

Cox v NAP Constr. Co., Inc.

2011 NY Slip Op 32459(U)

September 9, 2011

Sup Ct, NY County

Docket Number: 111790/2003

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Cox, Anthony, et al

- v -
Nap Construction Company, Inc., et al

INDEX NO. 111790/03
MOTION DATE 07/28/11
MOTION SEQ. NO. (12)
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
SEP 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

SEP 13 2011

NEW YORK COUNTY CLERK'S OFFICE
JUSTICE SHIRLEY WERNER KORNREICH

Dated: 9/19/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ANTHONY COX, ROGER FRANCO, JON LINARES,
and SAMUEL MITCHELL, individually and on behalf
of all other persons similarly situated who were
employed by NAP CONSTRUCTION COMPANY, INC.
with respect to certain Public Work Projects awarded
by the CITY OF NEW YORK and/or THE NEW YORK
CITY HOUSING AUTHORITY,

Plaintiffs,

-against-

NAP CONSTRUCTION COMPANY, INC., ST. PAUL
MERCURY INSURANCE COMPANY, GREENWICH
INSURANCE COMPANY and ANTHONY PANAGIO,

Defendants.

-----X
GREENWICH INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

NAP CONSTRUCTION COMPANY, INC., ANTHONY
PANAGIO and SHERYL PANAGIO,

Third-Party Defendants.

-----X
ST. PAUL MERCURY INSURANCE COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

NAP CONSTRUCTION COMPANY, INC., ANTHONY
PANAGIO and SHERYL PANAGIO,

Second Third-Party Defendants.
-----X

Index No.: 111790/2003

DECISION and ORDER

FILED

SEP 13 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. KORNREICH, SHIRLEY WERNER, J.:

Upon the foregoing papers, defendant and second third-party plaintiff St. Paul Mercury Insurance Company, Inc.'s motion to reargue is granted, on default.

The facts of this case are laid out in this court's decision and order dated November 30, 2010 and will not be repeated here except as necessary for the purposes of this decision. In that order, the court found that St. Paul had submitted sufficient evidence to establish a prima facie claim for indemnification against defendants and second third-party defendants Nap Construction Company, Inc. (Nap), Anthony Panagio and Sheryl Panagio.¹ It further found that Nap had answered St. Paul's second third-party complaint, but that after Nap's counsel had been relieved by the court, it had failed to retain new counsel and make any subsequent appearances. Nevertheless, the court denied St. Paul's motion for a default judgment against Nap due to its failure to submit proof of original service in accordance with CPLR § 3215(f). While the denial was without prejudice to renew upon submission of proof of service, the court stated that "the court will dismiss St. Paul's second third-party complaint, with prejudice, unless St. Paul renews and re-files its motion for default within thirty days of entry of this order."

On December 23, 2010, St. Paul again moved for a default judgment, this time submitting what it purported to be proof of original service. In support of this motion, it submitted the affidavit of Jeffrey Wittenberg, president of Supreme Judicial Services, Inc. (Supreme), attesting

¹ The Panagios filed a petition for individual bankruptcy under Chapter 13 of the Bankruptcy Code on October 6, 2010. This action was therefore stayed as to them as of that date and the stay remains in place. For this reason, the decision and order dated November 30, 2010 made no rulings as to the Panagios.

to the fact that, according to his company's records, Nap was served on January 8, 2004, at 2:17 p.m. at 64-14 69th Place, Queens, New York 11379. He attested that his records reflected that on that date, an employee of Supreme named Israel Evans effected service "on Nap by personally delivering a copy of the Summons and Complaint to Anthony Panagio, who identified himself as an authorized party and managing agent of Nap." However, St. Paul did not submit either the original affidavit of service made by Mr. Evans or a subsequent affidavit by Mr. Evans attesting to the fact of service. As a result, by a decision and order dated March 21, 2011, this court dismissed St. Paul's second third-party complaint, against both Nap as well the Panagios, with prejudice.

Accordingly, St. Paul now moves, pursuant to CPLR 2221(d) for leave to reargue, and upon reargument, seeks an order "(1) reinstating the action against Anthony Panagio and Sheryl Panagio, subject to the stay imposed by the United States Bankruptcy Code; (2) reinstating the action against Nap Construction Company, Inc. and setting the matter down for trial, together with any additional relief the Court deems just and proper." Notice of Motion, p. 2. Neither Nap nor the Panagios have offered any opposition to this motion.

CPLR 2221(d) states that "A motion for leave to reargue: (1) shall be identified specifically as such; [and] (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion..."

CPLR 320(a) states that: a "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." CPLR 320(b) states that "an appearance of the defendant is equivalent to personal service of the

summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211.” *See also, Peterson v JJ Real Estate, Inc.*, 82 AD3d 859 (2nd Dept 2011) (defendant’s failure to raise the affirmative defense of lack of personal jurisdiction in its answer or to move on that ground within 60 days of serving its answer constitutes a waiver of the defense). Nap and the Panagios answered St. Paul’s second third-party complaint and failed to raise the defense of lack of personal jurisdiction—due to improper service or otherwise. *Fiorello Affirm. Ex. 3*. Having thus waived the defense, it was unnecessary for the court to require St. Paul to submit proof of original service on them. Moreover, as the action was stayed as to the Panagios pursuant to the United States Bankruptcy Code, the action against them should not have been dismissed. Accordingly, it is hereby

ORDERED that defendant and second third-party plaintiff St. Paul Mercury Insurance Company, Inc.’s motion to reargue is granted, on default; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated March 21, 2011; and it is further

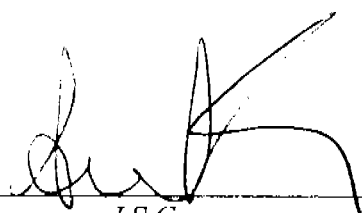
ORDERED that the action as to Anthony Panagio and Sheryl Panagio is severed and continued, subject to the stay imposed pursuant to the Bankruptcy Code; and it is further

ORDERED that plaintiff’s motion for a default judgment against defendant Nap Construction Company, Inc. is granted, on default; and it is further

ORDERED that judgment is to be entered in defendant and second third-party plaintiff St. Paul Mercury Insurance Company, Inc.’s favor and against second third-party defendant Nap Construction Company, Inc., in the principal amount of \$1,669,159.37, with interest at the

statutory rate from the date of this order until entry of judgment, as calculated by the Clerk,
together with costs and disbursements as taxed by the Clerk.

Dated: 9/9/11

Enter: 
J.S.C.