 528, 529 [2d Dept 2022]; *Acqua Capital, LLC v 510 W. Boston Post Rd, LLC*, 164 AD3d 1195, 1196 [2d Dept 2018]). Instead, "personal delivery" means "in-hand delivery" of the summons and complaint to the defendant or its agent for service (*Dime Sav. Bank v Norris*, 78 AD2d 691, 691 [2d Dept 1980]; *Fleetwood Park Corp. v Jerrick Waterproofing Co.*, 203 AD2d 238, 239 [2d Dept 1994]). Thus, Defendant is not barred from seeking relief pursuant to CPLR 317 but must still "demonstrate[] that it did not have notice of the action and that it has a meritorious defense" (*Borohov v Queens Fresh Meadows, LLC*, 225 AD3d 581, 582 [2d Dept 2024]).

First, Defendant provided an affidavit demonstrating that it did not personally receive notice of the action in time to defend. In her affidavit, Paula Stolowicz, a shareholder, concedes that the address on file with the Secretary of State was 400 Sunny Isles Boulevard[1] in Florida (NYSCEF Doc No. 85, ¶ 7). Though Ms. Stolowicz admits that she lived at that address, she states that she "moved in December 2021 prior to Plaintiff's attempt to effectuate service" (*id.*). "A failure to file a change of address with the Secretary of State does not constitute a per se barrier to vacatur of a default judgment pursuant to CPLR 317" (*Evans*, 163 AD3d at 772). Plaintiff argues that all pleadings, notices, motion papers and default judgment order were served on all known addresses for Defendant. The only affidavits of service provided by Plaintiff reflect service through the Secretary of State and/or via first class mail at 617 Warren Street. While the Secretary of State is an agent authorized to receive process for Defendant (*Jordan-Covert v Petroleum Kings, LLC*, 199 AD3d 666, 668 [2d Dept 2021], citing CPLR 311-a [a]; Limited Liability Company Law § 303 [a]), Defendant has established that the address on file was no longer valid and did not receive notice through service on the Secretary of State. With respect to service via mail at 617 Warren Street, where a multi-family home is located, Defendant denies owning or occupying the property. Even if Defendant did own and/or occupy the premises, service via mail there does not comply with the CPLR 311-a or Limited Liability Company Law § 303[2] and is insufficient to establish that Defendant received actual notice since no acknowledgment of receipt was proffered (*see Fleetwood Park Corp.*, 203 AD2d at 239 [defendant cannot establish he did not receive actual notice where his employee signed the receipt of a certified envelope containing a copy of the

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[1] Ms. Stolowicz admits that the Florida address is a condominium complex and yet no condominium number was on file (NYSCEF Doc No. 85, ¶ 8)

[2] "New York state law does not authorize service on a corporation or limited liability company via mail" (*Jordan v Forfeiture Support Assoc.*, 928 F Supp 2d 588, 596 [ED NY 2013]).

summons and complaint]; *DeLisca v Courtesy Transp., Ltd.*, 6 AD3d 646, 647 [2d Dept 2004]). In addition, Plaintiff has not proffered any evidence that it served a member or manager of the LLC, or any other agent authorized by appointment to receive service pursuant to CPLR 311-a [i], [ii] and [iii]) to impute actual notice on Defendant. Finally, "there is no basis in the record upon which to conclude that the defendant was deliberately attempting to avoid service" (*Leader v Steinway, Inc.*, 186 AD3d 1209, 1211 [2d Dept 2020]).

Second, with respect to a meritorious defense, while it is undisputed that Plaintiff was employed by Consolidated, Defendant avers that there are no records reflecting that Plaintiff performed any work on the project or that Plaintiff was injured at the site. In support of this argument, Defendant submitted the affidavits of Aron Scott, 617 Warren's shareholder and Executive Officer, and Issac Adler, the owner and Executive Officer of Silvercup Scaffolding I, LLC ("Silvercup"). Mr. Scott states that 617 Warren retained Silvercup to provide scaffolding services for the project and that Consolidated was neither hired by 617 Warren nor did they perform any work at the project site. Similarly, Mr. Adler states that Silvercup did not hire or subcontract Consolidated and did not employ Plaintiff.

In opposition, Plaintiff argues that Defendant has failed to proffer any documentary evidence to substantiate its claims. In addition, Plaintiff asserts that HLB was the general construction contractor for the project and would have hired, supervised, controlled, and directed any and all contractors, yet Defendant did not include any affidavits or documentary evidence denying that HLB retained Consolidated. Plaintiff further contends that his Workers Compensation records confirm that he suffered a work-related injury on July 20, 2021.

In its reply, Defendant argues that Plaintiff submitted no testimony or documentary evidence to contradict Mr. Scott's and Mr. Adler's affidavits, wherein they state that Consolidated did not perform any work for Defendant or at Defendant's property. Moreover, Defendants claim that while the Workers Compensation records reflect that Plaintiff sustained an injury while working for Consolidated, they do not contain any evidence about the location where the injury occurred. Based upon the foregoing, the Court finds that Plaintiff did not proffer sufficient evidence to establish that Defendant's alleged defense has no merit (*see Carr v Decesare*, 280 AD2d 852, 853 [3d Dept 2001]). Accordingly, Defendant has raised a potentially meritorious defense.

Therefore, upon consideration of the papers submitted and in light of public policy favoring the resolution of cases on the merits, it is hereby

ORDERED, that Defendant 617 Warren LLC's motion to vacate (Mot. Seq. No. 5) is granted and an answer shall be filed and served within thirty days of Notice of Entry of this order.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice