

Ren v Sela
2019 NY Slip Op 32537(U)
July 17, 2019
Supreme Court, Richmond County
Docket Number: 151051/2016
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

XIAOYAN REN,

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 151051/2016

Motion No. 2

Plaintiff,

-against-

BEDRI SELA,

Defendant.

The following numbered 1 through 9 were marked submitted on May 14, 2019

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Order to Show Cause, dated April 24, 2019.....	1
Affirmation in Support of Order to Show Cause, with Exhibits, dated April 23, 2019.....	2
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Affidavit of Bedri Sela in Support of Order to Show Cause, dated February 28, 2019.....	4
Affidavit of Aberesha Sela in Support of Order to Show Cause, dated February 28, 2019.....	5
Affidavit of Dashamir Sela in Support of Order to Show Cause, dated February 28, 2019.....	6
Affirmation in Opposition, with Exhibits, dated May 7, 2019.....	7
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In the above titled action, Defendant seeks to vacate a default judgment entered against him. After an inquest was performed and a decision was issued on December 3, 2018, a

judgment was entered in the amount of \$150,000.00 on December 7, 2018. Defendant claims he was not properly served and was not aware of this Action until December 2018. Defendant's Motion to Vacate is hereby granted.

The underlying Action involves a slip and fall; Defendant claims that on the day of the incident, a Good Samaritan rang his bell after Plaintiff allegedly fell on the neighboring property and asked if the Plaintiff could wait for an ambulance. The Affidavit of Service states that service was effectuated on the Defendant by delivering and leaving a true copy of the Summons and Verified Complaint with "(John Smith) (who refused full name), co-tenant". The description of "John Smith" reads that the male was white, with brown hair, approximately age 50, 5'7 and 195 pounds. Defendant claims that he was never served with the Summons and Verified Complaint and that "John Smith" was not a co-resident or person of suitable age and discretion. Furthermore, Defendant argues that the description of "John Smith" matches no one at Defendant's house, but rather matches that of his neighbor at 3487 Hylan Boulevard.

According to Defendant, he was not served at his place of business or his last known address, as he claims he does not reside at 3483 Hylan Boulevard ("Premises") where service was effected. The Defendant and his father own the Premises. However, Defendant states in his moving papers that in 2016 or the fifteen years before that, the Premises was not his actual place of business, dwelling place, or usual place of abode. Instead, Defendant claims that he has resided for the last fifteen years at 261 Chesterton Avenue.

Plaintiff argues that while Defendant's Motion relies on self-serving conclusory affidavits alleging that he does not reside at the Premises, the important material facts are the Defendant's relationship to the Premises. In Plaintiff's opposition, he argues that (1) the evidence shows that the Defendant co-owned the Premises, (2) he paid the property taxes and listed the property as

his mailing address with the NYC Department of Finance, (3) he resided a 12 minute walk away from the Premises, (4) Defendant's brother and sister-in-law resided at the Premises and learned of the accident immediately after it took place and (5) Defendant's brother informed him of the accident just after it occurred. Plaintiff's counsel asserts that its office sent a letter of representation to Defendant at the Premises. After receipt of such, Defendant's wife called Plaintiff's counsel's office and was advised by the office manager that she should contact her insurance carrier or a lawsuit would be filed against her husband. Plaintiff also cites to Defendant's receipt of the entered judgement, which Plaintiff's counsel states it sent to Defendant at the Premises in December 2018. Plaintiff argues that such evidence shows that Defendant decided to ignore the properly-served Summons and Complaint and that clearly the Premises is Defendant's actual place of business, as he rented out the property to his brother.

Under CPLR §317, "a defaulting defendant who was 'served with a summons other than by personal delivery' may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense." *Progressive Cas. Ins. Co. v Excel Prods., Inc.*, 171 A.D.3d 812, 813, 98 N.Y.S.3d 87, 88 (App. Div. 2d Dept., 2019). See *Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141, 492 N.E.2d 116, 118, 501 N.Y.S.2d 8, 10, 1986 N.Y. LEXIS 17531, *7-8 (1986); *Gershman v Midtown Moving & Storage, Inc.*, 123 A.D.3d 974, 975, 999 N.Y.S.2d 485, 486-487 (App. Div. 2d Dept., 2014). Pursuant to CPLR §5015(a)(1), a defendant who seeks to vacate a default judgment must show a reasonable excuse for the default and a potentially meritorious defense. See *Capital Source v AKO Med., P.C.*, 110 A.D.3d 1026, 1026, 973 N.Y.S.2d 794, 795 (N.Y. App. Div. 2d Dep't October 30, 2013); *Capital Source v AKO Med., P.C.*, 110 A.D.3d 1026, 1026, 973 N.Y.S.2d 794, 795 (App. Div. 2d Dept., 2013);

Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc., 83 A.D.3d 1080, 1082, 923 N.Y.S.2d 572, 574 (App. Div. 2d Dept., 2011).

The Court finds that pursuant to CPLR §317, Defendant has demonstrated that he did not personally receive notice of the summons in time to defend the action and that he has a potentially meritorious defense. While it is not contested that Defendant did not reside at the Premises at the time of service, it is not clearly established that the Premises was Defendant's actual place of business or usual place of abode under CPLR §308(2) at such time. Under CPLR §308(6), "actual place of business" "shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business." While Defendant rented out the Premises to his brother and sister-in-law, Plaintiff has not adequately shown that the Premises fits this definition under CPLR §308(b). There is also no evidence that the Premises served as Defendant's usual place of abode.

Defendant also adequately showed that it did not receive notice of the summons in time to defend the Action. While Defendant received a notice of representation that was mailed to the Premises by Plaintiff's counsel and Defendant's wife was in contact with Plaintiff's counsel, this is not sufficient proof that Defendant received notice of the actual summons. Knowledge of a potential claim against Defendant is not equivalent to notice of the summons and therefore this interaction is not sufficient proof to overcome Defendant's showing that it did not receive the Summons in sufficient time to defend the Action. The affidavits of the actual residents of the Premises at the time, Aberesha Sela and Dashamir Sela, demonstrate that they were not served with the Summons and Complaint and that the description of "John Smith" does not match the description of anyone residing or visiting the Premises at the date of service. The evidence shows that Plaintiff served someone of a suitable age and discretion who does not match the

description of anyone residing at the Premises, which was also not Defendant's residence, place of abode or actual place of business.

The evidence also demonstrates that Defendant has a potentially meritorious defense. In support of its Motion, Defendant submitted an Affidavit in which he argues that on the date of Plaintiff's fall, he received a call from Dashamir Sela, who lived at the Premises at the time and told Defendant that someone had fallen on the sidewalk of the neighbor's property located at 3487 Hylan Boulevard. A Good Samaritan, who had seen Plaintiff fall and helped her up, rang the bell at the Premises after discovering that no one was home at 3487 Hylan Boulevard. According to the Affidavit of Aberesha Sela, who was at the Premises at the time of the incident, the Good Samaritan told her that he saw the Plaintiff fall next door at 3487 Hylan Boulevard as he was driving by and that he had to go but asked if the Plaintiff could wait in front of the Premises for the ambulance to arrive. Both Aberesha Sela and Dashamir Sela state in their Affidavits that Dashamir Sela waited with Plaintiff for the ambulance to arrive.

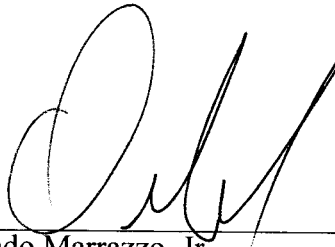
According to the Affidavit of Dashamir Sela, he personally cleaned any remaining snow and salted the sidewalk in front of the Premises on the morning of the incident. Dashamir Sela also attests that while there was no snow or ice in front of the Premises, there was a thin sheet of snow in front of the neighbor's property at 3487 Hylan Boulevard. In support of Defendant's Motion, Defendant submitted photos taken by Dashamir Sela of the sidewalk in front of the Premises and in front of 3487 Hylan Boulevard. According to Dashamir Sela's Affidavit, he personally took such photos at 8:30 a.m. on January 25, 2016, approximately fifteen minutes after he was told by his wife that the Good Samaritan and Plaintiff were at the door. The Court finds that the evidence offered by Defendant is sufficient to show that he has a potentially meritorious defense pursuant to CPLR §317.

The Court also finds that for the reasons stated above, Defendant has adequately shown that he has a reasonable excuse for the default and a potentially meritorious defense under CPLR §5015(a)(1). This is not a case in which the Defendant is providing an affidavit that simply denies receipt of the summons and complaint, which has been held to be insufficient to establish a reasonable excuse for the default. *See Progressive Cas. Ins. Co. v Excel Prods., Inc.*, 171 A.D.3d 812, 813-814, 98 N.Y.S.3d 87, 89 (App. Div. 2d Dept., 2019); *Xiao Lou Li v China Cheung Gee Realty, LLC*, 139 A.D.3d 724, 726, 32 N.Y.S.3d 198, 201 (App. Div. 2d Dept., 2016). Rather, the Affidavits of Aberesha Sela and Dashamir Sela, who resided at the Premises, provide a sufficient basis for holding that Defendant has adequately shown he has a reasonable excuse for the default, as he claims he was not properly served with the Summons and Complaint. Based on such Affidavits and other evidence submitted by the Defendant, the Court further finds that Defendant has a potentially meritorious defense, in that Plaintiff did not fall at the Premises but rather at 3487 Hylan Boulevard.

Therefore, the Court grants Defendant's Motion to vacate the default judgment entered against it on December 7, 2018 in the amount of \$150,000.00.

The parties are hereby ordered to appear before this Court for a Compliance Conference on August 21, 2019 at 9:30 a.m.

Dated: July 17, 2019
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court

**Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice**