

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

GLEN PHILLIPPI LUMBER CO., INC.

Plaintiff,

**MEMORANDUM
DECISION**

vs.

Index No. 227/2009

RONALD E. HAWK and
HAWK DEVELOPMENT, INC.,

Defendants.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **PAUL ALOI, ESQ.**
Attorney for Plaintiff

GERALD P. GORMAN, ESQ.
Attorney for Defendants

CURRAN, J.

Defendants, Ronald E. Hawk (“Hawk”) and Hawk Development Inc. (“HDI”) move under CPLR 5015 to vacate a default judgment taken against them. No opposition papers were received prior to the return date on the motion. Plaintiff’s counsel appeared on the return date, claiming to have filed his papers in the Erie County Clerk’s Office. In its discretion, the Court accepted the papers, which had not been date stamped by the Clerk’s office, and reserved decision.¹ Now, upon due consideration, the Court grants the motion to vacate the judgment,

¹ The clerk’s office shows the papers as having been filed after the return date (Attachment A).

dismisses the complaint as against HDI, and orders Hawk to serve his answer in the form attached to his papers as exhibit D, within twenty (20) days of service of the order on this Memorandum Decision with notice of entry.

In support of the motion, defendants submit affidavits from Hawk and from John Duggan, Treasurer of HDI, along with an affidavit of their attorney. Hawk is a shareholder and officer of HDI, but claims to have other business interests separate from those of HDI. Both defendants claim that the first knowledge they had of the underlying case arose from the service of restraining notices by plaintiff upon tenants at a strip mall owned by HDI.

According to affidavits of service filed in the Erie County Clerk's office, service was allegedly made upon HDI under CPLR 308 (4), by so-called "nail and mail" service at Hawk's residence (Defendants' Papers Exhibit B). Hawk was allegedly served the same way (*id.* Exhibit C). Hawk denies that he received any actual notice of the summons and complaint prior to judgment. He asserts that he is divorced, that his home is in a rural area and that his home is subject to severe weather conditions, under which the "affixed" pleadings may have "blown off" (Hawk Affid. ¶ 9). In addition, Hawk denies receiving copies of the pleadings in the mail.

In opposition, Plaintiff's counsel concedes that service may have been "questionable", but asserts, without further support, that defendants received actual notice of the action.

According to the judgment attached to Mr. Aloï's affidavit, application was made to the clerk on April 22, 2009, for a default judgment in the amount of \$70,378.28. In an affidavit attached to the judgment, Glen Phillippi asserts that the notice of default required to be

mailed under CPLR 3215 was mailed on January 22, 2009. However, there is no other proof of compliance with CPLR 3215 (g)(3). There also is no proof in the record that Plaintiff served a copy of the judgment with notice of entry upon defendants, to set the time running within which a party must move under CPLR 5015 (a) (1).

LAW

Under CPLR 5015 (a) (1), the court may relieve a party from a judgment upon the ground of excusable default. “A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action” (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *see Petrosino v Petrosino*, 24 AD3d 1210, 1211-1212 [4th Dept 2005]). However, under CPLR 5015 (a) (4), if service was not duly effected, jurisdiction is lacking and all further proceedings are a nullity (*Mayers v Cadman Towers Inc.*, 39 AD2d 844, 845 [2nd Dept 1982]).

A corporation cannot be served under CPLR 308, and therefore, the judgment obtained against HDI was without jurisdiction. HDI is not required to establish a reasonable excuse or a meritorious defense under these circumstances (*see Steele v Hampstead Pub Taxi*, 305 AD2d 401, 402 [2nd Dept 2003]). The judgment as against HDI is therefore vacated, and the proceeding dismissed as against HDI.

With respect to Hawk, the affidavit of service indicates that “nail and mail” service upon a natural person was attempted (*see CPLR 308 [4]*). Hawk asserts that the default was excusable because he received no actual notice of the action until after judgment was taken.

On the merits, Defendants submit a copy of an invoice from plaintiff to HDI dated one month after judgment was taken, showing only \$11,999.02 past due and owing. Mr. Hawk alleges that he has no personal liability for that invoice. In addition, Hawk asserts that, although he may personally owe a debt to plaintiff, it is in an amount much smaller than the amount of the judgment to plaintiff. He claims that he and plaintiff have a barter system, in which he works for plaintiff in order to pay off his bills. Hawk attaches to his papers a copy of a proposed answer. In response, plaintiff has failed to submit any evidence from any one with personal knowledge of the merits of the action.

Hawk has established he may have a meritorious defense (*see generally Frontier Linen Supply Inc. v Buffalo Motel Corp.*, 109 AD2d 1061 [4th Dept 1985], *appeal dismissed* 65 NY2d 784 [1985]; *Rawson v Austin*, 49 AD2d 803 [4th Dept 1975]). “In view of the unintentional nature of the default, the reasonable nature of the excuse, ... and the judicial preference for resolving cases on their merits,” the Court grants Hawk’s motion to vacate the default judgment against him (*Petrosino v Petrosino*, 24 AD3d at 1212 [internal quotation marks omitted]).

Defendants to draft order and settle with Plaintiff’s counsel.

DATED: December 21, 2009

HON. JOHN M. CURRAN, J.S.C.