

Chavarry v 120 E. 83rd St. Owners Corp.
2018 NY Slip Op 33208(U)
December 12, 2018
Supreme Court, New York County
Docket Number: 154857/2017
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-X

JOSE CHAVARRY

INDEX NO. 154857/2017

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

120 EAST 83RD STREET OWNERS CORP.,

Defendant.

DECISION AND ORDER

-X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

VACATE -

were read on this motion to/for

DECISION/ORDER/JUDGMENT/AWARD

The motion by defendant to vacate a default judgment is granted.

Background

This action arises out of plaintiff's work at 120 East 83rd Street in Manhattan. Plaintiff was cutting wood for flooring at the site when the machine he was using kicked back and cut his left finger. Plaintiff contends that his accident occurred because the tool he was using (a grinder) lacked a guard.

Plaintiff commenced the action by serving defendant via the New York Secretary of State. Defendant defaulted and the Court entered a default judgment in plaintiff's favor (NYSCEF Doc. No. 14). At the inquest, JHO Gammerman awarded plaintiff \$500,000 (NSYCEF Doc. No. 22) and a judgment was entered on June 28, 2018 (NYSCEF Doc. No. 28).

Defendant now moves to vacate the default and claims that it never personally received the summons and complaint because its address with the Secretary of State was incorrect. That

filing lists 1133 Broadway, Suite 426 as the address where process should be mailed. Defendant observes that this was the former office of its management company and the correct address is now 770 Lexington Avenue in Manhattan. Defendant points out that plaintiff's counsel sent a good faith letter requesting an answer to this same incorrect address and the letter was returned. Defendant contends that plaintiff filed a motion for default judgment after knowing that the address on file was incorrect.

In opposition, plaintiff observes that as of the date of the opposition, plaintiff still had not updated the address with the Secretary of State. Plaintiff argues that defendant's failure to update its address is not an excusable default. Plaintiff also points out that defendant did not offer an affidavit asserting that it did not receive service; only defendant's property manager submitted an affidavit claiming defendant had no notice.

Discussion

CPLR 317 "states, in part, that '[a] person served with a summons other than by personal delivery to him or to his agent for service under CPLR 318 may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment 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.' As has been emphasized in numerous cases, there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay. It is also 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. Thus, corporate defendants served under Business Corporation Law § 306 have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend" (*Eugene Di*

Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 141, 42, 501 NYS2d 8 [1986] [citations omitted]).

“A defendant who meets the requirements of [CPLR 317] normally will be entitled to relief, although relief is not automatic, as the section states that a person meeting is requirements may be allowed to defend the action. Thus, denial of relief under CPLR 317 might be appropriate where, for example, a defendant’s failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice” (*id.* at 143 [internal quotations and citations omitted]).

As an initial matter, under *Eugene Di Lorenzo, Inc.*, a corporation can cite CPLR 317 in support of a motion to vacate a default judgment if the corporation did not personally receive service. Here, the question is whether denying defendant relief under CPLR 317 is appropriate. The Court finds that defendant should be allowed to defend the action and the motion is granted.

The fact is that *after*, and only after, plaintiff got a judgment for \$500,000 entered against defendant, plaintiff served the judgment on the correct address (770 Lexington Avenue) and at the premises itself (*see* NYSCEF Doc. No. 55). Suddenly sending legal papers to the right address when seeking to recover a judgment gives the impression of “gotcha” litigation tactics. Plaintiff does not deny that its good faith letter was returned due to a problem with the address in August 2017 (*see* NYSCEF Doc. No. 51). And the fact that the affidavit denying service comes from the managing agent (*see* NYSCEF Doc. No. 32) is of no moment because the managing agent is supposed to receive service for defendant. Under these circumstances, the Court finds that vacating the default judgment is warranted.

Defendant has also established a potentially meritorious defense by arguing that it did not control the means and methods of plaintiff's work and that a grinder does not qualify as a power tool under Labor Law § 241(6). Defendant need not establish these defenses in this motion; defendant must merely show that its defenses might be meritorious. Discovery may reveal that these defenses are insufficient.

Summary

The Court observes that despite admitting that its address was wrong with the Secretary of State, defendant has apparently not yet changed its address. Plaintiff attaches a printout of the Secretary of State's website showing the incorrect address (1133 Broadway, Suite 426) *still* listed as the address process should be mailed to as of October 9, 2018 (NYSCEF Doc. No. 62). While the Court cannot conclude that constitutes a scheme to avoid service and therefore grounds to deny the instant motion, it does evidence sloppy record keeping and a general indifference to the requirement that the address must be current (*c.f. John v Arin Bainbridge Realty Corp.*, 147 AD3d 454, 46 NYS3d 589 [1st Dept 2017] [finding under the totality of the record that vacating a default judgment was not appropriate where defendant failed to keep a current address on file with the Secretary of State and where there were numerous examples to support the inference that defendant deliberately sought to avoid service]).

Despite defendant's apparent failure to change its address for service of process even at this late date, the fact is that plaintiff's decision to mail the notice of entry to the correct address and to the premises after a judgment was entered compels the court to grant the instant motion. Clearly, plaintiff learned the correct address at some point and decided to use that information to try to collect a judgment rather than give defendant notice of the instant lawsuit. To be clear, the Court is not imposing an additional service requirement on plaintiff, but plaintiff cannot have it

both ways. Plaintiff cannot rely on defendant's failure to update its address to get a default judgment and then use another address (the correct one) to satisfy that judgment.

Accordingly, it is hereby

ORDERED that defendant's motion to vacate its default herein is granted on condition that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry and on the condition that defendant update its address with the Secretary of State within 90 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further]

ORDERED that counsel are directed to appear for a preliminary conference on March 26, 2019 at 2:15 p.m. *and bring proof that the address has been updated to the conference*

12-12-18

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

REFERENCE