SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3

NASSAU COUNTY

FIRST CARDINAL LLC as administrator of the Contractors Compensation Trust,

Plaintiff,

-against-

VECTOR STRUCTURAL PRESERVATION CORP.,

Defendant.

MOTION DATE: 3/1/12
MOTION SEQ. NO.: 001

INDEX NO.: 23217/10

The following papers read on this motion (numbered 1-3):

Order to Show Cause.....1
Affirmation in Opposition.....2
Reply Affidavit.....3

In this action to collect allegedly unpaid workers compensation premiums, defendant moves pursuant to **CPLR §5015** and **CPLR §317** to vacate the default judgment in the sum of $24,826.65, issued by the Nassau County Clerk on May 18, 2011 and entered on June 2, 2011 (the "Judgment").

Defendant's President, Vassilios Handakas ("Handakas"), states as follows: (i) that defendant engaged ADP Insurance Services to calculate and pay premiums to plaintiff on a weekly basis; (ii) that plaintiff conducted an audit of defendant's operations and claimed that certain insurance certificates were missing and certain monies were due; and (iii) that defendant provided the insurance certificates and heard nothing further from plaintiff until it received a copy of the Property Execution obtained by plaintiff. Affidavit of Vassilios Handakas, sworn to on December 22, 2011 ("Defendant's Affidavit"), ¶¶ 4-7. Handakas states further that he never received the Summons and Complaint, purportedly served on February 10, 2011 pursuant to **BCL §306** by delivery to the New York Secretary of State, nor the second mailing to the defendant's office address pursuant to **CPLR §3215(g)**. Defendant's Affidavit, ¶¶ 13-14; OTSC Exh. D. Handakas admits that the New York Secretary of State has the proper address for service upon the defendant (which is the office address used by plaintiff for the second mailing), but states

that none of his office staff recalls signing for any documents from the Secretary of State. Defendant's Affidavit ¶12. Handakas claims to be familiar with legal documents such as the Summons and Complaint, and states that "[i]t is my policy to immediately forward such papers to our counsel when same are received."

On the merits, the Defendant's Affidavit states that "Vector made the required premium payments weekly," but is silent with respect to the additional monies demanded by plaintiff upon audit. Defendant's Affidavit ¶14. In his Reply Affidavit, sworn to on February 23, 2012 ["Reply Affidavit"], Handakas asserts that plaintiff's auditor mis-classified defendant's employees and accordingly, assessed erroneous premiums against defendant. Reply Affidavit, ¶¶ 9-10. Handakas demonstrates that he disputed the classifications used by plaintiff, in writing, on or about December 22, 2009. Reply Affidavit ¶10; Reply Exh. B.

A party seeking to vacate a default pursuant to **CPLR §5015(a)(1)** must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense to the action. **DiLorenzo v. A.C. Dutton Lumber Co., Inc.,** 67 NY2d 138; **Royal Agricola, S.A. v. F.D. Import and Export Corp.**, 37 A.D.3d 693; **Parker v. City of New York,** 272 AD2d 310. The determination of what constitutes a reasonable excuse lies within the discretion of the Court. **Id.**

Where the Summons and Complaint have been served by some means other than personal delivery, a party may apply for relief pursuant to **CPLR §317**. Service upon a corporation by delivery to the Secretary of State is one of the means of service contemplated by this section. **Pabone v. Jon-Bar Enterprises Corp.,** 140 AD2d 872; **Solomon Abrahams, P.C. v. Peddlers Pond Holding Corp.,** 125 AD2d 355. Vacatur pursuant to **CPLR §317** does not require a showing of a reasonable excuse for the default, but the party seeking such relief must demonstrate that it did not personally receive actual notice of the action in time to defend the action. **Harbert Offset Corp. v. Bowery Sav. Bank,** 174 A.D.2d 650; **Solomon Abrahams,** 125 AD2d at 356-357. As on a motion pursuant to **CPLR §5015(a)(1)**, the party also must demonstrate the existence of a meritorious defense.

It is well settled that the "mere denial" of receipt of the Summons and Complaint is not only insufficient to rebut the presumption of proper service created by plaintiff's affidavit of service, but also fails to satisfy the defendant's burden of showing that it did not receive actual notice in time to defend the action. **Thas v. Dayrich Trading, Inc.,** 78 AD3d 1163; **Montefiore Medical Center v. Auto One Ins. Co.,** 57 AD3d 958; **Cavalry Portfolio Services, LLC, v. Reisman,** 55 AD3d 524; **Coyle v. Mayer Realty Corp.,** 54 AD3d 713; **Trini Realty Corp. v. Fulton Center LLC,** 53 AD3d 479; **Commissioners**

of State Ins. Fund v. Nobre, Inc., 29 AD3d 511. A "mere denial" of receipt is particularly unavailing, where, as here, there is no indication that the address on file with the Secretary of State was incorrect, or there is proof of an additional mailing pursuant to **CPLR §3215(g)**. *See, e.g.,* **Trini Realty,** 53 AD3d at 480; **Thas,** 78 AD3d at 1164.

In the case at bar, Defendant's Affidavit amounts to little more than a denial of notice of the action. Although at least two cases suggest that an affidavit detailing the office procedures employed by the defendant in the handling of legal papers might be sufficient to demonstrate non-receipt [*see* **Westchester Medical Center v. Philadelphia Indemnity Ins. Co.,** 69 AD3d 613; **Hospital for Joint Diseases v. Lincoln Gen. Ins. Co.,** 55 AD3d 543], the Court will not strain to reach that holding here. Handakas's reference to his "policy" of forwarding all legal papers to defendant's counsel and the office staff's non-recollection of any such papers, adds texture but no real substance to the denial.

Defendant offers no other explanation for its failure to answer or appear in this action. Accordingly, relief on the basis that the default is excusable is not available. *See* **CPLR §5015(a)(1).**

Nonetheless, the grounds enumerated in **CPLR §5015(a)** are neither preemptive nor exhaustive, and were not intended to limit the inherent power of the Court to vacate its own judgment in the interests of justice. **Town of Warwick v. Black Bear Campgrounds,** 2012 WL 1605761. "Resolution of disputes on the merits rather than by default is favored, and to that end a liberal policy toward opening defaults exists." **Pabone,** 140 AD2d at 873.

In this case, the Court holds that vacatur of the Judgment is warranted in the interest of justice. First, the Court believes that defendant has stated a potentially meritorious defense. Defendant asserts that it automatically paid, through payroll deductions, the amount of premiums calculated by its agent, and offers specific grounds to dispute the amounts claimed by plaintiff.

More importantly, however, the Court finds that the application for a default judgment was inappropriately submitted to the Clerk (as opposed to the Court) in the first instance. A Clerk's judgment is only appropriate when the debt is for a "sum certain" or a sum which could be made certain by computation. *See* **CPLR 3215(a); Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.,** 44 N.Y.2d 568. "The term 'sum certain' in this context contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. Obviously, the clerk then functions in a purely

ministerial capacity." **Reynolds Securities,** 44 NY2d at 572. Submission to the clerk is inappropriate where the amount of plaintiff's damages cannot be determined without extrinsic proof. **Id.**

As evident from the submissions, the amount claimed by plaintiff in its application for a default judgment was not a sum certain. Rather, it was derived from an audit of defendant's operations, which defendant challenges on the basis of inappropriate assumptions and classifications. This is a classic example of damages which cannot be determined without resort to extrinsic proof.

The Court therefore finds that the Judgment is invalid, and that the matter should be remitted for an appropriate determination of liability and damages due to plaintiff, if any. Accordingly, it is

ORDERED, that defendant's motion to vacate the Judgment is **granted.** The Judgment is **vacated** and any enforcement procedure or device arising from the Judgment and currently in effect shall be released, rescinded or otherwise vacated. It is further

ORDERED, that defendant shall file and serve an Answer to the Complaint within twenty (20) days after entry of this Order. Defendant shall serve a copy of this Order upon plaintiff forthwith, upon receipt from any source.

Dated: May 22, 2012

J.S.C.

ENTERED
JUN 13 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE