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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KATHRYN E FREED PART 2

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT *Justice*

RIVERA, ANA M.

Plaintiff,

- V -

M.D.G. REALTY CORP.,

Defendant

INDEX NO. 104341/2009

MOTION DATE 06/18/2014

MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying Affidavits ..... No(s) _____

Cross Motion ..... No

Upon the foregoing papers, it is ordered that this motion is

FILED

DEC 23 2014

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

RECEIVED
DEC 23 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

DATED: 12/19/2014

DEC 19 2014

KATHRYN E FREED , J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS : ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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ANA M. RIVERA,

Plaintiff,

-against-

M.D.G. REALTY CORP.,

Defendant.

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DECISION/ORDER
Index No. 104341/09
Seq. No. 003

HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE AND AFFIDAVIT ANNEXED.....	.1,2(Exs. A-V).
AFFIRMATION IN OPPOSITION.....	.3 (Exs A-G).....
REPLY AFFIRMATION.....	.4(Ex A).....
SUPPLEMENTAL AFFIDAVITS.....	.5,6(Ex 1-3).....
MEMORANDUM OF LAW.....	.7.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff allegedly sustained injuries on October 24, 2006 when she tripped and fell over a misleveled area of the sidewalk between 5595 Broadway and 5601 Broadway, Bronx, NY – in the roadway of Naples Terrace where it intersects with Broadway. Plaintiff initially filed a Notice of Claim with the City of New York in which she alleged that the City of New York failed to maintain and repair the sidewalk. M.D.G. Realty Corp ("MDG"), named as a defendant in both that action and the one herein, owns 5589-5595 Broadway and states that it receives all communications at either 5589 Broadway or at its offices at 35 Judson Avenue in Ardsley, New York.

Subsequently, plaintiff sued MDG, Broadway Associates and Kenneth Friedman for her injuries related to this incident. Broadway Associates answered the complaint but MDG did not. MDG states that it never received the summons and complaint because plaintiff served MDG's prior counsel, Thomas J. Altieri, Esq. at his former office address. Unfortunately, as defendant points out herein, Mr. Altieri was deceased.[1] Therefore, as defendant was unaware of these proceedings and never responded to them, that fact was never previously raised . Instead, because plaintiff failed to move for a default judgment against MDG in a timely manner, that initial action was dismissed against it.

Following this dismissal, plaintiff initiated the current action against MDG. Plaintiff again served defendant at the prior office of its deceased attorney Joseph Altieri. Plaintiff subsequently served an additional copy of the Summons and Complaint upon MDG Realty Corp at 5955 Broadway – which, defendant states, is not one of the two addresses at which it receives mail. Plaintiff then served a request for judicial intervention as well as a motion for default judgment upon MDG. These papers were again served at 5955 Broadway rather than either 5589 Broadway in the Bronx or 35 Judson Avenue in Ardsley, New York. On November 13, 2009, although defendant defaulted on the motion, the Court (Diamond, J), denied the motion for default due to plaintiff's failure to submit proof of adequate service of the pleadings. Plaintiff then brought another motion for default, again serving defendant at 5955 Broadway. Predictably, not having received the papers, defendant again defaulted on the motion.

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[1] The Court has confirmed, through the attorney directory and public records, that Mr. Altieri died in 2008.

However, this time, by order dated April 28, 2010,[2] the Court (Diamond, J), granted plaintiff a default judgment against MDG. According to defendant, plaintiff never served it with a copy of the order with notice of entry, however, it should be noted that the Court, concluding that defendant was in default, did not require such service, therefore, defendant states that it never received notice of either the order of default or the subsequent inquest. On October 24, 2012, pursuant to the inquest, plaintiff received a judgment of $110,000.

Defendant now seeks to vacate the $110,000 judgment, and to renew and reargue plaintiff's second motion for a default judgment. To vacate an order or judgment under CPLR 5015(a)(1), the moving party must provide a reasonable excuse for the default and a meritorious defense. *Dormitory Auth. v. M.T.P. 59 St. LLC,* 103 A.D.3d 602, 602, (1st Dep't 2013). The record shows that plaintiff served the summons and complaint on the office of Joseph Altieri, Esq., the deceased former attorney for MDG. The requisite mailing of the pleadings was made to 5955 Broadway, Bronx, New York, which also was an incorrect address. Similarly, plaintiff served the two sets of motion papers, the RJI and the note of issue at this same improper address. Additionally, pursuant to CPLR 3215(g), plaintiff did not serve defendant with an additional notice of default and with a notice informing it that plaintiff intended to take the default and notifying the corporation that it was being served pursuant to CPLR 306(b).

As plaintiff notes, the First Department does not consider it a reasonable excuse for default when the plaintiff serves the defendant at the incorrect mailing address because the defendant has failed to keep its address current with the Secretary of State.

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[2]Plaintiff discontinued her initial lawsuit against Broadway Associates and Kenneth Friedman, the two remaining defendants, on February 1, 2010.

Baez v. Ende Realty Corp., 78 A.D.3d 576, 576, (1st Dep't 2010). However, it is appropriate to vacate a judgment on default under CPLR 317 in circumstances such as those herein, where the defendant's failure was not the result of a deliberate attempt to avoid notice. *See, e.g., Diggs v. Karen Manor Assoc.*, LLC, 117 A.D.3d 401, 402, (1st Dep't 2014)(also distinguishing *Baez* because there the court found defendant's statement that it had not received any notification was not credible); *see Newman v. Old Glory Real Estate Corp.*, 89 A.D.3d 599, 599, (1st Dep't 2011). This is true, of course, only as long as defendant also shows that a meritorious defense exists. *See Cohen v. Michelle Tenants Corp.*, 63 A.D.3d 1097, 1098, (2nd Dep't 2009). [3]

Here, as the Court has noted, plaintiff sent the additional mailing of the pleadings and the mailing of all motions to a wrong address. Moreover, there is no indication that defendant deliberately attempted to avoid notice. Since defendant did not receive notice of the case or of the motion, it did not submit a defense to the action. Finally, it must be noted that defendant promptly made this motion upon learning of the judgment, which gives additional weight to the finding that defendant's failure to appear previously was inadvertent. *See Chevalier v. 368 E. 148th St. Assoc., LLC*, 80 A.D.3d 411, 413, (1st Dep't 2011). Thus, the Court grants that branch of defendant's motion seeking to vacate the $110,000 judgment.

Next, the Court turns to defendant's application to renew the original motion of plaintiff for a default judgment. Under CPLR 2221(e), a party may move to renew if it

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[3] Plaintiff states that according to defendant, the mailing address was correct. In fact, defendant does state this, at one place in his affidavit in support. However, as in every other place he swears that it was the wrong address and he sets forth a lengthy discussion as to why this was the wrong address, this single comment appears to be the result of the typographical omission of the word "not."

can offer new, material information that would change the court's prior determination. If those material facts existed at the time of the earlier motion but were known to the party now seeking renewal but that party did not have the opportunity to inform the court of those material facts, renewal is proper. *Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dep't 1979). *See also Salman v. Rosario*, 87 A.D.3d 482, 485, (1st Dep't 2011). "A motion to vacate is left to the sound discretion of the court." *Braynin v. Dunleavy*, 109 A.D.3d 571, 571, (2nd Dep't 2013).

As the Court has recounted above, defendant has alleged improper notice. Therefore, it did not have the chance to apprise the Court of material facts that may have resulted in a different decision. Moreover, because of its lack of notice of the proceedings and outcome, it was clearly not aware of plaintiff's allegations and evidence. In light of these equitable concerns, the Court concludes that defendant has set forth sufficient reasons for the Court to grant it renewal.[4] Accordingly, the Court now reviews and reconsiders the earlier motion for a default judgment. First, as with the monetary judgment, defendant must first show a reasonable excuse for its default and secondly put forth a meritorious defense. *Dormitory Auth. v. M.T.P. 59 St. LLC,* 103 A.D.3d 602, 602, (1st Dep't 2013). For the same reasons as above, the Court concludes that there is a reasonable excuse for the default. Next, the Court turns to the question of meritorious defense.

Defendant alleges that plaintiff's testimony that the defect was adjacent to 5595 Broadway was incorrect An inquest was held on September 10, 2012. However, the

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[4] The Court notes that even where there is not a sufficient excuse for the default, it has the discretion to vacate the default. *See Bustamante v. Green Door Realty Corp.*, 69 A.D.3d 521, 522, (1st Dep't 2010).

referee who conducted the inquest was never advised that the defect in the sidewalk was abutting 5601 Broadway, that the location of the defective condition was not on a sidewalk that abutted the property owned by defendant MDG Realty Corp, and that the owner of 5601 Broadway and its tenants had a special use of the sidewalk area that included the raised flag that formed the upper portion of the trip hazard where plaintiff was injured. A judgment was subsequently entered by plaintiff's counsel on October 24, 2012.

As proof that these assertions were in error, defendant submits expert evidence, in the form of Affidavits from two experts, Gerald O'Buckley, a professional land surveyor and Jacques P. Wolfner, a professional engineer, both attesting to the fact that the point at which plaintiff allegedly fell was not located on defendant's property. Although plaintiff disputes the merit of defendant's arguments, it is clear that defendant must only show that one or more *potentially* meritorious arguments exist. *See Braynin* supra at 572; and *Chevalier*, supra at 413.

Based on the above, it is

ORDERED that the motion is granted in its entirety; and it is further

ORDERED that, as defendant has annexed its answer to the motion papers, the default judgment against defendant is vacated on the condition that defendant serve a copy of this order with entry, within 30 days of the date of entry of this order; and it is further

ORDERED that defendant shall file a copy of this order with notice of entry with the County Clerk (room 141B) and the Trial Support Office (room 158); and it is further

ORDERED that the parties are directed to appear for a preliminary discovery conference in Part 2, room 280 at 80 Centre Street, on Tuesday, March 10, 2015 at 2PM and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: December 19, 2014 ENTER:

KATHRYN E. FREED,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

DEC 23 2014

NEW YORK
COUNTY CLERK'S OFFICE