SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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PERFORMLINE, INC.,

Index No. 650217/2021

Plaintiff,

-against-

APOGEE EVENTS INC.,

Defendant.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT APOGEE EVENTS INC.'S ORDER TO SHOW CAUSE TO VACATE THE DEFAULT JUDGMENT

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Defendant Apogee Events Inc. ("Defendant") respectfully submits this Memorandum of Law in Support of Defendant's Order to Show Cause to Vacate the Default Judgment pursuant to CPLR § 317 and § 5015.

I. PRELIMINARY STATEMENT

Plaintiff allegedly served the Summons and Complaint in this action on the Secretary of State. However, Defendant did not receive service of the Summons and Complaint from the Secretary of State. Plaintiff's counsel emailed a default notice to Defendant and when there was no response, moved for a default judgment rather than attempting to provide actual notice of this action to Defendant's counsel with whom he had exchanged pre-litigation correspondence.

Defendant now seeks an Order vacating the judgment and setting aside Defendant's default and accepting Defendant's Answer. As set forth more fully below, Defendant's Order to Show Cause to Vacate the Default should be granted for the following reasons:

1. Pursuant to CPLR § 317, since service of the Complaint was made other than by personal delivery, Defendant did not receive actual notice of the Summons and Complaint until it had defaulted and this application to vacate the default is made within one (1) year of learning of the entry of the Judgment, the Judgment should be reopened.
2. Pursuant to CPLR § 5015, Defendant has a reasonable excuse and a meritorious defense to Plaintiff's claims and Defendant should be provided relief from the Default Judgment.

Finally, courts in New York favor resolving cases on their merits and the Default Judgment should be vacated in the interest of justice so that the case can be litigated on the merits.

II. FACTS AND PROCEDURAL HISTORY

Defendant respectfully refers the Court to the Affidavit of Billy Reilly for a full recitation of the facts and procedural history.

III. ARGUMENT

1. DEFENDANT HAS ESTABLISHED IT IS ENTITLED TO REOPEN THE DEFAULT PURSUANT TO CPLR § 317

Pursuant to CPLR § 317, a "person served with a summons other than by personal delivery…who does not appear may be allowed to defend the action within one year after he obtains knowledge of the entry of 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." Personal service on a corporation means in hand delivery to a corporate representative such as an officer, director or managing agent. CPLR § 311(a)(1). Delivery to the New York Secretary of State is not personal delivery to the corporation. *See Rivera v. Triangle Excavators of New York, LLC*, 173 A.D.3d 1088 (2d Dept. 2019), *Fleetwood Park Corp. v. Jerrick Waterproofing Corp.*, 203 A.D.2d 238, 239, 615 N.Y.S.2d 695, 697 (2d Dept. 1994). In *ULG Logistics Inc. v. B&S Lighting and Furniture, Inc.*, the court found that a default judgment should be vacated when the manager of the corporate defendant averred that he had not been personally served and the first time he learned of the judgment was when his bank account was frozen. *ULG Logistics Inc. v. B&S Lighting and Furniture*, 2020 WL 6386162 at *1 (Sup. Ct. Queens Cty. 2020).

Under CPLR § 317, a defendant that demonstrates it did not receive actual notice does not need to show a reasonable excuse. *Rivera v. Triangle Excavators of New York, LLC, supra.* Here, the Affidavit of Service of the Summons and Complaint states that the Summons and Complaint were served on the Secretary of State. *See* Affidavit of Billy Reilly. Accordingly, service was made by means other than personal delivery. Further, and as explained in detail in

the Affidavit of Billy Reilly, David did not receive service of the Summons Complaint or this action until Plaintiff's counsel sent a notice that it was in default. Additionally, Defendant has a meritorious defense to Plaintiff's Complaint, including without limitation, that the parties modified the Catering Agreement and Defendant is entitled to retain the $40,000 until an event is rebooked and if Plaintiff did not rebook the event then as a cancellation fee. *See* Affidavit of Billy Reilly.

2. DEFENDANT HAS ESTABLISHED THAT IT IS ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT PURSUANT TO CPLR § 5015

Pursuant to CPLR § 5015(a)(1), a party can seek relief from a judgment if the party makes an application within one (1) year after entry of the judgment and can demonstrate there was a reasonable excuse for the default. A determination of what is a reasonable excuse for the default is within the discretion of the Court. *Crespo v. A.D.A. Mgt.,* 292 AD2d 5, 739 NYS2d 49 (1st Dept. 2002). The Default Judgment against should be vacated because Defendant did not receive service of the Summons and Complaint which constitutes a reasonable excuse for the failure to appear and answer in a timely manner. While there is a presumption that items mailed will be properly received, courts have noted the difficulty inherent in proving a negative. *See Garrick-Aug Associates Store Leasing, Inc. v. Shefa Land Corp.,* 199 WL 34782716 (Sup. Ct. N.Y. Co. Aug 17, 1999), *aff'd* 270 A.D.2d 68 (1st Dept. 2000). Lost or misplaced mail has been held to constitute a reasonable excuse for default. *Id.* Here, while Defendant cannot specifically point to why the mailing from the Secretary of State was never received, the reasons set forth in the Affidavit of Billy Reilly constitute a reasonable excuse such that vacatur pursuant to CPLR § 5015(a)(1) is appropriate here.

Further, Defendant has a meritorious defense to this action. As a threshold matter, Defendant denies the allegations in the Complaint. As aforementioned, the parties reached an

agreement that Defendant would keep the $40,000 deposit towards rebooking a future event or as a cancellation fee.

3. THE JUDGMENT SHOULD BE VACATED SO THE CASE CAN BE RESOLVED ON ITS MERITS.

New York has adopted a policy which favors disposing of cases on their merits. *See Flower Girl NYC, LLC v. Eldridge 245 LLC,* 2021 WL 1241198 (2021); *see also, Navarro v. A Trenkman Estate, Inc.*, 279 AD 2d 257, 719 NYS 2d 34 [1st Dept 2000]. Further than the powers specifically granted in the CPLR, the court has the inherent power to set aside an order or judgment in the interests of justice and is not limited by statute. *See Woodson v. Mendon Leasing Corp.,* 100 N.Y.2d 62 (2003). In the instant case, Defendant submits that the Court should utilize its discretion to vacate the judgment so that Defendant can have an opportunity to set forth its defenses and examine Plaintiff regarding its alleged claims and damages.

IV. CONCLUSION

Based upon the foregoing, Defendant respectfully requests that the Court issue an Order granting its Order to Show Cause to Vacate the Default Judgment, setting aside Defendant's Default, accepting Defendant's Answer and granting such other relief as the Court deems just and proper.

Dated: New York, New York
April 27, 2021

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