SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

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RSY REALTY CORP. and COLUMBUS AVENUE LINEN, INC.,

Plaintiff,

- against -

UNITED CONSTRUCTION & DEVELOPMENT GROUP CORP., HBC CORONA, LLC and D-BEST INDUSTRIES CORP.,

Defendants.

Index No.: 11434/2011

Motion Date: 07/26/12

Motion No.: 31

Motion Seq.: 2

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The following papers numbered 1 to 13 were read on this motion by defendant, HBC CORONA, LLC., for an order pursuant to CPLR 317 vacating a judgment entered on default:

| | Papers Numbered |
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| Notice of Motion-Affidavits-Exhibits | 1 - 6 |
| Affirmation in Opposition-Affidavits-Exhibits | 7 - 10 |
| Reply affirmation | 11 - 13 |

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This is a negligence action commenced by the plaintiffs on May 11, 2011 to recover for structural damage to premises located at 32-26 112th Place, East Elmhurst N.Y. Plaintiff, Columbus Avenue Linen, Inc. is the tenant of the building owned by RSY Realty Corp. The plaintiffs' premises were allegedly damaged as a result of excavation and construction work being performed at the defendants' adjoining premises located at 112-15 Northern Boulevard, Flushing, New York. Defendant HBC is the owner of the adjoining premises and defendant United Construction & Development Group Corp., was the general contractor on the construction project retained by HBC Corona. Defendant D-Best

Industries Corp., was the subcontractor hired by HBC Corona to perform construction at the adjoining premises. Plaintiff alleges that as a result of the construction, the City of New York Department of Buildings issued a vacate order requiring the removal of occupants from the premises until the unsafe condition was abated. Plaintiffs allege that defendants were negligent in failing to properly and adequately brace and support the ground and walls of the premises; in failing to properly excavate the premises; in failing to properly and adequately place footings and foundation supports at the site of the premises while conducting construction activity; and in violating applicable provisions of the New York City Administrative Code.

Defendant HBC Corona was served with the summons and verified complaint on May 26, 2011 by delivering a copy of the summons and complaint to the Office of the Secretary of State. Defendant failed to serve an answer. In November 2011 the plaintiff moved for an order granting a default judgment against defendant, HBC Corona, based upon their failure to answer the summons and complaint. By decision dated November 28, 2011, this Court granted a default judgment against defendant, without opposition, and stated that the action would be placed on the calendar for an assessment of damages at the time of the trial of the remaining defendants. HBC Corona now moves for an order vacating the default pursuant to CPLR 317 on the ground that defendant did not receive the summons and complaint by personal service. Further, defendant asserts that it has a meritorious defense to the action.

In support of the motion, the defendant submits a document from the NYS Department of State, Division of Corporations, showing that HBC Corona's address listed with the Department of State is "c/o Betty Hsu, 112-15 Northern Boulevard Corona, New York 11368." In her affidavit dated May 24, 2012, Ms. Hsu states that she is a part owner and managing member of HBC Corona LLC. She states that the reason her company never answered the summons and complaint and defaulted on the motion was because her company never received the summons and complaint at their office. She states that at the time she formed HBC Corona with her partner in 2005 she was operating out of a warehouse located at the address on file with the Secretary of State. However, she also states that subsequently she moved to a new business address at 35-06 Leavitt Street, Flushing, New York, without filing a change of address with the Secretary of State. Ms. Hsu states that she owns the property adjoining the plaintiff's premises. She states that she entered into a contract with United Construction in June 2008 to perform construction work on her property. Ms. Hsu states that pursuant to the contract, United agreed to indemnify and hold HBC

Corona harmless for any lawsuit brought against United Construction in connection with work contracted with HBC Corona. Ms. Hsu maintains that HBC Corona is a commercial property owner and did not perform any of the actual work on the subject real property, and as such, it asserts that it is not liable to the plaintiffs for damage to their property as it did not contribute or participate in the onsite construction work.

Counsel for defendant, Brian Shengjin Yang, Esq., maintains that because the defendant moved its address without notifying the Secretary of State and because defendant's present address was not in the records of the Secretary of State that the summons and complaint was not delivered to the defendant. Defendant states in this regard that the courts have held that unless plaintiff can show that the defendant deliberately avoided service of process, the inadvertent failure to notify the Secretary of State of its change of address is not relevant to whether it is entitled to relief under CPLR 317 (citing Cohen v. Michelle Tenants Corp., 63 AD3d 1097 [2d Dept. 2009][there was no evidence that the defendant was on notice that an old address was on file with the Secretary of State]; Tselikman v Marvin Court, Inc., 33 AD3d 908 [2d Dept. 2006][there was no evidence that the defendants were on notice of the failure to designate a new registered agent for service or that an old address was on file with the Secretary of State]).

With respect to a potentially meritorious defense, counsel asserts that as HBC Corona was only the owner of the adjoining premises and did not do any of the actual excavation work which allegedly damaged the plaintiffs property, HBC Corona cannot be subject to any claims of on-site negligence which caused plaintiffs to suffer damages. In addition, defendant asserts that pursuant to contract, United Construction is required to indemnify HBC Corona for any damages caused by the general contractor or subcontractor.

In opposition, counsel for plaintiffs, Noe Solorzano, Esq., argues that the defendant's contention that it did not perform any of the work that led to the property damage does not constitute a meritorious defense in that the Court of Appeals has recently held that landowners that cause excavation to be performed on their property are strictly liable for any damage to adjoining lots as a result of excavation work (see Yenem Corp. V 281 Broadway Holdings, 18 NY3d 481[2012]). In Yenem, the Court held that absolute liability may be imposed against an adjoining land owner if the plaintiff can prove that a violation of the NYC Administrative Code was the proximate cause of plaintiffs' damages. Counsel contends that for defendant to interpose a

meritorious defense it would have to allege that it did not contract for excavation to be caused on its property or that its excavation did not cause any damage to plaintiffs' property. Counsel states that HBC Corona expressly stated in its motion that it did hire United Construction to perform the excavation work.

In reply, Betty Hsu submits a second affidavit dated July 20, 2012, in which she does not dispute that the Yenem case holds that the NYC Administrative Code imposes absolute liability on adjacent landowners when excavation work causes damage to adjoining premises regardless of whether there is any evidence of the landowners involvement in the performance of the work that caused the claimed injury.

Upon review and consideration of the defendants' motion, plaintiffs' affirmation in opposition, and defendants' reply thereto, this court finds that the defendants' motion to vacate the default judgment is denied.

The Courts have held that as a general rule, "to vacate a default pursuant to CPLR 317, a defendant who has not been served pursuant to CPLR 308(1) does not have to establish a reasonable excuse for his or her default, but must show that he or she did not actually receive notice of the action in time to defend it, and must further show that he or she has a potentially meritorious defense" (Deutsche Bank Natl. Trust Co. v DaCosta, 2012 NY Slip Op 5495 [2d Dept. 2012]; also see Fleisher v Kaba, 78 AD3d 1118 [2d Dept. 2010]).

Here, it is not disputed that the defendant did not receive actual notice of the summons and complaint in time to defend the action. It is clear that the summons was served on the Secretary of State and that the Secretary of State did not have the present address of the defendant due to defendants' inadvertent failure to notify the Secretary of State of their change of address (see Cohen v Michelle Tenants Corp., 63 AD3d 1097 [2d Dept. 2009]). However, it is also clear that the defendants failed to demonstrate a meritorious defense in light of the recent holding in Yenem Corp. V 281 Broadway Holdings, 18 NY3d 481[2012]), which held that landowners are strictly liable for excavation damage to adjoining property where there is a violation of the New York State Administrative Code and where the violation was the proximate cause of the damage. Therefore, defendant's purported defense, that it hired United Construction to do the excavation work, that United Construction is contractually obligated to indemnify HBC Corona for damages and that HBC Corona itself was not actually involved in the construction is without merit for

purposes of the instant motion. Further, defendant has failed to provide any factual affidavits purporting to show that it was not negligent or did not violate the NYC Administrative Code section in question.

In addition, the defendant has failed to submit a copy of a proposed answer.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the motion by HBC CORONA LLC to vacate the default judgment on liability and for leave to serve and file a late answer pursuant to CPLR 317 is denied.

Dated: August 20, 2012
Long Island City, N.Y.

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**ROBERT J. MCDONALD**
**J.S.C.**