CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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HUDSON RELATED RETAIL LLC,

Petitioner,

-against-

LIBERTY OF ROOSEVELT ISLAND CORP.,

Respondent,

JOHN DOE,

Respondent/Undertenant

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DECISION AND ORDER

Index No. L&T 50720/13

Papers Considered
(1) OSC and Affs and
(2) Opp Aff

Attorney for Petitioner: Higgins & Trippett LLP (Thomas P. Higgins, of counsel)
Attorney for Respondent: Law Office of Jay Stuart Dankberg (Jay Stuart Dankberg, of counsel)

JENNIFER G. SCHECTER, J.

Petitioner Hudson Related Retail LLC (Hudson) is the landlord of "all rooms and every portion of the commercial ground floor storefront at street level" located at 544 Main Street Roosevelt Island in New York (Premises) (*see* Kyung Sook Lee Affidavit in Support [Lee Aff.], Ex E, Verified Petition at ¶6). It commenced this commercial holdover proceeding against Liberty of Roosevelt Island, Corp. (Liberty), seeking possession of the Premises and a monetary judgment. On February 19, 2014, Hudson's motion for summary judgment was granted without opposition and on default (Lee Aff., Ex. C). The court concluded that Hudson proved entitlement to possession as well as a money judgment and that all nine affirmative defenses were "meritless" (*id*.)

Respondent moves to vacate its default. The motion was held in abeyance pending a *traverse* hearing. After a two-day hearing, for the reasons stated below, *traverse* is overruled. The motion to vacate is denied as the court finds that it has personal jurisdiction over respondent and there is no reasonable excuse for the default here.

Traverse Hearing

After a *traverse* hearing conducted on May 29 and May 30, 2014, the court finds that Hudson met its burden of proving that respondent was properly served. At the hearing, Jesse Goldman, the process server who served the notice of termination as well as the notice of petition and petition (collectively the Papers) testified at length. Though understandably Mr. Goldman did not remember many particular details about serving respondent--it had been

almost a year and a half since the notice of petition and petition were served at 544 Main Street[1]--the court finds based on his testimony and his records that he properly served Liberty by personally delivering to Kyung Sook Lee, Liberty's president (1) the termination notice on October 24, 2012 and (2) the notice of petition and petition on January 15, 2013.[2]

In his log books, Mr. Goldman described Ms. Lee very accurately. In his October 2012 entry, he wrote that she was an Asian female with black hair, who was approximately 60, stood 5"1, weighed approximately 115 pounds and wore glasses (Petitioner's Hearing Ex 5). His description of her the following January is almost identical and, on that occasion, he indicated that her hair was "black/gray," she was 5"3 and 120 pounds (Petitioner's Hearing Ex 3). Though there are slight differences in the descriptions, they are immaterial and, in fact, only weigh favorably in an assessment of credibility because they confirm that Mr. Goldman entered his present impressions in his log books after making each delivery. The court finds that though Mr. Goldman's testimony was not in all respects perfectly consistent with the information contained in his affidavits, he properly personally delivered the Papers to Ms. Lee. The court also credits Mr. Goldman's testimony based on his recollection and description of items sold at the Premises and the court believes that Mr. Goldman communicated with Ms. Lee's husband and that her husband was present in the store when Mr. Goldman served the notice of termination. In sum, Mr. Goldman's records were very well maintained and Mr. Goldman was very believable.

In contrast, the court finds that Ms. Lee was not credible and that she lied under oath both at the hearing and in her affidavit in support of this motion. Ms. Lee denied ever receiving copies of the Papers by certified mail. Significantly, at the hearing, she examined the return receipt forms (Petitioner's Hearing Exs 6 and 7) and, while under oath, denied that they contained her signatures.[3] The court has compared those signatures to the signatures on her affidavit (Petitioner's Hearing Ex 8) and her verification of the answer. The signatures are identical (*see* CPLR 4536) and the court finds that Ms. Lee was not truthful.

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[1] Respondent never moved to dismiss and lack of jurisdiction was not raised as a defense to payment of use and occupancy (*see* RPAPL 745[2] (a] [iv]).

[2] Petitioner proved that service was proper by establishing that the Papers were personally delivered to Liberty's president. Though unnecessary, petitioner also proved that the Papers were properly mailed to respondent both by certified mail and regular-first-class mail within one day of their delivery.

[3] At the *traverse* hearing, moreover, when respondent's attorney initially showed Ms. Lee a USPS return receipt that was ultimately admitted into evidence, the court observed him direct Ms. Lee on how to react. The court's contemporaneous observations are reflected on the record.

Additionally, at the hearing, Ms. Lee testified that she received the notice of petition by mail; yet, in her affidavit she twice swore that she had not received any of the legal documents (*see* Lee Aff at ¶ 17 ["at **no** time did I receive any legal documents (I only found out about this proceeding by a postcard from the Court)"]; "Jurisdiction" at ¶ 21 ["At **no** time did I ever receive any notice, or legal documents advising me of the Court proceeding, rather only received a post card"]). The court had the opportunity to observe Ms. Lee as she testified. When the interpreter translated the statements contained in her affidavit, in which she denied receipt of legal papers, Ms. Lee immediately asked who wrote those statements. It is clear to the court that the statements (which served as a basis for the court conducting a traverse hearing) were inaccurate and untrue. Based on Ms. Lee's lack of credibility, the court does not believe her testimony that she never saw Mr. Goldman prior to the hearing. Petitioner proved that Ms. Lee received papers from him twice before--in October 2012 and again in January 2013. *Traverse* is therefore overruled.

Motion to Vacate

Almost five months after the summary-judgment motion was made, almost two months after the default and after restraining notices were served, respondent moves to vacate its default in this summary proceeding. Because the court finds that service was proper and that there is personal jurisdiction over respondent, in order for respondent to prevail on its motion to vacate it must establish both a reasonable excuse for the default and that it has a meritorious defense (*Time Warner City Cable v Tri State Auto, Inc*., 5 AD3d 153 [1st Dept. 2004), *lv dismissed* 3 NY3d 656 [2004]).

Respondent did not demonstrate a reasonable excuse for its default. Respondent's attorney affirms in a conclusory manner that he was out of work for several weeks "and did not know about any next scheduled date until after the default was taken" (Dankberg Affirmation [Dankberg Aff] at ¶ 6). Respondent additionally submits an affidavit from its attorney's employee, Evelyn Hammer, which states:

> "On November 29, 2013 a motion was received by this office for a summary judgment and related relief, however the return date was scheduled for December 3, 2013 at 9:30 AM (this motion was 'short served' on it's face and would have needed to be adjourned.
>
> "Due to a calendaring error on my part I did not have this case scheduled in my calendar.
>
> "I inadvertently did not enter in the next Court date on my calendar, which I am very diligent about."
> (Affidavit of Evelyn Hammer at the first ¶¶ 10-12).

Respondent offers these excuses in a vacuum without providing material information about

the scheduling of the summary-judgment motion. Particularly glaring is respondent's omission of any discussion of the parties' January 16, 2014 stipulation.[4]

On January 16, 2014, the parties' attorneys executed a stipulation related to petitioner's motion (Stipulation) (Affirmation in Opposition [Opp] Ex D). The Stipulation provided that respondent's opposition papers were to be received by petitioner's attorneys "no later than January 23, 2014 by 4:00 PM" and that the motion was adjourned to February 19, 2014, Part 52 at 9:30 a.m." (Opp, Ex D). Respondent's counsel crossed out language in the Stipulation, initialed the change and signed the Stipulation. Ms. Hammer sent petitioner's attorney a note along with the executed Stipulation setting forth "I spoke with Jay; here is the signed stip with his change per his request" (*id*.).

Another glaring omission is respondent's counsel's lack of an explanation for failure to serve opposition papers by January 23rd as promised.[5] That, in itself, is a default for which no reasonable excuse was offered much less established.

After opposition papers were not timely received, petitioner's attorney contacted respondent's attorney's office (Opp. at ¶ 13). Subsequently, on February 7, 2014, petitioner's attorney sent a fax directed to Ms. Hammer. He also sent a copy of the fax to the office by mail (Opp. at 14). Petitioner's attorney set forth:

> "Three times you have promised to serve me with opposition papers to petitioner's pending motion for summary judgment, and three times you have not done so.
> . . .

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[4] Neither Mr. Dankberg (in his affirmation) nor Ms. Hammer (in her affidavit) addresses the January stipulation. Ms. Lee's affidavit simply states that she was advised that the "case/motion was adjourned on consent to February 19" (Lee Aff at ¶8). Additionally, due to the scant information provided, the court cannot even tell with certainty which date was not calendared. Ms. Hammer's statements preceding discussion of the calendaring mistake refer to the initial December 2013 return date. The court nonetheless assumes for purposes of deciding this motion that it was the February 2014 default date that was not calendared despite the lack of clarity.

[5] Ms. Lee's hearsay statements--my "attorney advises me that he was scheduled to leave the country on January 24 (one week after he was told he could return to work") and "I am advised he returned to work on modified duty as he was still weak" (Lee Aff n 2)--are not supported by any probative proof. In fact, she submits a "schedule-change" letter that apparently indicates that her attorney left on January 26, 2014 (Lee Aff. Ex B). Nor is there any explanation as to why Mr. Dankberg, while allegedly on "modified duty," was unable to complete the opposition papers or, if he needed an adjournment due to illness, ask for one as he had before (*see* Opp. Ex D, Stipulation at 2).

> "And in our telephone discussion on 1-31-14 [after the opposition papers were due], you said you were faxing the papers to Mr. Dankberg (who I was told is on vacation) for his signature, and I would have the papers on Monday, 2-3-14.
>
> "It is now Friday 2-7-14, and I do not have papers from you, nor have you communicated with me in any fashion to explain why this is so" (Opp. Ex E).

Almost two weeks later, on February 19, 2014, petitioner's motion was granted without opposition (Lee Aff. Ex C).

The day after the default, on February 20, 2014, petitioner's attorney received a fax, which, based on the course of communication, was likely sent by Ms. Hammer. The fax from "Jay Stuart Dankberg, Esq" states:

> "I would first like to apologize for not appearing yesterday.
>
> "In response to your fax (and I apologize for not responding sooner, our fax line has not been working due to the storm, and just received your fax recently),[6] as you were aware Mr. Dankberg was sick prior to his vacation, and thereafter he was out of the country. At that time, I tried to fax him a copy of your motion and the opposition but due to the fax machine being down in Aruba he was not able to receive faxes there.
>
> "Please advise if we can agree to vacate this default on consent.
>
> "Again I apologize for neither I nor Jay appearing in Court today" (Opp. Ex G).

Significantly, there is no probative proof--nor even a direct first-hand allegation--that Mr. Dankberg was too ill to prepare opposition papers prior to his leaving the country. Nor is there any statement by Mr. Dankberg that he was unaware of the Stipulation and its terms. Nor are there any sworn or affirmed statements or proof of problems with fax machines (or, for that matter, mail) in New York and Aruba that would excuse the failure to oppose the motion or seek an adjournment prior to the default. Nor is there a reasonable excuse for the failure to move to vacate the default for over a month in this proceeding involving adjudication of property rights. In sum, though respondent offered excuse after excuse for default after default, none is reasonable or acceptable. The missed dates for opposition and court <u>despite having stipulated to the dates</u>, alleged missed communications by fax and mail for unknown periods of time (though the fax-machines-problems are not actually set forth in any sworn or affirmed statements by respondent's counsel or Ms. Hammer) and waiting over a month to vacate a default that respondent knew about the very day after it happened will not

[6] There is no indication how "recently" the fax was received and petitioner's counsel's communication was also sent by mail.

be excused under these circumstances (*see Admiral Ins. Co. v. Marriot Intl, Inc*, 79 AD3d 572, 572 (1st Dept. 2010), *1v denied* 17 NY3d 708 [2011]; *contrast Toos v. Leggiadro Intl, Inc*, 114 AD3d 559 (1st Dept. 2014) ("undisputed assertion of . . . counsel that he did not receive notice of the scheduling of oral argument provided a reasonable excuse for the default in appearing in oral argument of the fully briefed motion" (emphasis added)])."[7] Based on the contents of respondent's submissions, the material omissions and serious credibility concerns, the Court finds that there was no reasonable excuse for the default.

Accordingly, it is ORDERED that *traverse* is overruled and respondent's motion to vacate its default is denied in its entirety. Execution of the warrant is stayed 10 days to allow respondent to vacate.

This constitutes the Decision and Order of the Court.

Dated: June 19, 2014

JENNIFER G. SCHECTER

[7] Because the court finds that there was no reasonable excuse for the default, the existence of a meritorious defense is academic (*see Time Warner City Cable v. Tri State Auto, Inc.*, 5 AD3d 153 [1st Dept. 2004], *lv dismissed* 3 NY3d 656 [2004]). Many of the defenses asserted by respondent are patently meritless. By way of examples, lack of personal jurisdiction has been disproven, use and occupancy has been accepted by petitioner *without prejudice* (*see e.g.* Opp. Ex. A) and an inquest was not held because a motion for summary judgment was decided based on the proof submitted.