

**M-E/Vogel Taylor Engrs., P.C. v Fletcher Thompson
Architecture Eng'g LLC**

2019 NY Slip Op 32342(U)

August 1, 2019

Supreme Court, New York County

Docket Number: 654817/2017

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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M-E/VOGEL TAYLOR ENGINEERS, P.C. D/B/A M-E ENGINEERS,

Plaintiff,

- v -

FLETCHER THOMPSON ARCHITECTURE ENGINEERING LLC, KURT BAUR, MICHAEL MARCINEK, JOHN OLIVETO, ROBERT WILDERMUTH, BRIAN DUDDY

Defendant.

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INDEX NO. 654817/2017

MOTION DATE 07/25/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents and for the reasons set forth on the record (8/1/2019), Robert Wildermuth's motion is granted solely to the extent that the default judgment against him is vacated.

The Relevant Facts and Circumstances

M-E/Vogel Taylor Engineers, P.C. d/b/a M-E Engineers (the Plaintiff) commenced this action on July 14, 2017 to recover payment for its mechanical engineering services on certain construction projects. The complaint alleges five causes of action against (i) Fletcher Thompson Architecture Engineering LLC (Fletcher Thompson LLC) as general contractor on the projects, (ii) its principals, and (iii) its employees (collectively, the Defendants). Only the fifth cause of action is asserted against Mr. Wildermuth as employee of Fletcher Thompson LLC: violation of Article 3-A of the New York Lien Law (NYSCEF Doc. No. 1, ¶¶ 38-56).

The plaintiffs served their complaint on Mr. Wildermuth by personal service on July 28, 2018 (NYSCEF Doc. No. 88). None of the Defendants filed an answer. The Plaintiff then moved for default judgment against the Defendants and served their motion papers on Mr. Wildermuth via the United States Postal Service on March 23, 2018 (NYSCEF Doc. No. 89). In an amended decision and order, dated June 13, 2018, the Court granted the Plaintiff's motion (Mtn. Seq. 001) for default judgment against all Defendants (NYSCEF Doc. No. 55, the **First Order**).

The Plaintiff subsequently filed a motion (Mtn. Seq. 002) to correct the First Order, which was served on Mr. Wildermuth on August 23, 2018 (NYSCEF Doc. No. 70). The Court granted the Plaintiff's motion and issued a decision and order, October 30, 2018, that granted default judgment against the Defendants, with the inclusion of pre-judgment interest (NYSCEF Doc. No. 71; hereinafter the **Second Order**). On December 6, 2018, the Plaintiff's filed notice of entry and judgment was entered against Mr. Wildermuth, among others, in the amount of \$27,600, plus interest of \$3,491.66, together with \$12,968.78 in attorney's fees (NYSCEF Doc. No. 72; hereinafter the **Notice of Entry**). The Plaintiff then served Mr. Wildermuth by Regular First Class Mail with the Notice of Entry (NYSCEF Doc. No. 94).

On February 7, 2019, the Plaintiff personally served Mr. Wildermuth with an Information Subpoena with Restraining Notice (NYSCEF Doc. No. 96). After the Plaintiff served the Sheriff of Suffolk County with an Income Execution against Mr. Wildermuth on March 14, 2019 (NYSCEF Doc. No. 97), Plaintiff's counsel received the first garnishment payment on July 16, 2019.

Mr. Wildermuth then moved by order to show cause on July 25, 2019 to vacate the Second Order and obtain a temporary restraining order staying garnishment of his salary.

Discussion

I. Vacating the Default Judgment

Mr. Wildermuth argues that the Second Order should be vacated because (i) his delayed response to the action was because his boss advised that the lawsuit would be taken care of, and (ii) that he has a meritorious defense because he was not an employee, officer, director or agent of Fletcher Thompson LLC. The Plaintiff argues that Mr. Wildermuth does not have a reasonable excuse for his delay and that Mr. Wildermuth was a former employee and agent of Fletcher Thompson LLC.

A defendant that seeks to vacate its default under CPLR § 5015 (a) (1) must demonstrate a reasonable excuse for its delay in appearing and a meritorious defense to the action (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Although there exists strong public policy to dispose of cases on their merits, the Court may exercise its sound discretion when assessing what constitutes a reasonable excuse for a default (*Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]).

In his affidavit in support of this motion, Mr. Wildermuth explains that once he received notice of the judgment, he “reached out to [his] boss, who was also involved in the defendant Fletcher Thompson LLC, and he told me that he would take care of it” (*id.*, ¶ 5). Mr. Wildermuth asserts that he only realized the action remained unresolved when his wages were garnished (*id.*). At that time, Mr. Wildermuth then spoke with an attorney and learnt about the judgment against

him. Under these circumstances, Mr. Wildermuth has a reasonable excuse because the timeline indicates that he spoke with his former employer once he received notice of the action. He was therefore entitled to rely on his former employer's assurance that the lawsuit would be taken of – *i.e.* that his employer would defend against this action and be responsible for any associated damages.

Mr. Wildermuth also timely brought this motion within the same month that he discovered his wages were being garnished. To the extent that the Plaintiff argues that Mr. Wildermuth should have appeared after proper service of the complaint, Mr. Wildermuth denies that he received the complaint (*id.*, ¶ 5). The facts in this case indicate that Mr. Wildermuth reacted promptly to his default, unlike those cases where no reasonable excuse existed when a defendant was advised by its insurer that a defense would be tendered, but the defendant unreasonably relied on the insurer's representation even after being served with a motion for default judgment (*see e.g.*, *Gecaj*, 67 NY2d at 604). As a result, Mr. Wildermuth has established a reasonable excuse for his default.

Mr. Wildermuth's meritorious defense depends on whether liability attaches to him as an "officer, director or agent" of Fletcher Thompson LLC pursuant to § 79-a (1) of New York Lien Law. Mr. Wildermuth asserts that he was an employee of Fletcher Thompson Inc. between February 2008 to 2017, and not Fletcher Thompson LLC, which is the defendant in this action (NYSCEF Doc. No. 76, ¶ 3). Mr. Wildermuth adduces as proof, his 2015 W-2 statement, which states that his employer is "Fletcher Thompson, Inc. (NYSCEF Doc. No. 100).

The Plaintiff adduces documentary evidence that purports to show that Mr. Wildermuth was a principal of Fletcher Thompson LLC, including a screenshot from the website for Fletcher Thompson Architecture Engineering Interiors, illegible shop drawings by Fletcher Thompson that purportedly list Mr. Wildermuth as a principal, a quote from an online article from “Robert Wildermuth of Fletcher Thompson Architecture Engineering,” and an online record from the NYC Department of Design and Construction that lists Mr. Wildermuth as the contact person for “Fletcher Thompson Architecture Engineering” (NYSCEF Doc. Nos. 99, 103, 104, 105). In light of the conflicting evidence between Mr. Wildermuth’s 2015 W-2 statement and other online evidence, Mr. Wildermuth has a meritorious defense that he was employed by Fletcher Thompson, Inc. rather than the Fletcher Thompson defendant in this action.

Accordingly, Mr. Wildermuth’s motion to vacate the Second Order is granted because he has demonstrated a reasonable excuse and meritorious defense for his default.

II. Temporary Restraining Order

For the reasons set forth above, the branch of Mr. Wildermuth’s motion for a temporary restraining order to stay garnishment of his wages is moot because his default and the Second Order is vacated.

Accordingly, it is

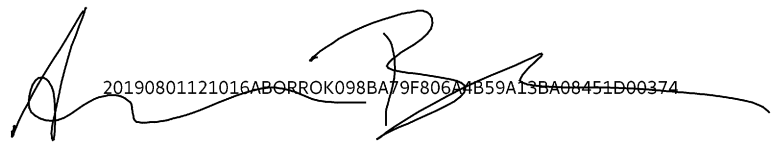
ORDERED that defendant's motion to vacate its default herein is granted on condition that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

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 at 60 Centre Street, Room 238 forthwith.

8/1/2019
DATE


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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE