SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MD, MG, MI)

MARIA OLYNEC and ROMAN OLYNEC,

Plaintiffs,

-against-

TERRENCE STANWICK, COUNTY OF NASSAU and INCORPORATED VILLAGE OF FLORAL PARK,

Defendants.

Motion Sequence #1, #2, #3
Submitted October 26, 2011

INDEX NO: 20276/10

The following papers were read on this motion:

Notice of Motion and Affs.....1-4
Notice of Cross-motion and Affs.....5-7
Second Notice of Cross Motion and Affs.....8-11
Affs in Opposition.....12-17
Affs in Reply.....18-21

Upon the foregoing, it is ordered that this motion by plaintiffs, Maria Olynec and Roman Olynec for an order pursuant to CPLR 3215(b)(d) (incorrectly designated CPLR 3214) directing a default judgment against defendant, Terrence Stanwick and for an Order of Reference and/or Inquest to assess damages to be awarded to plaintiffs, is denied.

Cross motion by defendant, Terrence Stanwick, for an order pursuant to CPLR 317, 3012(d), 2004, and 2005, vacating the default of said defendant and compelling plaintiffs

to accept his appearance and answer to the complaint, is granted.

Motion by defendant, County of Nassau ("Nassau County") for an order pursuant to CPLR 3212 granting Summary Judgment in its favor dismissing the plaintiffs' complaint as against it, is denied with leave to renew upon the completion of discovery.

This is an action to recover money damages for personal injuries allegedly sustained as the result of defendants' negligence arising from an occurrence in which the plaintiff, Maria Olynec, claims that the she fell due to a "grossly uneven sidewalk" adjacent to defendant Stanwick's residence, which is situated within the defendant municipalities, the Village of Floral Park and Nassau County. Plaintiff's husband, Roman Olynec has a derivative cause of action claiming a loss of consortium and his wife's services as a result of her injuries.

Plaintiff sustained injuries, which included a fractured wrist, when she fell on the sidewalk abutting the premises located at 208 Carnation Ave., Floral Park, NY. The real property was and is owned by defendant, Stanwick. The plaintiffs served the Summons upon Stanwick by alternate service pursuant to CPLR 308 (4), where the Summons was affixed to the door of the residence and mailed to the address.

According to plaintiffs, service was attempted upon Stanwick at his residence on: Wednesday, January 26, 2011 at 7:32 p.m.; Friday, January 28, 2011 at 7:46 p.m.; February 11, 2011 at 4:18 p.m.; Saturday, February 12, 2011 at 7:44 a.m., and Saturday, February 12 at 3:59 p.m. When plaintiffs were unsuccessful in locating a person of suitable age and discretion at the premises, they affixed a copy of the Summons with Notice on the door on February 14, 2011 and mailed a copy to the address of the premises on that same date. Defendant had not appeared or answered the Summons for a period

of about 60 days afer the date of alternate service. The complaint was served upon the Stanwick by mail on February 11, 2011.

It is unclear from the record as to when Stanwick actually received notice of the underlying action, as he did admit to receiving correspondence from the municipal defendants. Stanwick filed his answer upon the plaintiffs on or about May 11, 2011; however, the plaintiffs rejected the answer and filed the instant motion.

Plaintiffs argue that service was proper upon Stanwick and his mere denial of receiving the Summons and Complaint, is insufficient to vacate his default. Moreover, there is no reasonable excuse for his failure to appear. As to Nassau County, its motion is premature as discovery has yet to be conducted.

Stanwick contends that he never received the Summons or Complaint. However, he has set forth a meritorious defense and his default is excusable. Additionally, public policy favors that cases should be decided on the merits. Nassau County argues that the sidewalk where the plaintiff sustained her injuries, was and is situated within the Village of Floral Park. As such, the submitted statutory evidence provides that the defendant Village is responsible for maintaining the subject sidewalk. Further, there is no evidence that the County received prior written notice of any defect in the sidewalk. Therefore, based on both arguments, liability cannot attach.

CPLR 317 provides in relevant part: "... a person served with a summons other than by personal delivery to him...who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment..." When process is served by some method other than personal delivery, the possibility exists that the defendant will not actually receive it. Even with a mailing plus delivery pursuant to CPLR

308(2) or affixation to the defendant's front door CPLR 308(4), circumstances may arise in which the process does not reach the defendant. A default judgment is the inevitable result in such cases (see Practice Commentaries, CPLR 317, 2010 Main Volume by Vincent C. Alexander).

CPLR 317 addresses the issue by providing the defendant an opportunity to open the default by showing that he failed to receive actual notice of the action in time to defend it and that he has a meritorious defense. First, the defendant must show that service was made in a manner other than personal delivery. Here, by the plaintiffs' own admission, service was effected by nail and mail as they made several unsuccessful attempts to personally serve Stanwick.

The defendant must also show that he did not receive actual notice of the process in time to defend the action. Stanwick, in the case at bar, contends that he did not receive the Summons or Complaint in time to make a timely appearance. It is noted that Courts have held, particularly in actions involving corporate defendants, that a mere denial of receipt is insufficient to rebut the presumption of a proper mailing of a summons and/or complaint (*Udell v Alcamo Supply & Contracting Corp.*, 275 AD2d 453). However, the Court of Appeals in *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, held that relief pursuant to CPLR 317 is generally discretionary (see *Cruz v Narisi,* 32 AD3d 981).

In addition, the defendant must set forth a meritorious defense. This is accomplished with an "affidavit of merit" from an individual with personal knowledge of the relevant facts. The affidavit must contain factual detail, not mere conclusory or vague assertions (*Brownfield v Ferris*, 49 AD3d 790). Finally, the defendant has a one-year time

limit for the making of a motion under CPLR 317, running from the receipt of knowledge of entry of the default judgment with an outside time limit of five years from such entry.

In the case at bar, the defendant has met the foregoing criteria by way of his supporting affidavit. Further, as already stated herein, Stanwick appeared in the underlying action well within the one year time period.

Here, under the circumstances of this case and particularly in view of the meritorious nature of this action as evinced by Stanwick's evidence, the absence of an intent to abandon the action, the lack of substantial prejudice to the plaintiffs, and the public policy in favor of resolving cases on the merits, this Court determines that it would not be improvident to deny plaintiffs' motion for a default judgment and grant Stanwick's cross motion permitting him to appear and defend the action (*Heffney v Brookdale Hosp. Ctr.*, 102 AD2d 842). Moreover, Stanwick served his answer within a relatively short period of time after the mailing of the summons and/or complaint by the plaintiffs and a default judgment has not been entered against him (*Tugendhaft v Country Estates Assocs.*, 111 AD2d 846; see also *Paradiso & Assoc. v Tamarin*, 210 AD2d 386).

As to Nassau County's cross motion for summary judgment, CPLR 3212 (a) provides in relevant part that; "... any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made..." While Nassau County's motion can be made prior to the pre-trial discovery process, the statute further provides in CPLR 3212 (f) that "...[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may

order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just".

In addition to the foregoing, and in light of the arguments set forth by Nassau County, this Court has determined that its motion is being raised prematurely. As such, a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*Olmedo–Garcia v Dobson,* 31 AD3d 727; *Venables v Sagona,* 46 AD3d 672).

Accordingly, the plaintiffs' motion is denied, defendant Stanwick's cross motion is granted, defendant Nassau County's motion is denied with leave to renew upon the conclusion of all discovery. The plaintiffs are ordered to accept Stanwick's answer and the matter shall be set down for conference to determine discovery schedules within 30 days of the issuance of this decision.

Dated: DEC 12 2011

UTE WOLFF LALLY, J.S.C.

ENTERED
DEC 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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