

<b>Camara v Five Star Carting, Inc.</b>
2020 NY Slip Op 30481(U)
February 3, 2020
Supreme Court, Kings County
Docket Number: 508058/2019
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

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ABDOUAYE CAMARA,

Plaintiff,

Decision and Order

-against-

Index No. 508058/2019

FIVE STAR CARTING, INC., FIVE STAR  
CARTING NY, LLC. and FIVE STAR CARTING,  
LLC.Submitted: 12/3/19  
Motion Seq. 001, 002 &  
003

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

PapersNumberedPlaintiff's Notice of Motion dated August 1, 2019; Attorney Affirmation of Alan Shapey, Esq., affirmed on August 1, 2019; Affidavit of Abdoulaye Camara, sworn to on July 18, 2019 (Exhibit F); and Exhibits A-F.....  
1Defendant GPB WASTE NY LLC d/b/a FIVE STAR CARTING i/s/h/a FIVE STAR CARTING, INC.'s Attorney Affirmation in Opposition of Adam Hiller, Esq., affirmed on September 24, 2019; Affidavit of Nino Tristani, sworn to on September 24, 2019; Affidavit of Jay Gomez, sworn to on September 24, 2019; and Exhibits A-C.....  
2Defendant GPB WASTE NY LLC d/b/a FIVE STAR CARTING i/s/h/a FIVE STAR CARTING, INC.'s Notice of Cross-Motion to Compel Acceptance of a Late Answer dated September 24, 2019; Attorney Affirmation of Joseph Salvo, Esq., affirmed on September 24, 2019; Affidavit of Nino Tristani, sworn to on September 24, 2019 (Exhibit F); Affidavit of Jay Gomez, sworn to on September 24, 2019 (Exhibit F); and Exhibits A-F.....  
3Plaintiff's Attorney Affirmation in Opposition to Defendant GPB WASTE NY LLC d/b/a FIVE STAR CARTING i/s/h/a FIVE STAR CARTING, INC.'s Cross-Motion, of Brian Isaac, Esq., affirmed on November 26, 2019; and Exhibits A-E  
4Defendants FIVE STAR CARTING, LLC. i/s/h/a FIVE STAR CARTING NY, LLC. and FIVE STAR CARTING, LLC.'s Cross-Motion to Compel Acceptance of a Late Answer dated September 24, 2019; Attorney Affirmation of Dejon Delpino, Esq., affirmed on September 24, 2019; Affidavit of Marc Valenti, sworn to on September 24, 2019 (Exhibit F); and Exhibits A-F.....  
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Plaintiff's Attorney Affirmation in Opposition to Defendant FIVE STAR CARTING, LLC. i/s/h/a FIVE STAR CARTING NY, LLC. and FIVE STAR CARTING, LLC.'s Cross-Motion, of Brian Isaac, Esq., affirmed on November 26, 2019; and Exhibits A-C.....

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**MONTELIONE, RICHARD J., J.**

Plaintiff commenced this action for personal injuries sustained by him in the use of a baler<sup>1</sup> located at the Standard Hotel, purportedly leased and provided by defendants by filing the summons and complaint on April 10, 2019. Service upon defendants FIVE STAR CARTING, LLC. i/s/h/a FIVE STAR CARTING NY, LLC. and FIVE STAR CARTING, LLC ("Five Star Carting, LLC.") was made upon the New York Secretary of State pursuant to BCL 306 on April 16, 2019 and pursuant to CPLR 311. Service upon defendant GPB WASTE NY, LLC. d/b/a FIVE STAR CARTING i/s/h/a FIVE STAR CARTING, INC. ("GPB Waste NY, LLC.") was made upon the New York Secretary of State pursuant to BLC 303 on April 16, 2019 and pursuant to CPLR 311. No answer was interposed and plaintiff moves for default judgment.

Defendant Five Star Carting, LLC. cross-moves to vacate their default in answering and to compel plaintiff to accept its answer. Defendant proffers the affidavit of Marc Valenti, the vice-president of Five Star Carting, LLC, who contends, *inter alia*, that defendant did not receive a copy of the summons and complaint and was made aware of it for the first time when he was notified by William Manning, an attorney at the law firm of Morris, Duffy, Alonso & Duffy, who was assigned by defendant's insurance carrier to represent defendant's interests in court. The insurance carrier was notified of the action when the insurance agent for co-defendant GPB Waste NY, LLC. forwarded the complaint to them and upon receipt, promptly retained counsel to interpose an answer. Mr. Valenti avers that defendant Five Star Carting, LLC. does not maintain an office at 58-35 47th Street, Maspeth, NY 11378, that defendant Five Star Carting,

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<sup>1</sup> A baler is a machine to use compress recyclable and waste materials into small, manageable bales.

LLC maintains an office at 115 Thames Street, Brooklyn, NY 11237, is "unaware of what circumstances led to the incorrect address being placed on the New York Secretary of State website," that no employee of defendant Five Star Carting, LLC. works at 58-35 47th Street, Maspeth, NY 11378 and that defendant never received service of the summons and complaint. Lastly, Mr. Valenti contends that defendant is not the lessor or lessee of the subject baler and had no duty to maintain the baler.

Defendant GPB Waste NY, LLC. separately cross-moves for the same relief. Defendant proffers the affidavits of Nino Tristani, the Chief Operating Officer of GPB Waste NY, LLC. and Jay Gomez, a Sales Manager of GPB Waste NY, LLC. Mr. Tristani avers that the address of 52-35 47th Street, Maspeth, NY 11378 is a waste recycling plant with multiple entry points and that to his knowledge there were two female employees working there on the date of service and that no one working at the facility on the date of service matches the description of the individual described in the affidavit of service. Further, Mr. Tristani contends that copies of the summons and complaint were never received by mail and defendant's first notice of the lawsuit was receipt of plaintiff's motion for summary judgment. Mr. Gomez avers, *inter alia*, that to his knowledge, the baler at the subject of this lawsuit was in good working order when it was provided and was free of defects.

Plaintiff argues, *inter alia*, that as to defendant GPB Waste NY, LLC., defendant's assertion is conclusory and insufficient to rebut plaintiff's affidavit of service. Moreover, defendant's mere denial is insufficient to rebut the presumption of proper service created by service upon the secretary of state. Lastly, plaintiff argues that defendant's affiant, Jay Gomez, admits that defendant provided the baler at issue but does not state whether they retained responsibility to maintain the baler or describe the waste removal services it continues to provide

to the Standard Hotel. Likewise, plaintiff argues, *inter alia*, that as to defendant Five Star Carting, LLC., defendant's affiant, Marc Valenti, offers no explanation as to how the address on file with the NYSOS was incorrect and as such fails to proffer a reasonable excuse sufficient to vacate its default.

On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the claim by an affidavit made by the party, and proof of the defendant's default (*see CPLR 3215[f]; Mercury Cas. Co. v. Surgical Ctr. at Milburn, LLC*, 65 A.D.3d 1102, 885 N.Y.S.2d 218; *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202).

A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer (*see Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 58, 970 N.Y.S.2d 260, 262; *Ennis v. Lema*, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Mid-Hudson Props., Inc. v. Klein*, 167 A.D.3d 862, 864, 90 N.Y.S.3d 264; *White v. Inc. Vill. of Hempstead*, 41 A.D.3d 709, 710, 838 N.Y.S.2d 607, 608). Moreover, whether to grant such relief is discretionary (*see Goldfarb v. Zhukov*, 145 A.D.3d at 759, 43 N.Y.S.3d 135), and relief may be denied "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" (*Eugene Di Lorenzo, Inc.*, 67 N.Y.2d at 143) (*see Stevens v. Stepanski*, 164 A.D.3d 935, 937, 84 N.Y.S.3d 1, 3 [App. Div. 2d Dept. 2018]).

In the instant case, defendants' unexplained failure to keep a current address on file with the Secretary of State is insufficient to demonstrate their lack of actual notice of the action in time to defend (*Yellow Book of New York, Inc. v. Weiss*, 44 A.D.3d 755, 843 N.Y.S.2d 190 [2nd Dept. 2007]). Further, defendants did not proffer specific facts to rebut the statements in the process server's affidavit. Defendant GPB Waste NY, LLC.'s affiant merely states that to his knowledge, "no one ... matches the description of individual described in the affidavit of service" and the same does not sufficiently contain a "detailed and specific contradiction of the allegations in the process server's affidavit" (*Machovec v. Svoboda*, 120 A.D.3d 772, 992 N.Y.S.2d 279 [2nd Dept 2014]). "A mere conclusory denial of service will not be sufficient to rebut the process server's affidavit (internal citations omitted). Rather, the denial must be substantiated by specific, detailed statements, and/or independent evidence that contradicts the allegations in the affidavit of service" (*Mizerek v. Rosenfeld*, 162 A.D.3d 1005, 80 N.Y.S.3d 358 [2nd Dept. 2018]). Likewise, defendant Five Star Carting, LLC.'s affiant fails to proffer any specific facts to rebut the affidavit of service but merely provides a general statement that no individual works there or is authorized to accept service at the address served. As such, defendants failed to demonstrate a reasonable excuse for their default (see *Jean v. Csencsits*, 171 A.D.3d 1149, 1150, 99 N.Y.S.3d 348, 351 [2nd Dept. 2019]).

Since defendants failed to demonstrate a reasonable excuse, it is not necessary to consider whether they have sufficiently demonstrated the existence of a potentially meritorious defense (see *Maida v. Lessing's Rest. Servs., Inc.*, 80 A.D.3d 732, 915 N.Y.S.2d 316 [2nd Dept. 2011]).

Plaintiff's submissions in support of his motion for leave to enter a default judgment are sufficient to demonstrate his entitlement to default judgment. The verified complaint and the plaintiff's affidavit set forth sufficient facts for a determination that the plaintiff alleged a viable

cause of action against the defendants; namely, that based upon defendants' ownership and negligence in its' failure to maintain a baler in which plaintiff used in the course and scope of his employment for The Standard Hotel, he became injured by which his right hand and arm became caught in the point of operation.

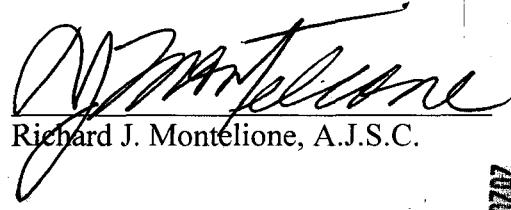
Therefore, based on the foregoing, plaintiff's motion for default judgment against defendants GPB Waste NY, LLC d/b/a Five Star Carting i/s/h/a Five Star Carting, Inc. and Five Star Carting, LLC. i/s/h/a Five Star Carting NY, LLC. and Five Star Carting, LLC. is granted. Defendants' respective cross-motions to vacate and compel acceptance of a late answer are denied.

Plaintiff shall file a Note of Issue on or by March 4, 2020 and the Inquest is scheduled for April 28, 2020.

A copy of this order shall be served on all sides within fifteen (15) days of the notice of entry.

This constitutes the decision and order of the court.

Dated: FEB 3 2020



Richard J. Montelione, A.J.S.C.

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