

Arboleda v Kama Rest. & Lounge Inc
2024 NY Slip Op 35184(U)
September 17, 2024
Supreme Court, Bronx County
Docket Number: Index No. 817577/2023E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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AMILCAR ARBOLEDA,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 817577/2023E

KAMA RESTAURANT & LOUNGE INC and
JOREY REALTY CORP.,

Motion Sequence Nos. 2, 3

Defendants.

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GUZMAN, J.

Plaintiff commenced this action to recover damages for injuries he allegedly sustained on July 24, 2023, at the Kama Restaurant & Lounge at 255 East Burnside Avenue, Bronx, New York. Defendant Jorey Realty Corp. allegedly owns the premises. Plaintiff alleges that Plaintiff was at the premises when gunfire erupted and he was shot by another patron, who was visibly intoxicated. The complaint alleges a cause of action for negligence and violations of Alcoholic Beverage Control Law §65 [2] and General Obligations Law § 11-101, also known as the Dram Shop Act. The affidavits of service reflect that both Defendants were served pursuant to service upon the Secretary of State. After neither Defendant answered or appeared, this Court granted a default judgment by Decision & Order dated April 24, 2024.

Before the Court is a motion filed by Jorey Realty Corp. (“Jorey”) to vacate the default judgment pursuant to CPLR § 5015(a)(1) and/or CPLR § 317 on the grounds that (1) the default is excusable and there is an absence of willfulness; (2) Jorey has a meritorious defense; and (3) Jorey did not receive actual notice in time to respond (Motion Sequence No. 2). It also moves to vacate Plaintiff’s Note of Issue, filed on May 21, 2024 (Motion Sequence No. 3).

CPLR § 5015 (a) provides that the court which rendered a judgment or order may relieve a party from it upon such terms as may be just 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 entry. Under CPLR § 5015 (a)(1), a defendant must establish both a reasonable excuse for the default and a potentially meritorious defense to the action. *Perez v. Table Run Estates, Inc.*, 191 A.D.3d 416, 416, 137 N.Y.S.3d 683 (1st Dep’t 2021). The determination of whether an excuse is reasonable lies within the sound discretion of the motion court. *Gecaj v. Gjonaj Realty & Mgt. Corp.*, 149 A.D.3d 600, 602, 51 N.Y.S.3d 74 (1st Dep’t 2017). In determining whether an excuse is reasonable, a court must

consider all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits. *See Young Su Hwangbo v. Nastro*, 153 A.D.3d 963, 965 (2d Dep't 2017); *Chevalier v. 368 E. 148th St. Assocs., LLC*, 80 A.D.3d 411, 413-14, 914 N.Y.S.2d 130 (1st Dep't 2011); *Picinic v. Seatrain Lines, Inc.*, 117 A.D.2d 504, 508 (1st Dep't 1986) (noting that "a strong public policy exists. . . for resolving disputes on their merits, and toward that end a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that parties may have their day in court").

Similarly, CPLR § 317 permits a defendant who has been "served with a summons other than by personal delivery" to defend the action within one year after he obtains knowledge of entry of the judgment upon a finding by the court that the defendant "did not personally receive notice of the summons in time to defend and has a meritorious defense." *See John v. Arin Bainbridge Realty Corp.*, 147 A.D.3d 454, 455, 46 N.Y.S.3d 589, 590 (1st Dep't 2017).

In support of the motion, Jorey has submitted an affirmation from Joseph Reyes, an officer and principal of Jorey Realty Corp. Mr. Reyes states that he was not aware of this lawsuit because he was in Puerto Rico for an extended period of time, including when service was effectuated upon the Secretary of State; his personal mail was being forwarded to him in Puerto Rico; however mail for Jorey Realty Corp. was not being forwarded to Puerto Rico, but instead to his personal address, where the building concierge kept mail for Jorey in its office for safekeeping until Reyes' return. *See* NYSCEF Doc. 20. Reyes further states that when he returned from Puerto Rico in April 2024, he received the summons and complaint, and immediately called his personal attorney and Jorey's insurance broker, which promptly retained a law firm to represent Jorey in this action. Reyes also states that Jorey has meritorious defenses herein because the shooting allegedly occurred outside of Kama Restaurant & Lounge; Jorey was not in possession of the premises on the date of the alleged incident or at any time after Kama Restaurant & Lounge took possession under a lease agreement; Jorey was unaware of any violent behavior or criminality taking place within or among the patrons of Kama Restaurant & Lounge; and it has never been in the business of selling or producing alcohol for sale or consumption. *Id.*

In opposition, Plaintiff states that "it is not reasonable for [Reyes], as the registered agent to his corporation, to leave the country for an extended period of time and not take steps to ensure he is receiving all mailings relative to that corporation." *See* NYSCEF Doc. 28 at ¶ 8. Plaintiff also notes that where a defendant does not receive service of process because it failed to keep a current address

on file with the Secretary of State, courts generally do not find a reasonable excuse for a default. *Majada Inc. v. E&A REd Capital Corp.*, 205 A.D.3d 648, 170 N.Y.S.3d 18 (1st Dep't 2022).

Here, however, Defendant's error was not in updating Jorey's address for service with the Secretary of State, but instead in failing to ensure that his legal mail was forwarded. Nevertheless, the delay was not lengthy, and Reyes took immediate steps to contract Jorey's insurance broker. Additionally, Plaintiff does not claim that he suffered any prejudice as a result of the instant delay.

Jorey has also established that it was served with a summons other than by personal delivery, it did not receive actual notice of the summons in time to defend, and it has a potentially meritorious defense. 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. *Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986). Jorey did not learn of this lawsuit until April 2024, after the default judgment motion had been submitted. The Court also finds that Jorey has set forth meritorious defenses to this action. "The quantum of proof needed to prevail on a [motion to vacate] is not as great as that required to successfully oppose a motion for summary judgment." *Winney v. County of Saratoga*, 252 A.D.2d 882, 884, 676 N.Y.S.2d 356, 358 (3d Dep't 1998); see *Williams v. City of New York*, 71 A.D.3d 605, 897 N.Y.S.2d 99 (1st Dep't 2010). A defendant need only to make "a prima facie showing of legal merit." *Shapiro v. Ray*, 306 A.D.2d 267, 267, 760 N.Y.S.2d 360 (2d Dep't 2003); see also *Peacock v. Kalikow*, 239 A.D.2d 188, 190, 658 N.Y.S.2d 7, 9, 1997 (1st Dep't 1997). Accordingly, the Court finds that Jorey is entitled to vacate the default judgment under CPLR § 5015(a)(1) and CPLR § 317. In view of this determination, the Note of Issue must also be vacated. Accordingly, it is hereby:

ORDERED AND ADJUDGED that the motion filed by Defendant Jorey Realty Corp. to vacate the default judgment against it pursuant to CPLR § 5015(a)(1) and CPLR § 317 (Motion Sequence No. 2) is granted; and it is further

ORDERED AND ADJUDGED that this Court's Decision & Order dated April 24, 2024, with Notice of Entry filed on April 25, 2024, is vacated with respect to Defendant Jorey Realty Corp., only, and it is further

ORDERED AND ADJUDGED that Defendant Jorey Realty Corp. shall serve an Answer within twenty days of the date of this Decision & Order; and it is further

ORDERED AND ADJUDGED that Defendant's motion to vacate the Note of Issue (Motion Sequence No. 3) is granted; and it is further

ORDERED AND ADJUDGED that the parties shall complete a Preliminary Conference Form, as per this Court's Part Rules, within thirty days of the date of this Decision and Order; and it is further

ORDERED AND ADJUDGED that Defendant Jorey Realty Corp. shall serve a copy of this Decision & Order with Notice of Entry within twenty days of Entry.

This constitutes the Decision & Order of the Court.

Dated: Bronx, New York
September 17, 2024



HON. WILMA GUZMAN, J.S.C.