Greenberg Farrow Architecture, Inc. v Hello Living LLC
2021 NY Slip Op 31840(U)
June 2, 2021
Supreme Court, New York County
Docket Number: 150718/2020
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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GREENBERG FARROW ARCHITECTURE, INC.,

Plaintiff,

- v -

HELLO LIVING LLC,

Defendant.

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INDEX NO. 150718/2020

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20-42 were read on this motion to vacate judgment/award.

By order to show cause, defendant moves pursuant to CPLR 317 or 5015(1)(a) for an order vacating a decision and order dated September 25, 2020, granting plaintiff a default judgment entered against it (NYSCEF 15); a money judgment was entered on October 5, 2020 (NYSCEF 18). Plaintiff opposes.

It is undisputed that on February 3, 2020, plaintiff, an architectural firm served the summons and complaint on defendant, a real estate developer, via the New York Secretary of State (NYSCEF 2), and that on February 11, 2020, plaintiff's attorney served defendant with a copy of the pleadings on defendant by first-class mail (NYSCEF 3). Defendant claims through its managing member that in "March 2020" it closed its offices due to the pandemic, and as all operations were conducted remotely, he did not visit the offices and is unaware of whether the Secretary of State mailed a copy of the pleadings to the former offices. He thus denies that defendant personally received notice of the summons and complaint in time to defend the action. (NYSCEF 21).

The managing member also maintains that plaintiff filed its motion for a default judgment on or about March 10, 2020 "when the entire city was under lockdown from the coronavirus pandemic," and that it had not been mailed to it before it had permanently closed its offices due to the pandemic. Thus, defendant did not personally receive notice of either the action or the default judgment until it received a restraining notice from its bank dated October 2, 2020. (*Id*).

According to the managing member, plaintiff advised defendant that to obtain certain advantages for a project it was developing, it could voluntarily enter the Inclusionary Housing Program by including inclusionary housing in the building's design. The deed to the property, however, contains a restrictive covenant mandating that Inclusionary Housing be included in any building constructed thereon, "under a zoning changed [sic] for the Property that had apparently been approved by the New York City Planning Commission." The restrictive covenant was discovered, the managing member relates, by a company that was to provided financing for defendant's purchase of the property, and he asserts that plaintiff's failure to discover the covenant "ultimately resulted in the withdrawal of funding for the purchase of the Property by the financing company and the failure of the defendant to close on the purchase of the Property," and the loss to defendant of millions of dollars. (*Id.*).

By affidavit dated January 19, 2021, plaintiff's Chief Financial Officer (CFO) observes that it was not until March 20, 2020 that nonessential businesses were locked down by the state due to the COVID-19 pandemic, and that therefore, defendant fails to demonstrate a reasonable excuse for its default. He also denies that defendant states a meritorious defense, offering an email dated November 15, 2018, by which defendant proposed to plaintiff a project for "580 Gerard," asking it to review the zoning calculations for feasibility and advised that the property

is "within Inclusionary Housing Area (not Mandatory)" which would mean that defendant "would opt out of" it and erect a smaller building. Thus, the CFO argues, the determination as to whether the inclusionary housing was mandatory was not within the scope of its work. (NYSCEF 36). Notwithstanding defendant's advice, the CFO alleges that plaintiff searched the official New York City Planning website and confirmed that the property does not fall within the mandatory inclusionary housing area, and that when plaintiff learned of the difficulty with defendant's financing, it reconfirmed its conclusion with plaintiff's attorneys who rendered an opinion as to the zoning consonant with its own opinion (NYSCEF 38). (NYSCEF 36).

Here, as it is a matter of record that the pandemic lockdown was not imposed until March 20, 2020, defendant's conclusory denial of receipt of the pleadings and its assertion that it closed its doors on an unspecified day in March 2020 are insufficient to rebut plaintiff's *prima facie* demonstration of proper service. (*See Country–Wide Insurance Company v Power Supply, Inc.*, 179 AD3d 405 [1st Dept 2020] [defendant's conclusory denial of receipt of pleadings from Secretary of State, although address used was defendant's correct business address, insufficient to rebut presumption of service created by Secretary of State's affidavit of service]). Moreover, in light of the written opinion of plaintiff's attorney that the property did not fall within the mandatory inclusionary housing area, which opinion was furnished to the parties well before the commencement of the instant litigation and is based on information not addressed by defendant, defendant's partial reliance on the hearsay opinion of an unidentified finance company as evidence of its defense is insufficient to demonstrate the merits of its defense.

Accordingly, it is hereby

ORDERED, that defendant's motion to vacate the judgment is denied.

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6/2/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE