| **Li Xian v Tat Lee Supplies Co., Inc.** |
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| 2012 NY Slip Op 33965(U) |
| November 7, 2012 |
| Supreme Court, Bronx County |
| Docket Number: 304347/09 |
| Judge: Mary Ann Brigantti-Hughes |
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11/21/12

**SUPREME COURT STATE OF NEW YORK**
**COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes

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LI XIAN and ZONGYING REN a/k/a LILY REN,

Plaintiffs,

-against-

**DECISION / ORDER**
Index No. 304347/09

TAT LEE SUPPLIES, CO., INC.,
LORIMER DEVELOPMENT, LLC.,
and EIGHTH AVE. BUILDERS, CORP.,

Defendants.

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The following papers numbered 1 to 4 read on the below motion noticed on July 10, 2012 and duly submitted on the Part IA15 Motion calendar of **August 6, 2012**:

| Papers Submitted | Numbered |
|---|---|
| Def.'s Notice of Motion, Exhibits | 1,2 |
| Pl.'s Aff. In Opp., Exhibits | 3,4 |

By way of Order to Show Cause, defendant Tat Lee Supplies Co., Inc. ("Defendant") moves to vacate a set aside the default judgment rendered against it, entered on January 10, 2012, and for leave to serve an answer.

I. Background

This is an action for personal injuries allegedly sustained by plaintiffs Li Xian and Zongying Ren a/k/a Lily Ren (collectively "Plaintiffs") on or about January 4, 2008. According to the Verified Complaint, Defendant is the owner of a premises located at 169 Lorimer Street, Brooklyn, New York. On January 4, 2008, Plaintiffs were allegedly sub-tenants doing business at the premises when they were injured "as a result of structural disrepair of the building." The Complaint asserts that Plaintiffs were severely beaten, assaulted, and battered by assailants due to Defendant's failure to secure the premises. Defendant did not answer the summons and complaint served on June 2, 2009. Plaintiff's motion for a default judgment was granted against

Defendant by order dated April 19, 2010. An inquest hearing was held on November 10, 2011, and Judgment was entered against Defendant on January 10, 2012.

Defendant argues that it never answered the summons and complaint because the papers were never received. Defendant, instead, first learned of this action on January 10, 2012, after default judgment had been entered, when defendant received an information subpoena at his private residence located at 138-11 62nd Avenue, Flushing, New York. Defendant asserts that service in this matter was a nullity since all papers were sent to "an address that never belong to defendant" located at 75 Eldridge Street, New York, New York. Defendant states that its true mailing address is "c/o Liu & Choy, 100 Lafayette Street, New York, NY 10013" and/or "138-11 62nd Avenue, Flushing, New York."

Defendant states that the premises where this incident occurred was "at all times renting to tenant" and the tenant did not forward any court papers to Defendant. The attorney affirmation states that Plaintiff herein is neither the tenant nor the subtenant of the moving Defendant. Further, "the Secretary of State does not know [D]efendant's actual principle place of business is in Queens."

With respect to a meritorious defense, Defendant argues that the alleged injury bears no relationship to Defendant because the premises were "at all times renting to the tenants." Further, Plaintiff "has no standing" against Defendant since he is neither the tenant nor the subtenant of the Defendant and Defendant never had any business or personal dealing with Plaintiff. Pursuant to the lease agreement, tenant was required to carry general liability insurance.

In opposition, Plaintiff asserts *inter alia* that Defendant was served with process on June 2, 2009 through the Secretary of State, and provides an Affidavit of Service certifying that process was simultaneous served via certified mailing. Defendant's address on file with the Secretary of State was "75 Eldridge Street, New York, New York" since its original filing in 1979.

II. Analysis

Under *CPLR* 5015, a court may vacate an Order where there is excusable default, where such motion is made within one year of service of a copy of the judgment or order upon the moving party. A default may not be vacated without the demonstration of a reasonable excuse for the failure to respond and a meritorious cause of action. *Qrt Associates, Inc. v. Mouzouris*, 40 A.D.3d 326 (1st Dept. 2007). The determination whether to vacate a default is generally left to the sound discretion of the motion court, and will not be disturbed if the record supports such a determination. *White v. Incorporated Village of Hempstead*, 41 A.D.3d 709 (2nd Dept. 2007). Such a motion may be granted where no prejudice will be sustained by opposing party. *Serrano v. City of New York*, 35 A.D.3d 287 (1st Dept. 2006).

The defendant may demonstrate a "reasonable excuse" for default if it "did not receive personal notice of the summons in time to defend..." *Newman v. Old Glory Real Estate Corp.*, 89 A.D.3d 599 (1st Dept. 2011); CPLR 317. Reasonable excuse has been established, for example, where process was served on the Secretary of State and sent to the wrong address, and there is no evidence that Defendant engaged in a deliberate attempt to avoid notice by failing to update its address with that department. *Id.*, citing *Eugene DiLorenzo, Inc. v. A.C.Dutton Lbr. Co.*, 67 N.Y.2d 138 (1986); *Raiola v. 1944 Holding ltd.*, 1 A.D.3d 296 (1st Dept. 2003).

Both CPLR 5015 and 317 require that a defendant demonstrate that it has a meritorious defense to an action in order to successfully vacate a default judgment. *Peacock v. Kalikow*, 239 A.D.2d 188 (1st Dept. 1997). In order to demonstrate such a meritorious defense to warrant vacatur, a defendant must provide an affidavit from an individual with personal knowledge of the facts. The affidavit must make sufficient factual allegations and must do more than merely make conclusory allegations or vague assertions. *Id.*

Here, Defendant-landlord asserts that they never received service of process in this matter, and that it does not know of the address "75 Eldridge Street, New York, New York" that was purportedly on file with the Secretary of State. The filing, supplied by Plaintiffs, notes that the address was originally provided in 1979. Defendant has only provided an affirmation of counsel alleging that "75 Eldridge Street" is an address that "never belonged to Defendant." Counsel goes on to assert that this address is "unknown and unrelated to defendant." Counsel's

contentions, however, cannot be considered since counsel does not assert whether he has personal knowledge of Defendant's proper address for service of process, or the basis for such knowledge. Defendant has also provided the affidavit of its president, Siu Kee Kam, who states that process was served "to an address where I will not receive mail." Mr. Kim, however, does not state whether "75 Eldridge Street" was ever a proper address for Defendant, or if he was ever made aware that the Secretary of State had an inaccurate address on file. The moving papers, therefore, insufficiently demonstrate whether Defendant has the requisite "reasonable excuse" for its default in answering the summons and complaint.

Even assuming Defendant has demonstrated a "reasonable excuse" for default, it has not established the requisite "meritorious defense" to this action. In an affidavit, Mr. Kam states that he is "personally fully familiar with all the facts herein." Mr. Kam states that at all times, the premises were rented to the tenant, and he never received court papers in this action. Mr. Kam states "I am advised that the default judgment should be vacated because Defendant has both a meritorious defense and a reasonable excuse for the default." Mr. Kam only states "[t]he alleged injury bears no relationship to the defendant because the premises were at all times renting to tenant and the tenant of the premises are fully responsible for all accident occurs [sic] in their tenancy."

This affidavit constitutes only a general disclaimer, not specifically responsive to Plaintiffs' claims that a structural disrepair contributed to the alleged injuries. Indeed, Mr. Kam fails to directly refute or specifically address the allegations in the complaint. Moreover, while Mr. Kam states he is the president of Defendant, he does not assert the precise basis of his personal knowledge. *Gogos v. Modell's Sporting Goods, Inc.*, 87 A.D.3d 248, 254 (1st Dept. 2011). He does not state whether or not Plaintiffs were tenants or sub-tenants of the property. The single-sentence assertion of Defendant's alleged meritorious defense is plainly conclusory and vague. *See Peacock v. Kalikow*, *supra* at 190. Defendant has, therefore, failed to demonstrate entitlement to vacatur, and its motion is denied.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion to vacate default judgment pursuant to CPLR 5015 and 317 is denied.

This constitutes the Decision and Order of this Court.

Dated: November 7, 2012

Hon. Mary Ann Brigantti-Hughes, J.S.C.