SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

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ESSEX INSURANCE COMPANY,

Plaintiff,

- against -

ROWAN CONSTRUCTION CO., INC.,

Defendant.

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DECISION AND ORDER

Index No: 2948/11

Motion Sequence No: 001
Original Return Date: 08-25-11

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 11 were submitted on this Order to Show Cause on September 1, 2011:

	Papers numbered
Order to Show Cause, Affirmation and Affidavit in Support	1-3
Affirmation and Affidavit in Opposition	4-5
Memorandum of Law in Opposition to Motion	6
Reply Affirmation and Affidavits (2)	7-9
Affirmation in Further Opposition	10
Memorandum of Law in Further Opposition	11

The motion by defendant, Rowan Construction Co., Inc. ("Rowan"), seeking an Order of this Court, vacating the judgment on default granted and entered in favor of the plaintiff, Essex Insurance Company ("Essex") against the defendant, is **granted**[1].

The instant motion arises out of an underlying breach of contract action where plaintiff

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[1]The moving defendant did not cite to any statutory provision under which it is seeking the requested relief. This Court will therefore base its determination under CPLR §5015(a) and CPLR §317.

alleged that the defendant corporation failed to tender payment for earned premiums on a general liability policy in the amount of $35,082.48. In December, 2010, plaintiff filed a Summons and Complaint in this Court and served the same upon Donna Christie, a Clerk authorized to accept service on behalf of the Secretary of State of New York. An additional copy was served by mail to the defendant's last known address at 305 Gilmore St., Mineola, NY, on April 4, 2011.

In June, 2011, the plaintiff, upon the defendant's default in appearing and answering the complaint, sought a default judgment in its favor from the Clerk of the Court. A judgment was issued and entered on June 28, 2011. Defendant claims that it never received the Summons and Complaint and only became aware of the subject judgment when it received plaintiff's letter, dated July 7, 2011, notifying it that a judgment was entered against it in this Court. Defendant filed the instant motion on or about August 9, 2011.

ARGUMENTS

Defendant claims that it had no notice of the proceedings until it received a letter from the plaintiff in July, 2011, enclosing a copy of the judgment. As it shares a single mail box with other parties at its Mineola address, it is possible that it did not receive the mailed notices from the plaintiff and/or Secretary of State. Defendant has submitted a picture of the mail box as evidence.

Further, there is also a dispute as to the merits of the action as the defendant alleges that the plaintiff's claimed cost of $35,000 for the annual premium was never communicated to the defendant. Further, defendant contends that it had paid about $4,000.00 in annual premiums to the plaintiff for the two previous years. As such, the $35,000 amount is incorrect and/or unreasonable.

Plaintiff contends that the defendant's default was inexcusable and that no meritorious defense exists and posits that the defendant's actions are nothing more than an effort to prolong the

litigation process, thus wasting the Court's time and resources.

FACTS

By way of background, Rowan Construction Corp. provides construction workers for various companies and the companies provide liability insurance for these employees. The procedure is that when workers are needed for construction sites, the companies call the appropriate unions and the unions assign the workers and contact Rowan. Rowan, in turn, pays the employees, collects the union dues from the employees and remits the dues to the unions, and then invoices the companies for the employees' services.

Rowan retained Essex as its liability insurer and the annual premiums were based on the amount of Rowan's payroll. The policy term in dispute is for the time period from July 26, 2008 through July 26, 2009. According to Rowan, the premium amount was based on a formula using the amount of its payroll. Initially, Essex approximated the amount of Rowan's payroll, and for the prior insurance year, Rowan's payroll was estimated at about $120,000.00. The resulting premium amount, after applying the formula and appropriate taxes, was initially set at $5,066.00. This method for determining the premium amount, as set forth by Rowan, is disputed by Essex. Essex avers that the premiums are based on payroll exposure and gross sales exposure.

In September, 2009, Essex, with Rowan's accountant, conducted an audit and the actual payroll and gross sales exposure was determined to be about $760,000.00. The premium amount, after the application of the formula and appropriate costs, totaled about $35,000. When Rowan failed to tender payment, Essex issued demand letters.

In response to Essex's February, 2010 demand letter, Rowan, as per its letter dated April 3, 2010, contended that there was some discrepancy between what Essex perceived as the amount of

payroll and the amount Rowan maintained was the actual payroll. According to Rowan, and as stated in the April, 2010 letter, the Essex accountants were apprised of this issue and they indicated that they were going to make the appropriate readjustments to the premium invoice.

DISCUSSION

It is noted that the defendant has not based its entitlement to a vacatur of the judgment on any statutory provision as set forth the CPLR. However, there are two statutory provisions that apply.

CPLR § 5015 (a)(1) provides in relevant part;

> On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
> 1. 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 §317 provides that "[a} person served with a summons other than by personal delivery to him or to his agent for service 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."

The fundamental difference between the two is that CPLR §317 applies when the defendant has been served by a method other than by personal delivery. Under this section of the CPLR, the defendant need not show an excuse for its failure to appear – only that it did not personally receive the summons and complaint. It is well established that 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 (see *Solomon Abrahams, P.C. v. Peddlers Pond Holding Corp.* 125

AD2d 355 [2nd Dept 1986]). Thus, where service is made pursuant to BCL 306, the Court may vacate a default where the Court finds a potentially meritorious defense.

On the other hand, CPLR 5015(a)(1) applies without regard to the method of service used. While an affidavit of merit must generally be part of the moving papers to vacate a default under either provision, an excuse for the default is needed under CPLR §5015(a)(1).

Here, the plaintiff references Business Corporation Law §306 which provides that "[c]orporations are obligated to keep current address on file with Secretary of State and failure to receive copies of process served upon Secretary due to breach of this obligation will not constitute reasonable excuse for corporation seeking to vacate default." However, Courts have allowed corporations to vacate the default pursuant to CPLR §317, by moving within one year after receiving notice of the summons and including an adequate affidavit of merits, even if the corporation was at fault in failing to provide the updated mailing information as required by the statute (see *Brac Const. Corp. v. Di-Com Corp.*, 51 AD2d 740 [2nd Dept 1976]).

In sum, if the corporation has only argued that the reason for defaulting is that it did not receive the copy of the summons and complaint mailed by the Secretary of State, it can rely on CPLR §317 instead of CPLR 5015(a)(1). Said another way, the Court can determine that under CPLR §317, the defendant "did not personally receive notice of the summons in time to defend", and that itself is an excuse (see CPLR §317 McKinney's Consolidated Laws of New York Annotated, Practice Commentaries, C317:1). Further, the defendant filed the instant motion well within the year it became aware of the judgment.

Here, this Court finds that the defendant has factually established the existence of a potentially meritorious defense to plaintiff's claim (see *County Asphalt, Inc. v. North Rockland*

Underground Corp, 96 AD2d 570 [2nd Dept 1983]). The defendant has submitted evidence that it disputed the plaintiff's claim before the plaintiff filed its Summons and Complaint (see Reply Affirmation, Stephen Goodman letter, dated April 3, 2010). It has factually laid out its reasons for disputing the billed amount of $35,082.48. Moreover, there is a preference that disputes be resolved on their merits, and "a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues" (see *Sanford v. 27-29 W. 181st Street Ass'n, Inc.*, 300 AD2d 250 [1st Dept 2002]; *Coven v. Trust Co. of New Jersey*, 225 A.D.2d 576 [2nd Dept. 1996]).

Accordingly, after due deliberation, it is

ORDERED, that the defendant's motion to vacate its default is **granted** and the judgment against it is hereby vacated on condition that the defendant answers the complaint within ten (10) days after service upon it of a copy of this order, together with notice of entry thereof; and it is further

ORDERED, that counsel for the plaintiff and the defendant shall appear in the DCM Part of this Court at 100 Supreme Court Drive, Mineola, New York on **January 30, 2012** at 9:30 for a preliminary conference.

The foregoing shall constitute the Decision and Order of this Court.

Dated: Mineola, New York
December 29, 2011

ENTER:

JOEL K. ASARCH, J.S.C.