

**Stillwell Cafe, Inc. v 1680 Eastchester Realty Corp.**

2015 NY Slip Op 32987(U)

August 17, 2015

Supreme Court, Bronx County

Docket Number: Index No. 21236/2013E

Judge: Julia I. Rodriguez

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

-----X **Index No. 21236/2013E**  
Stillwell Café, Inc. and Thomas Poli,  
Plaintiffs,

-against-

**DECISION and ORDER**

1680 Eastchester Realty Corp.,

Present:

Defendant.

Hon. Julia I. Rodriguez  
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to vacate the default judgment entered in this action.

<u>Papers Submitted</u>	<u>Numbered</u>
OSC, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Affidavit of M. Salerno in Opposition	3
Pls. Memorandum of Law	4

Defendant moves for an Order vacating and setting aside the default judgment against it pursuant to CPLR 317 and CPLR 5015(a)(1), 3 and 4, and directing plaintiffs to accept defendant's answer.

Background

In November of 2006, plaintiff Stillwell Café, Inc. ("Stillwell") and defendant 1680 Eastchester Realty Corp. ("Eastchester") entered into a commercial lease for the use of certain property owned by Eastchester as a restaurant. Michael Verini, now deceased,<sup>1</sup> was the president and principal officer of Eastchester. In March of 2010, Eastchester commenced a nonpayment proceeding against Stillwell in Housing Court. Stillwell interposed an answer with affirmative defenses and counterclaims. On April 9, 2010, the NYC Department of Buildings ("DOB") inspected the premises and issued a violation, finding that severe weather flooding had

<sup>1</sup>Michael Verini died on June 12, 2012.

undermined the foundation, caused severe vertical cracks and separated the floor from the main structure. A peremptory vacate order was issued by the DOB that same day.

The nonpayment matter was scheduled for trial on September 13, 2010. However, Eastchester's counsel was unable to appear on the trial date because of family illness. His law partner was unfamiliar with the case but appeared with a detailed written affirmation requesting an adjournment. The trial judge dismissed Eastchester's petition and held an immediate inquest hearing. By decision dated September 14, 2010, the trial court issued a default judgment in the amount of \$942,730 in Stillwell's favor based on its counterclaim of construction eviction.

On September 29, 2010, Stillwell restrained Eastchester's bank account. Eastchester filed an order to show cause to vacate the default judgment. The OSC was signed on October 14, 2010 by a different judge with the standard stay pending the hearing and determination of the motion. Eastchester served the signed OSC on counsel for Thomas Poli, Stillwell's president, by overnight mail and sent a letter to Chase Bank. The original trial judge denied the motion to vacate on November 15, 2010 and Eastchester appealed.

In the interim, Chase Bank issued a check for \$121,340.08 to Marshall Locascio, who disbursed the funds minus poundage to Stillwell's counsel who disbursed \$115,000.00 to Poli on November 22, 2010 after the motion to vacate was denied. Poli promptly spent the disbursed funds.

The Appellate Term, First Department, issued a stay on December 1, 2010 and made the matter returnable on December 10, 2010. By decision dated July 6, 2011, the Appellate Term reversed the lower court's decision and determined that: (1) Eastchester's attorney had established a reasonable excuse for his failure to appear, to wit, the declining condition and chemotherapy treatment of his father and (2) Eastchester had made a sufficient showing of a meritorious claim for nonpayment of rent. In its decision, the Appellate Term noted the "strong public policy" favoring the disposition of matters on the merits. The Court vacated the default judgment and remanded the case back to Civil Court for further proceedings.

Stillwell filed a motion on August 17, 2011 to restore the case to active status and assign the trial to the original trial judge who conducted the inquest. However, the case was assigned to

a different judge. On or about August 24, 2011, Eastchester filed a motion to punish Stillwell for contempt of court and direct restitution based on the removal of Eastchester's funds while the Civil Court stay was in effect. The new trial judge denied Eastchester's contempt motion by decision dated October 6, 2011 on the basis that the Civil Court Order containing the stay was not served upon the City Marshall to impede his disbursement of the funds to Stillwell's counsel. The Court also noted that no Civil Court or Appellate Term stay was in effect when counsel released the \$115,000 to Poli on November 22, 2010. Eastchester's motion for restitution prior to the commencement of trial was denied without prejudice because the parties failed to select an independent appraiser as directed by the Court to appraise Stillwell's restaurant equipment for bond purposes. Stillwell's motion to restore was granted to the extent that a motion schedule was set to determine whether Stillwell's counterclaims for damages should be dismissed.

In a decision dated February 2, 2012 on Eastchester's renewed restitution motion, the trial court, noting that it lacked equitable jurisdiction, found that it was without power to issue a declaratory judgment ordering restitution and denied the motion.

The underlying nonpayment proceeding was scheduled for trial on March 27, 2012. However, by decision dated July 25, 2012, the trial court dismissed Eastchester's nonpayment proceeding without prejudice to both parties asserting their claims in a plenary action. In a decision dated June 18, 2012, the same trial court granted summary judgment to Eastchester in the holdover proceeding and awarded final judgment of possession of the premises to Eastchester. Execution was stayed through July 31, 2012. Thereafter, Stillwell was evicted from the premises by a New York City Marshall. In February of 2013, the DOB approved Eastchester's application for the demolition of the premises. On or about April 5, 2013, plaintiffs commenced the instant action against Eastchester alleging breach of the lease, breach of implied warranties, negligence and fraud. Service was effected on the office of the Secretary of State on April 24, 2013. At that time, Eastchester maintained the address 1680 Stillwell Ave. Bronx, New York 10461 as its designated place for service of process with the office of the Secretary of State. On May 29, 2013, an additional copy of the summons and complaint was mailed by certified mail, return receipt requested, to 1680 Stillwell Ave. However, by July of

2013, the premises had been completely demolished and cleared of all debris. As such, it is likely that the demolition process had already begun at the time of that mailing. On July 31, 2013, Stillwell moved for a default judgment as Eastchester failed to answer or appear. The motion was served by mail to Eastchester at the 1680 Stillwell Avenue address. By order dated January 22, 2014, the trial court issued a default judgment in Stillwell's favor in the amount of \$1,200,000. The default judgment was filed with the Bronx County Clerk on February 5, 2014. On or about March 19, 2015, Stillwell filed a foreclosure of lien action against Eastchester and a notice of pendency naming both Eastchester and Michael Verini as defendants. The pleadings in the foreclosure action together with the notice of pendency and a copy of the January 22, 2014 default judgment order were mailed to Eastchester at 1680 Stillwell Avenue and to Michael Verini at 2705 Vance Street, Bronx, NY 10469.

In support of the instant motion, Eastchester submitted the affidavit of Thomas Verini, the son of Michael Verini. In his affidavit, Verini states that he "was involved in the affairs of 1680 Eastchester, whose sole business was the operation of the [subject property]." Verini also states that "after years of highly contentious litigation," Stillwell was evicted from the premises and a judgment of possession was awarded to Eastchester. Verini alleges that Eastchester "never received notice of [the instant action] in time to defend it and had no knowledge of this action or of the Default Judgment until Stillwell Café filed a notice of pendency and commenced a second action . . . more than a year after obtaining a Default Judgment— in which Stillwell Café now seeks to enforce the Default Judgment by forcing a sale of the subject premises." Verini also alleges that Eastchester did not receive a copy of the summons and complaint and did not receive any additional documents in this action or any notice of this action until about March 2015, when Stillwell Café "attempted to serve the pleadings in the Foreclosure Action."

Additionally, Verini states that after the September 14, 2010 default judgment was issued, Eastchester discharged its counsel and hired its current counsel. Verini alleges that Poli knew of his father's death and had expressed his condolences. Verini further alleges that there were communications between Eastchester's counsel and Stillwell's counsel regarding his father's death. Verini states that "[a]ll of the documents that Plaintiffs purportedly served in this

proceeding (other than the Summons and Complaint, which was served upon the Secretary of State), were purportedly mailed to 1680 Stillwell Avenue, Bronx, New York, and to no other address.” However, Verini alleges, “[h]aving no other operations other than the ownership and operation of the subject premises, having duly evicted Stillwell Café and being in the process of demolishing the subject premises, 1680 Eastchester did not receive any mail at the premises during this time.” In fact, according to Verini, “[a]t the time this action was commenced there was no mailbox at the subject premises.” Verini alleges that, at that time, 1680 Eastchester “was receiving documents related to the subject premises at the Verini household, *not* at the subject premises.” Verini attached to his affidavit copies of NYC Dept. Of Finance property tax bills for the premises for the period beginning February 2013 through June 2013, all of which are addressed to Michael Verini at 2305 Vance St., Bronx, NY 10469-6017. Verini also points to the first page of the lease for the premises which states that the principal offices of 1680 Eastchester are located at 2305 Vance Street, Bronx, New York. According to Verini, “[h]aving been evicted pursuant to a demolition clause in the Lease, Plaintiffs knew that the subject premises would be demolished, yet insisted on serving the subject premises.” Verini also states that “[p]laintiffs were essentially mailing Court papers to a dead man at an empty, leveled parking lot.” Verini alleges that “Plaintiffs knew that [he] was helping [his] father handle the affairs of 1680 Eastchester and had countless meetings and interactions with [him] regarding the subject premises and the Lease.” Also, Verini alleges, “Plaintiffs knew that I operated another business in the Bronx and knew the location of that business . . . [and] . . . could have contacted me regarding this action or mailed the pleadings or any other notice of this action to me . . . [but] deliberately chose not to do so.” Verini further alleges that “despite years of contentious litigation with 1680 Eastchester’s prior counsel and current counsel, Plaintiffs, and their counsel, calculatedly did not notify 1680 Eastchester’s counsel of the existence of this action and did not inquire as to whether counsel would accept service of any papers on 1680 Eastchester’s behalf.” Verini states that “Poli knew that 1680 Eastchester’s President and principal officer (Michael Verini) was deceased since June 2012, yet served the Summons and Complaint on the Secretary of State, whose publically available records listed Michael Verini as the recipient of service of

process.” Finally, Verini alleges that “[a]fter a years’ long Court battle with Stillwell Café and Poli – up to the Appellate Term – had 1680 Eastchester received any notice of the instant action in time to defend it, 1680 Eastchester would not have simply ignored the action and sat by idly as an over million dollar judgment was entered against it.”

In opposition to the motion, plaintiffs submitted, *inter alia*, the affidavit of Michelle Salerno, a paralegal with plaintiffs’ counsel. In her affidavit, Ms. Salerno states that “[b]y letter dated May 29, 2013, [she] served a true and accurate copy of the summons and complaint upon the Defendant by certified mail, return receipt requested. The court notes that plaintiffs provided a copy of the certified mail receipt only and provided no explanation for their failure to provide a copy of the return receipt.

\* \* \* \* \*

CPLR 5015(a) provides that a party may be relieved from a judgment on the ground of, among others, excusable default. CPLR 5015(a)(1). A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action. *See 60 E. 9<sup>th</sup> St. Owners Corp., v. Zihenni*, 111 A.D.3d 511, 975 N.Y.S.2d 32 (1<sup>st</sup> Dept. 2013). While generally a defendant relying on this section must move to vacate the default within one year after service upon it of a copy of the judgment or order with written notice of entry, a court has the power to vacate a default judgment, in the interest of justice, even after the expiration of the one-year period set forth in CPLR 5015(a)(1). *See Molesky v. Molesky*, 255 A.D.2d 821, 680 N.Y.S.2d 739 (3<sup>rd</sup> Dept. 1998). Nor is there any per se rule that a corporation served through the Secretary of State, and which failed to update its address on file there, as in the instant case, cannot demonstrate an excusable default. *See Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 492 N.E.2d 116 (1986); *Crespo v. A.D.A. Mgt.*, 292 A.D.2d 5, 739 N.Y.S.2d 49 (1<sup>st</sup> Dept. 2002). Rather, a court should consider, among other factors, the length of time for which the address had not been kept current. *See Eugene Di Lorenzo, Inc., supra*, at 143. Here, the summons and complaint were served through the Secretary of State on April 24, 2013. As such,

the demolition process had either just commenced when, or was commenced shortly after, the office of the Secretary of State mailed the documents to the premises.

Given that the instant action is merely a continuation of the longstanding landlord/tenant dispute between the parties in Civil Court and the unlikelihood that Eastchester would have intentionally defaulted after participating in such protracted litigation in Civil Court, this Court finds that 1680 Eastchester has demonstrated excusable default for purposes of CPLR 5015(a)(1).

Additionally, the Appellate Term has previously determined that 1680 Eastchester has a potentially meritorious defense and this Court declines to disturb that finding.

Based on the foregoing, the Court need not address Eastchester's remaining arguments.

Accordingly, and in view of the strong public policy favoring resolution of cases on their merits, Eastchester's motion to vacate the default judgment entered against it on February 5, 2014 is **granted** and said default judgment is hereby vacated.

Eastchester is hereby granted leave to serve an answer, including any affirmative defenses and counterclaims, except no defense or counterclaim based on lack of personal jurisdiction may be raised.

Dated: Bronx, New York  
August 17, 2015

  
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Hon. Julia I. Rodriguez, J.S.C.