

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 25

TANYSHA WRIGHT,
-----X

Index No. 24993/2017E

Plaintiff,

Hon. MARY ANN BRIGANTTI
Justice of the Supreme Court

- against -

CAVAN PROPERTIES, INC., CITICORE I LLC., and
CITICORE ASSET MGMT, INC.,

Defendants.
-----X

The following papers numbered 89 to 124 were read on these motions (Seq. No. 5) for VACATE –
DECISION/ORDER/JUDGMENT/AWARD noticed on August 5, 2022 and duly submitted as
Nos. on the Motion Calendar of August 5, 2022

Table with 2 columns: Sequence No., NYSCEF Doc. Nos.
Rows include: Notice of Motion – Exhibits and Affidavits Annexed (89-117), Cross Motion – Exhibits and Affidavits Annexed, Answering Affidavit and Exhibits, Memorandum of Law (119-124), Reply Affidavit

This motion is decided in accordance with the accompanying memorandum decision.

Dated: November 1, 2022

Hon. [Signature]
Mary Ann Brigantti, J.S.C.

- 1. CHECK ONE..... [X] CASE DISPOSED IN ITS ENTIRETY [ ] CASE STILL ACTIVE
2. MOTION IS..... [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE..... [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] SCHEDULE APPEARANCE
[ ] FIDUCIARY APPOINTMENT [ ] REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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TANYSHA WRIGHT,

Plaintiff,

DECISION and ORDER

- against -

Index No. 24993/2017E

CAVAN PROPERTIES, INC., CITICORE I LLC.,  
and CITICORE ASSET MGMT, INC.

Defendants.

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**HON. MARY ANN BRIGANTTI**

Upon the foregoing papers by way of order to show cause, the defendant Cavan Properties, Inc. (“Cavan”) and nonparties Shawn Curry (“Curry”) and Marie McCormack (“McCormack”) (collectively, “Movants”) move for an order (1) vacating the decision and order of this Court dated June 4, 2018, and entered June 11, 2018, granting a default judgment against Cavan; (2) vacating the Decision and Order of this Court dated July 7, 2021 and entered July 8, 2021, granting an inquest against Cavan; (3) vacate the judgment against Cavan entered October 15, 2021; (4) vacating the Decision and Order of this Court dated April 18, 2022, entered on April 28, 2022, of contempt against Cavan, Curry, and McCormack as to their failure to comply with a subpoena duces tecum; (5) permitting Cavan to interpose an answer herein, and (6) such other and further relief as this Court deems just and proper. The plaintiff Tanysha Wright (“Plaintiff”) opposes the motion.

(1) Vacatur of the Default Judgment (orders entered June 11, 2018, July 8, 2021, and October 15, 2021).

Under CPLR 5015(a)(1), a defendant may be entitled to vacatur of a default judgment where it demonstrates a reasonable excuse for its default in appearing and answering the complaint, and a meritorious defense to the action (see *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138 [1986]). In this case, Cavan failed to provide a reasonable excuse for its default in appearing in this action. Cavan’s sole excuse is that service was accomplished through the New York Secretary of State pursuant to Business Corporation Law §306, but Cavan did not receive any mailings because its address on file with the Secretary of State was obsolete. It has been consistently held, however, that the failure to maintain a current address with the Secretary of State cannot constitute a reasonable excuse for a defendant’s default under CPLR 5015(a)(1) (see *Castillo v. 2460 Tiebout Avenue Associates, LLC*, 2022

NY Slip Op. 06783 [1<sup>st</sup> Dept. Oct. 22, 2022], citing *John v. Arin Bainbridge Realty, Corp.*, 147 A.D.3d 454, 455 [1<sup>st</sup> Dept. 2017]).

CPLR 317 “provides an additional avenue for relief from a default judgment, as it states 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.” Thus, relief may be afforded under CPLR 317 where a defendant “(1) was served by a method other than personal delivery, (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry), and (3) demonstrates a potentially meritorious defense to the action” (*Caba v. Rai*, 63 A.D.3d 578, 580 [1<sup>st</sup> Dept. 2009]). Relief under CPLR 317, however, is not available if it can be inferred that the “defendant’s failure to 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; *Lawrence v. Esplanade Gardens, Inc.*, 213 A.D.2d 216, 216 [1<sup>st</sup> Dept. 1995]; *On Assignment v. Medasorb Tech., LLC*, 50 A.D.3d 342 [1<sup>st</sup> Dept. 2008]).

According to the moving papers, Cavan’s service address on file with the Secretary of State was 50 Broad Street, #808 in New York, New York (“50 Broad”) from around 1998 until May 31, 2017, approximately one month before service was made in this case. 50 Broad was the office of Ralph Pastore (“Pastore”), who allowed Cavan to use his office address. Movants allege that on May 31, 2017, Pastore moved his office to 80 Broad Street, #624 in New York, New York (“80 Broad”) which is a “virtual office” that allows for flexible work space and amenities to customers and tenants. The only mail that is received at 80 Broad “must be specifically addressed” to Pastore or his firm. Curry alleges in an affidavit that Cavan was not a customer of the office space at 80 Broad. He is advised that mail cannot be delivered directly to Pastore’s office at 80 Broad – instead it goes to a different floor and if you are not a named customer or tenant, the mail will not be delivered or forwarded. He concludes: “[t]hus [Cavan] was never properly served with the Summons and Complaint or other papers herein nor received same, and Defendant was not aware of this lawsuit.” In a separate affidavit, Pastore states “[t]o my recollection, my office and I did not receive” the summons and complaint or “any papers from Plaintiff’s attorneys” in this action.

In opposition to the motion, Plaintiff notes that Cavan’s alleged failure to receive papers in this matter is suspect given the fact that Cavan appeared in an unrelated personal injury case after having been served through the Secretary of State, who sent the process to 50 Broad. Plaintiff further argues

that Cavan's failure to receive notice of the lawsuit is due to their own failure to keep updated records with the Secretary of State, which gives rise to an inference that Cavan was deliberately attempting to avoid service.

After careful review, this Court finds that Cavan is not entitled to relief under CPLR 317. The circumstances of this case permit the inference that Cavan deliberately avoided any notice of this action (*Lawrence*, 213 A.D.2d at 216; *On Assignment*, 50 A.D.3d 342; *Kaplan v. D'Agostino Supermarkets, Inc.*, 210 A.D.2d 79 [1<sup>st</sup> Dept. 1994]). Movants contend that Cavan moved from 50 Broad to 80 Broad one month before this action was commenced and any mailings not specifically addressed to Pastore at 80 Broad were not forwarded. Movants, however, failed to present any evidence that their original service address on file with the Secretary of State identified Pastore as service agent, and the printout submitted in opposition indicates that Cavan has never appropriately updated its service address and service agent at any point. Moreover, Plaintiff has presented evidence that Cavan was served via the Secretary of State in an unrelated action in 2018 (after this action was commenced), yet Cavan served an answer in that matter. Despite presumably being put on notice of the old service address by virtue of that 2018 action, Cavan still failed to update the address, thus permitting an inference that Cavan deliberately allowed the old address to remain. Furthermore, Cavan's apparent notice of the 2018 action despite service on the old address undermines Cavan's present contention that mailings sent to 50 Broad were not received by Pastore/80 Broad.

In addition, relief is not warranted under CPLR 317 where, in response to a plaintiff's affidavit of service, a defendant only provides a bare denial of receipt of the summons and complaint (*Pina v Jobar U.S.A. LLC*, 104 A.D.3d 544, 545 [1<sup>st</sup> Dept. 2013]; *Matter of de Sanchez*, 57 A.D.3d 452, 454 [1<sup>st</sup> Dept. 2008]). Here, Pastore and Curry only state in conclusory fashion that they did not receive the summons and complaint. Curry does not explain how the premises sale before this action was commenced would have impacted Cavan's notice of this lawsuit. The fact that Curry was in Ireland and unable to leave during the pandemic would not have affected his notice of papers served in 2017. Notably, Curry does not state how or when he first became aware of this action.

In light of the above, the motion to vacate the default judgment and permit Cavan to file a late answer is denied without reaching the issue of whether Cavan has a meritorious defense to the action (*see Jansons Associates Inc. v. 12 E. 72<sup>nd</sup> LLC*, 185 A.D.3d 499, 500 [1<sup>st</sup> Dept. 2020]).

(2) Vacatur of the Decision and Order of this Court dated April 18, 2022, entered on April 28, 2022, of contempt against Cavan, Curry, and McCormack as to their failure to comply with a subpoena duces tecum

To vacate an order entered on default, the movant must show a reasonable excuse for failing to oppose the motion, and a meritorious defense to the motion (CPLR 5015[a][1]; see *Bear Stern Asset-Backed Securities I Trust 2006-IMI v. Cessay*, 180 A.D.3d 504 [1st Dept. 2020]; *Marston v. Cole*, 147 A.D.3d 678 [1st Dept. 2017]). In this case, the moving papers do not substantively address Movant's failure to oppose Plaintiff's prior order to show cause seeking to hold them in contempt. This branch of the motion is therefore denied.


Accordingly, it is hereby

ORDERED, that this order to show cause is denied.

This constitutes the Decision and Order of this Court.

Dated: November 1, 2022

ENTER

  
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Mary Ann Brigantti, J.S.C.