

**DarlingsBeauty Lab, Inc. v
Professionals - Gen. Servs., Inc.**

2024 NY Slip Op 33791(U)

October 17, 2024

Supreme Court, New York County

Docket Number: Index No. 654521/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

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DARLINGSBEAUTY LAB, INC., DIANA HAYES, DARIA
KHOLODOVA

Plaintiff,

INDEX NO. 654521/2022

MOTION DATE 01/12/2024

MOTION SEQ. NO. 002

- v -

THE PROFESSIONALS - GENERAL SERVICES,
INC., FATMIR BARDHOCI,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59

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

Upon the foregoing documents, defendants’ motion to vacate the order for default judgment is granted.

Background

This motion involves a service dispute in a case that arises out of a beauty salon remodel. Plaintiff Dina Hayes, also known as Diana Abalmasova (“Diana”) leased a commercial space for use as a beauty salon together with Plaintiff Daria Kholodova (“Daria”) and DarlingsBeauty Lab, Inc. (“DarlingsBeauty” together with Diana and Daria the “Plaintiffs”). In 2022, Plaintiffs contracted Defendant The Professionals – General Services, Inc. (the “Professionals”) for remodeling work on the salon. The contract dated September 19, 2022, was signed by Plaintiffs and the CEO of the Professionals, Defendant Fatmir Bardhoci (“Fatmir”, together with the Professionals “Defendants”). Plaintiffs allege that the Defendants then failed to perform and complete the remodeling work to the contract’s specifications, made misrepresentations to increase the cost of the project, and made “improper threats” against Plaintiffs.

Plaintiffs brought a complaint on November 29, 2022, asserting causes of action for fraudulent misrepresentation, breach of contract, rescission, conversion, abuse of process, unfair and deceptive trade practice, and unjust enrichment. Attached to the complaint were two sworn affirmations of service. One affidavit claims that Fatmir was served on December 3rd, 2022, at 9:00 am at the address 234 Adams Avenue, Staten Island, New York by copies left with a Janin S. that was authorized to accept service on Fatmir's behalf. The other states that the Professionals were served on the same date and time, at the same address, also left with Janin S. who was authorized to accept service on behalf of the Professionals. Both affidavits further state that copies were mailed first class on the same date.

Defendants did not timely respond, and on February 13, 2022, Plaintiffs moved for a default judgment which was granted on February 23rd. After an inquest hearing was held and evidence submitted, on September 13th this Court issued an order on damages awarding Plaintiffs \$455,353.

Defendants bring the present motion to vacate the default judgment on the grounds that they had not appeared in the action because Plaintiffs failed to serve Defendants properly and they had not received the commencement documents. They argue that "there is no Janin S.", and in any respect such an individual was not authorized to accept service on behalf of either defendant. Defendants further claim that the Plaintiffs were aware of a different address for the Professionals (405 Lexington Ave., New York) They ask for both the February 23rd and the September 13th orders to be vacated and to be allowed to respond to the Complaint.

Standard of Review

A party seeking to vacate a default judgment pursuant to CPLR § 5015(a)(1) must "establish both a reasonable excuse for the default and a potentially meritorious defense to the

action.” *979 Second Ave. LLC v. Yue Wah Chao*, 227 A.D.3d 436, 436 (1st Dept. 2024). There is a “strong public policy” in the state of New York to hear cases on the merits. *Chelli v. Kelly Group, P.C.*, 63 A.D.3d 632, 633 (1st Dept. 2009).

Under CPLR § 317, a “person served with a summons other than by personal delivery to him or to his agent for service . . . who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment . . . 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.” Unlike CPLR § 5015, “there is no necessity for a defendant moving pursuant to CPLR 317 to show a ‘reasonable excuse’ for its delay.” *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141 (1986). But a conclusory denial is service is insufficient to rebut the “presumption of service created by the process server’s properly executed affidavit.” *U.S. Bank N.A. v. Martinez*, 139 A.D.3d 548, 549 (1st Dept. 2016).

Discussion

For the reasons following, here Defendants fail to establish vacatur under CPLR § 317 but do satisfy the requirements for vacatur under CPLR § 5015.

I: Defendant Fatmir was Properly Served and CPLR § 317 Does Not Apply for Defendant the Professionals Because There Was Not a Showing of No Actual Receipt of Service

The first issue for the Court to decide on this motion is whether or not Defendants were properly served in December 2022. In aid of this, a traverse hearing was held on October 15, 2024. At that hearing, the Court found that the process server did indeed deliver the summons and complaint to an individual at the given address who claimed to be authorized to accept service on behalf of Defendants. But because the standard to vacate under CPLR § 317 requires

more than a mere denial of actual receipt of the summons and complaint, the Defendants have not established grounds under this provision of the CPLR.

In support of their argument that they were not personally served, Defendants submitted the sworn affidavit of Fatmir, who also testified at the Traverse hearing. In this affidavit, Fatmir claims that the 234 Adams Avenue address was his personal residence, and not an office for the Professionals. He claims that he does not know anyone named Janin S. and did not authorize anyone by that name to receive service on his behalf. The address at that time for the Professionals, according to Fatmir, was the 405 Lexington Ave. address. Fatmir claims that he did not receive any mail sent to 234 Adams Avenue because from mid-December 2022 to February 2023, he was living in California, and then in Albania from February 2023, during which time he did not have access to the 234 Adams Avenue mail. At the hearing, his testimony was a bit different. He said that he had moved in early December, and that while the Adams Street address had been an address for his company, it was not the address at the time of the service of process in this matter.

Plaintiffs argue that the 234 Adams Ave address is the Executive Office Address of the Professionals, and in support of that contention they submit a January 18, 2024, Entity Report from the Department of State. The same report states that the sole CEO for the Professionals, Fatmir, currently resides at the same address.

Under CPLR § 308(2), personal service upon a natural person is made by:

“delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business.”

Here, service was delivered to a woman named Janin S. who claimed to be authorized to accept documents on behalf of Fatmir, at Fatmir's last known residence and (according to the Department of State) the actual place of business. Fatmir states in his affidavit that he did not authorize a Janin S. to accept service on his behalf, but as regards defendant Fatmir the service requirements of CPLR § 308(2) have been met. A person of suitable age and discretion at his actual place of business accepted the documents which were also appropriately mailed to said place of business. Therefore, a motion to vacate the judgment with respect to defendant Fatmir fails under CPLR § 317.

Under CPLR § 311(a)(1), personal service upon a corporation is made by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or law to receive service." The issue here is if service was appropriately made for the corporate defendant the Professionals. Service under this CPLR provision requires that the "process server tender process directly to an authorized corporate representative" and tendering service by overnight mail is ineffective. *Emaar Rak F.Z.E. v. Rak Tourism Inv. F.Z.C.*, 177 A.D.3d 538, 539 (1st Dept. 2019).

However, to support a motion to vacate under CPLR § 317, a "party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action." *Capital Source v. AKO Med., P.C.*, 110 A.D.3d 1026, 1027 (2nd Dept. 2013). A "mere denial of receipt of the summons and complaint is insufficient." *Id*; see also *Pina v. Jobar U.S.A. LLC*, 104 A.D.3d 544, 545 (1st Dept. 2013) ("conclusory denial of receipt is insufficient to raise an issue of fact as to proper service in the face of plaintiff's submission of affidavits from a process server, which constitute prima facie evidence of proper service"). Here, the summons and complaint were left with a person claiming

to be an authorized agent at an address that has been registered with the Department of State as the office address for the corporate defendant, as well as mailed to the last known residence of the only CEO.

Defendants submit a sworn affidavit saying that they did not receive actual notice because they were residing elsewhere without access to mail for the 234 Adams Avenue address. They also claim that the address for the Professionals at the time of the complaint was the 405 Lexington Ave. address and in support of this they submit two copies of contracts made with Plaintiffs that list 405 Lexington Ave. They deny that Janin S. was an agent of the Professionals.

It is unclear if the statement by Janin S. that she was an authorized agent for the Professionals is sufficient to constitute proper service on a corporate defendant. It is a somewhat novel issue to consider a person claiming to be an authorized agent for a company, while present at the registered place of business, who appears to in actuality be a stranger unconnected to the actual corporate entity. This Court, however, does not need to reach that issue, both because grounds to vacate under CPLR § 317 are not established for other reasons and because Defendants do make out a sufficient showing for vacatur under CPLR § 5015.

In order to vacate under CPLR § 317, as established above, a defendant must show that they did not receive *actual* service and a mere denial is not enough. Because here the only evidence that the corporate defendant did not receive actual service (when the summons and complaint were mailed and hand-delivered to the personal residence of its only CEO) is a mere denial of service through affidavit, the grounds for CPLR § 317 vacatur have not been established. Because there has not been a sufficient showing under CPLR § 317, in order to vacate the judgment Defendants must make out a sufficient showing under CPLR § 5015. Defendants, for the reasons given below, are able here to make such a showing.

II: Defendants Do Establish a Reasonable Excuse for the Default

As CPLR § 317 does not provide grounds to vacate the judgment, the analysis then shifts to CPLR § 5015, which requires a reasonable excuse and a potentially meritorious defense to the action. While there is no per se rule under CPLR § 5015 that failure to update an address with the Department of State defeats the showing of a reasonable excuse, the courts are directed to consider “among other factors, the length of time for which the address has not been kept current.” *Eugene* at 143. Here, Defendants claim to have left the 234 Adams Avenue in late 2022 and as of early 2024, the address with the Department of State had still not been updated. This wait of over a year does weigh against Defendants. However, given the health issues that Fatmir claims to have been dealing with during this time, and the fact that it is not alleged that the Professionals could not be reached at the office address provided directly to Plaintiffs, this factor is not considered dispositive.

Fatmir claims that he had moved out by the time that the process server spoke to Janin S., and that he is unaware of the identity of that person. In mid-May 2023, Fatmir claims that he was visiting the Richmond Country Courthouse on unrelated business, and it was at this time that he learned that an action had been filed against Defendants. He did not hire an attorney to represent him on this matter until December 2023, according to Fatmir, because of health issues that involved several hospitalizations. Because Fatmir was the sole executive corporate officer for the Professionals, and because service was rendered at his address and not the office address stated on the agreements with Plaintiffs, Defendants argue that the Professionals likewise never received actual service. As such, the Court finds that there was a reasonable excuse for the Defendants.

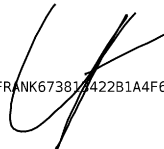
III: Defendants Establish a Potentially Meritorious Defense to the Action

For vacatur under CPLR § 5015 Defendants must also establish a potentially meritorious defense to the action. Here, a defendant is “not required to prove its defense, but merely ha[s] to set forth facts sufficient to make a prima facie showing of a meritorious defense.” *Batra v. Office Furniture Serv.*, 275 A.D.2d 229, 231 (1st Dept. 2000). Defendants argue that several of Plaintiffs’ claims are duplicative and insufficiently pled as a matter of law. It is also argued that certain of Plaintiff’s claims are made against individuals not party to the contracts alleged to be breached. They state that they have several meritorious counterclaims, and they submit the affidavit of Fatmir that raises some issues of fact regarding what work was performed and what payments due to Defendants have been unpaid. Affidavits in support of a motion that raises questions of fact have been deemed to support a potentially meritorious defense. *See Eugene* at 142. Although “conclusory and unsubstantiated assertions” are not sufficient to demonstrate a meritorious defense, here Defendants support their motion with copies of the two agreements made between the parties and proof that a check made out by Plaintiffs to the Professionals was marked fraudulent by Plaintiffs. The “quantum of proof needed to prevail on a CPLR 5015(a)(1) motion is less than that required when opposing a summary judgment motion” and is a “minimal standard of proof.” *Zoom Tan, Inc. v. Monforte*, 227 A.D.3d 1237, 1238 (3rd Dept. 2024). The Defendants have here met this minimal standard and established a potentially meritorious defense. Accordingly, it is hereby

ORDERED that defendants’ motion to vacate its default herein is granted on condition that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office; 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)


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10/17/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE