SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

MERCER SQUARE, LLC,

Plaintiff,

- v -

SOHO CLOSET 18, LLC, AHMED ALAMI and AMINE TERRICHE,

Defendants.

INDEX NO. 650581/2016

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..	1-3
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

This claim arises out of a commercial tenancy between Plaintiff, Mercer Square, LLC ("Plaintiff" or "Mercer Square"), as landlord, and defendant Soho Closet 18, LLC ("Soho Closet"), as commercial tenant, and defendants Ahmed Alami and Amine Terriche, as guarantors of the lease agreement between Plaintiff and Tenant, for premises described in the Lease (the "Premises") as "the store space on Broadway, between West 3rd and West 4th Street, shown as the southerly portion of Store 7 of Schedule A annexed [t]hereto (a/k/a 687 Broadway)."

By Notice of Motion filed on April 4, 2016 (Mot. Seq.# 1), Plaintiff moved for default judgment against Defendants. By Order dated May 23, 2016, Plaintiff's application for default judgment was denied for failure to comply with proof required by CPLR §3215(f) on such an application.

By Notice of Motion filed on June 28, 2016 (Mot. Seq. #2), Plaintiff made a second application for default judgment against Defendants. Plaintiff submitted the attorney affirmation of Jerry Weiss; the affidavit of Kenneth Butterman, employed by Mercer Square; the Lease; the Guaranty; Arrears Schedule; Complaint; proof of service upon Defendants; and proof of additional mailing upon Guarantors. Defendants did not oppose. By Order dated August 22, 2016, the Court entered judgment in favor of Plaintiff and against Defendants, jointly and severally, in the sum of $437,225.02 ("the Judgment").

Defendants move by way of Order to Show Cause pursuant to CPLR 5015(a)(1), for an Order vacating and setting aside the Judgment. Plaintiff opposes.

Pursuant to CPLR § 5015, the court which rendered a decision may, on motion, grant relief from the judgment or order 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 its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." (CPLR § 5015[a][1]). In order to prevail on a motion to vacate a default judgment upon the ground of excusable default under § 5015, the moving party must show that its default was "excusable" and demonstrate a "meritorious defense" to the underlying action. (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 1992]; *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dep't 2007]).

CPLR § 5015 further provides, "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of . . . lack of jurisdiction to render the judgment or order". (CPLR § 5015[a][4]). A motion predicated upon lack of jurisdiction need not assert a meritorious defense; a default judgment entered in the absence of personal jurisdiction over the defendant is a nullity. (*Boorman v. Deutsch*, 152 A.D.2d 48, 51 [1st Dep't 1989]). Where the plaintiff fails to properly serve the summons and complaint, the court fails to acquire personal jurisdiction over the defendant, and any subsequent proceedings are null and void. (*Prudence v. Wright*, 94 A.D.3d 1073, 1074 [2d Dep't 2012]; *Adames v. New York City Transit Authority*, 510 N.Y.S.2d 610, 611 [1st Dep't 1987]).

Defendants contend that they were never served with the Complaint or motion papers.

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]). Section 304(a) of the Business Corporation Law ("BCL") requires a domestic or authorized foreign corporation to designate the secretary of state as an agent upon which process may be served. Service through the secretary of state may be made by leaving duplicate copies of the documents to be served, together with the requisite fee, with any person authorized by the secretary of state to accept service documents, at the secretary of state's offices. (BCL 306(b)(1)). "Service of process on such corporation shall be complete when the secretary of state is so served." (Id.). Upon service of duplicate copies with any

person authorized by the secretary of state to receive service, BCL 306(b)(1) directs the secretary of state to "promptly send one of such copies by certified mail, return receipt requested, to such corporation at the post office, on file in the department of state."

Service of process on a corporation is complete when the Secretary of State is served irrespective of whether the process subsequently reaches the corporate defendant. (*Micarelli v. Regal Apparel Ltd.*, 52 A.D.2d 524 [1st Dep't 1976]; *Associated Imports. Inc. v. Leon Amiel Publisher. Inc.*. 168 A.D.2d 354 [1st Dept. 1990] ["Service of the summons and complaint on the Secretary of State is valid even though defendant did not receive such from the Secretary of State due to the failure to change the address on file."]). A corporate defendant's failure to keep a current address of an agent on file with the Secretary of State does not constitute a reasonable excuse for the default. (*See Baker v. E.W. Howell Co.*, 216 A.D.2d 242, 244 [1st Dep't 1995].

Here, as demonstrated by Plaintiff's affidavit of service, service of the Summons and Complaint was made upon Soho Closet via the Secretary of State, pursuant to BCL 306, on February 16, 2016 by delivering to and leaving with Sue Zouky, as agent for the New York State Secretary of State, two copies of the Summons and Complaint and paying the Secretary of State a fee of $40. A copy of the Summons and Complaint were mailed to the address that Soho Closet had on file with the NY Secretary of State, which was: 877 Broadway, New York, New York.

Soho Closet argues that such service was improper because the papers were mailed to an address that Soho Closet no longer occupies. Soho Closet argues that defendants Ahmed Alami and Amine Terriche, were evicted and vacated from 877 Broadway, New York, New York, prior to the commencement of this action, and that Plaintiff was aware of this because defendants had surrendered the keys to the premises to Plaintiff in January 2016. Soho Closet does not contest that service of process was made at the address on file with the Secretary of State, and that Soho Closet failed to keep a current address of an agent on file with the Secretary. Soho Closet's contention that the address for service of process on file with the Secretary of State was an incorrect address does not constitute a reasonable excuse for its delay in appearing or answering the complaint. (*See Baker v. E.W. Howell Co.*, 216 A.D.2d 242, 244 [1st Dep't 1995].

Service of the Summons and Complaint upon Ahmed Alami and Amine Terriche was completed pursuant to the terms of the Guaranty, at Page 3, which provides in pertinent part: ". . .service of process may be made upon any Guarantor by mailing a copy of the papers to be served to such Guarantor c/o Roman, V. Gambourg, Esq., Gambourg & Borsen, LLC, 611 Broadway - Suite 803, New York, New York 10012 and service shall be deemed complete upon the posting of such papers in any mail box regularly maintained by the United States Post Office." As shown by the affidavit of service dated February 9, 2016, on February 8, 2016, Ahmed Alami and Amine Terriche were served with the Summons and complaint via First Class Mail addressed to them, respectively, c/o Roman, V. Gambourg, Esq., Gambourg & Borsen, LLC, 611 Broadway - Suite 803, New York, New York 10012.

In their respective affidavits, Ahmed Alami and Amine Terriche claim that they have not heard from Mr. Gambourg since the commencement of this action and their calls to Mr. Gambourg after receiving Notice of Entry of the Judgment have been unanswered. Alami and Terriche also state that they went to the address where Plaintiff mailed Mr. Gambourg the Summons and Complaint, and his firm is no longer there. This does not constitute a reasonable excuse as Alami and Terriche never notified the landlord of a new address for notice.

As for a meritorious defense, Defendants argue that Plaintiff "failed to act in good faith and mitigate its damages." However, under New York law, landlords have no duty to mitigate damages after commercial tenants vacate by re-letting the subject property. *See Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 133 [1995](holding that "[o]nce the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages."). Defendants also argue that Plaintiff did not act in good faith because it rejected Defendants' proposed assignee whom they claim was willing and able to pay the same amount as required under the Lease. Defendants claim that Plaintiff is therefore not entitled to collect from Defendants the rent differential between what Defendants are obligated to pay under the Lease and the amount Plaintiff receives from its successor tenant that now occupies the subject space. However, under the Lease, Plaintiff has no obligation to accept Defendants' proposed assignee or to permit an assignment of the lease. (See Lease, Paragraphs 11, 50). Accordingly, Defendants do not have a meritorious defense to the Plaintiff's underlying claims for payment under the Lease and Guaranty.

Wherefore, it is hereby

ORDERED that Defendants' motion to vacate the Judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: DECEMBER 21, 2016

J.S.C.

DEC 21 2016

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST REFERENCE