

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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EMMIS RADIO, LLC D/B/A HOT 97, Index No.: 034577/2020

Plaintiff,
-against-

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

Defendant.
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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO VACATE**

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STATEMENT OF FACTS

For the purposes of this motion, the facts are straightforward. Plaintiff commenced this action in or around October 6, 2020, and obtained a judgment by default on February 5, 2021, which is only 20 days ago.

The service of process was made on the secretary of state on October 30, 2020, with the affidavit of service filed on November 9, 2020.

Defendant no longer has its address at the new remote address since in or around March 2020 due to Covid – 19.

Defendant has an excuse for the default and meritorious defenses, and any delay here is *di minimis*.

Defendant now moves to vacate the default.

ARGUMENT

CPLR §317 provides in relevant part:

“A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, 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. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal. This section does not apply to an action for divorce, annulment or partition.”

Companies which have failed to keep their current addresses up to date with the Secretary of State have been allowed to have default judgements against them vacated and their time to appear in the actions extended. Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 N.Y.2d 138, 143, 492 N.E.2d 116, 119 (1986)

In addition, under CPLR § 5015(a)(1), a default judgment may be vacated where the moving party demonstrates a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the proceeding. Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co., 67 NY2d 138, 501 N.Y.S.2d 8 (1986); Goldman v. Cotter, 10 AD3d 289, 781 N.Y.S.2d 28 (1st Dept 2004).

Resolution of disputes on the merits rather than by default is favored, and to that end a liberal policy toward opening defaults exists. Picinic v. Seatrain Lines, 117 A.D.2d 504, 508, 497 N.Y.S.2d 924 (1st Dept. 1986); Bishop v.

Galasso, 67 A.D.2d 753, 412 N.Y.S.2d 214 (3rd Dept. 1979). Service on a corporation by delivering process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR 318. Di Lorenzo, Inc. v. Dutton Lbr. Co., 67 N.Y.2d 138, 142, 501 N.Y.S.2d 8, 492 N.E.2d 116 (1986). The lack of a reasonable excuse for not maintaining a correct address with the Secretary of State does not preclude CPLR 317 relief. Marquette Co. v. Norcem, Inc., 114 A.D.2d 738, 739, 494 N.Y.S.2d 511 (3rd Dept. 1985).

As stated above, the service of process was made on the secretary of state on October 30, 2020, with the affidavit of service filed on November 9, 2020. A copy of the summons and complaint and affidavit of service are annexed hereto as Exhibits A & B respectively.

Defendant no longer has its address at the address listed on the secretary of state since in or around March 2020 due to Covid – 19. The correct address is 2700 S University Drive, Ste #202, Miramar Florida. See Affd. ¶ 4. Defendant has instructed its attorney to file a certificate of change forthwith with the NY Department of State. See Affd. ¶ 5.

Given the uncertainty that continues with Covid-19 as to when business would return to normal, it was unclear whether the secretary of state should be updated, and Defendant submits that this excuse is valid.

Defendant also has meritorious defenses, including but not limited to the fact that agreement was not with Defendant William Benson Group, LLC, but with “Billionaires Row Champagne”, and as such, no privity, nor any basis for an

account stated. A copy of the proposed answer is attached hereto and made a part hereof as Exhibit C.

Defendant has an excuse for the default and meritorious defenses, and any delay here is *di minimis*.

Defendant respectfully submits that the default should be vacated on

CONCLUSION

Defendant's motion to vacate should be granted in its entirety, together with other such further relief the court may deem just and proper.

No prior application has been made for the relief requested herein.

Dated: New York, New York
February 26, 2021

Respectfully submitted,

PEYROT & ASSOCIATES, PC

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