

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

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EMMIS RADIO, LLC D/B/A HOT97,

Index No.: 034577/2020

Plaintiff,

-against-

DECISION AND ORDER

WILLIAM BENSON GROUP, LLC D/B/A
BILLIONAIRES ROW D/B/A BILLIONAIRES
ROW CHAMPAGNE D/B/A BILLIONAIRES ROW
LLC,

Motion Date: March 31, 2021
Motion Sequence # 1

Defendant.

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The papers filed electronically on NYSCEF as documents numbered 8 through 34 were read on Defendant's motion to vacate the default judgment entered against it in this action.

On October 6, 2020, Plaintiff Emmis Radio, LLC d/b/a HOT97, a conglomerate of radio stations, filed this action against Defendant William Benson Group, LLC d/b/a Billionaires Row, and d/b/a Billionaires Row Champagne, and d/b/a Billionaires Row, LLC alleging causes of action for breach of contract and account stated. Plaintiff alleged that Defendant agreed to sponsor Plaintiff's "Hot 97 Summer Jam" media, social and broadcast event, for the sum of \$70,000. Plaintiff alleged that Defendant paid only the initial \$20,000 deposit, leaving a balance due and owing of \$50,000. Plaintiff attached to the Complaint a copy of the agreement between itself and Billionaires Row Champagne, one of Defendant's DBA companies.

On October 20, 2020, Plaintiff served Defendant with process by serving the Secretary of State. Defendant failed to answer or otherwise respond.

On February 5, 2021, Plaintiff obtained a Clerk's Judgment against Defendant on default in the sum of \$60,898.84.

On February 26, 2021, Defendant moved to vacate the Judgment and for permission to serve an Answer to the Complaint. Defendant contended that it did not receive notice of the Summons and Complaint because it had failed to notify the Secretary of State of its change of address to Miramar, Florida in March, 2020, due to the COVID-19 pandemic. Defendant argued that pursuant to CPLR §317 and *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141–42 [1986], it should be allowed to defend the action. Defendant also moved pursuant to CPLR §5015. Defendant submitted a proposed Answer with its motion papers.

Plaintiff argues that Defendant should not be allowed to have the Judgment set aside because it has not shown that it has a meritorious defense to the action. Plaintiff asserts that both CPLR §§317 and 5015 require that a party moving to vacate a default judgment must make that showing. A party who moves to vacate its default pursuant to CPLR §317 need not show a "reasonable excuse" for its delay. *Eugene Di Lorenzo, Inc.*, *supra* at 141–42 (citing *Simon & Schuster v Howe Plastics & Chems. Co.*, 105 AD2d 604, 605; *Zuppa v Bison Drywall & Insulation Co.*, 93 AD2d 997).

The Court of Appeals noted in *Eugene Di Lorenzo, Inc.* that "corporate defendants served under Business Corporation Law § 306 have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend." 67 NY2d at 142 (citing *Union Indem. Ins. Co. v 1001 50th Ave. Realty Corp.*, 102 AD2d 727; *Meyer v Fisher & Sons Dental Lab.*, 90 AD2d 889). The Court of Appeals explained that "service on a corporation through delivery of process to the Secretary of State is not 'personal delivery' to the corporation or to an agent designated under CPLR 318." *Id.* (citing *Taieb v Hilton Hotels Corp.*, 60 NY2d 725; *Cecelia v Colonial Sand & Stone Co.*, 85 AD2d 56, 57). The Court of Appeals advised courts to "consider, among other factors, the length of time for which the address had not been kept current." *Id.* at 143.

Defendant proffers as a reasonable excuse that the uncertainty as to when business would return to normal made it unclear whether to update its address for service of process with the Secretary of State during the pandemic. Defendant asserts that it need not show a reasonable excuse to obtain relief under CPLR §317. Defendant asserts that it has meritorious defenses, amongst them that there is no privity between itself and Plaintiff, because the contract was not between Defendant William Benson Group, LLC and Plaintiff. Defendant contends in its reply papers that the validity of its privity

defense is demonstrated by Plaintiff's "vigorous and detailed response", which further shows that the merits of that defense and others need to be fleshed out.

"In order to obtain vacatur of a default judgment pursuant to CPLR 317, a defendant must establish that it moved to vacate the default within one year after it obtained knowledge of entry of the judgment, that it did not receive notice of the summons in time to defend, that it did not deliberately attempt to avoid service, and that it has a potentially meritorious defense". *Berardi Stone Setting, Inc. v Stonewall Contracting Corp.*, 170 AD3d 934, 935 [2nd Dept 2019] (citing *Lange v Fox Run Homeowners Assn., Inc.*, 127 AD3d 823).

Defendant has met the requirements of CPLR §317, including stating a potentially meritorious defense to the action. As shown on the contract attached to the Complaint, the entity with which Plaintiff entered into the agreement was Billionaires Row Champagne, not William Benson Group, LLC. Plaintiff may ultimately prevail on its claims against Defendant William Benson Group, LLC, but the defense is litigable. Further, the length of time during which Defendant did not keep its address current and the circumstances favor vacatur of the default judgment.

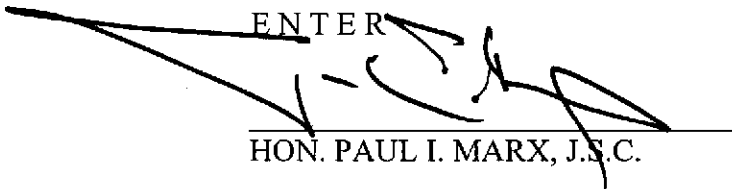
Plaintiff requested that, if the Court determines to grant Defendant's motion, it allow the Judgment to stand as security and require Defendant "to post a cash undertaking with the Clerk of the Court, in the amount of the Judgment plus ten per cent".

Plaintiff's request is denied. Defendant promptly moved to vacate the default judgment, which was entered by the Clerk rather than on motion to the Court, and Defendant demonstrated a potentially meritorious defense.

It is ORDERED that Defendant's motion to vacate the Judgment entered on default is granted. Defendant shall file and serve its Answer to the Complaint within 5 days of this Decision and Order; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 16, 2021, via Teams. The Part Clerk will transmit a Teams invitation with the specific time in advance of the conference.

Dated: May 27, 2021
New City, New York

ENTER

HON. PAUL I. MARX, J.S.C.