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

PRESENT: LOUIS B. YORK J Justice

PART 2

Index Number : 100016/2010
WOLF, ELEANOR
VS.
METROPOLITAN PROPERTY
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

MOTION IS [illegible]
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/16/12

LOUIS B. YORK J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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ELEANOR WOLF,

Plaintiff,

Index No. 100016/10

-against-

METROPOLITAN PROPERTY AND
CASUALTY INSURANCE COMPANY,

Defendants.

---x

LOUIS B. YORK, J.:

According to the Complaint in this action, in January 2008 plaintiff Eleanor Wolf had an insurance policy with defendant Metropolitan Property and Casualty Insurance Company which required it to pay "basic coverage for dwelling loss." Amended Verified Complt ¶ 5. The Complaint further alleges that the limit to the coverage was "about $448,400.00." Id. ¶ 7. Between January 8 and 10, 2008, a hot water pipe burst in her home, causing structural and other damage throughout her home. Although an adjuster from defendant inspected the premises on January 14, he informed plaintiff's then-husband that due to the extent of the damage a different adjuster had to visit the property and perform the appraisal.

The large-claims adjuster scheduled a visit to the property on January 21 and 22, 2008. According to plaintiff she asked that defendant allow her to prepare access ports for the adjustment; she does not explain what this means, but states that defendant unreasonably denied her repeated requests. Finally, following his visit to the premises on January 21, the adjuster allowed plaintiff to prepare the access ports. Apparently the adjuster did not return for a second

day of inspection although plaintiff alleges that she called daily between January 22 and 29 for this purpose. Plaintiff deems defendant's failure to return unreasonable and claims it resulted in a superficial inspection of the property damage. She alleges that the resulting estimate of damage by the adjuster included only part of the damage.[1]

On February 4, 2008, defendant issued a check to plaintiff for $59,498.63, an amount plaintiff states covered approximately 25% of the damage. Plaintiff states that she retained the check but as partial payment only, preserving her objection by "voluntarily submitting sworn Proof of Loss, with annexed two contractor's estimates and the structural engineering report as proof of Defendant's liability for full payment . . . ." Id. ¶ 41. She states that when she did not receive a response she further expressed her disagreement to defendant. The subsequent sequence of events is not clear, nor are all of plaintiff's allegations. However, it appears that the Complaint alleges that defendant advised plaintiff to proceed with the work and submit bills to defendant following its completion, suggesting that it would reimburse her fully at the appropriate time. She alleges a great deal of additional wrongful conduct by defendant, and asserts that she contacted defendant repeatedly by letter, telephone, and – following the rejection of her supplemental claim – by seven notarized letters, but that, defendant always rejected or failed to respond to her attempts to communicate. She states that after the restoration was complete, she submitted a "package of supporting documents and final bills" supporting her demand for an additional sum of $196,479.92 from defendant. According to plaintiff, defendant ignored her requests, and that defendant finally and perfunctorily rejected her claim by contending that she, rather than the adjuster, canceled the January 22, 2008 inspection and

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[1] The Complaint also states the report was backdated to suggest the inspection was January 18, 2008 instead of January 21, 2008 to give the impression that there was a more brief delay, but this does not appear to be relevant to her claims.

stating that even after this date she did not allow defendant's experts access to her property to inspect the damage. She additionally alleges other misconduct and misrepresentations by defendant related to the denial of the supplemental claim. Based on the above, plaintiff seeks $196,479.92, which she contends is the unpaid portion of her claim, along with interest from February 4, 2008.

Plaintiff retained counsel to represent her in the case; and her original counsel stipulated on several occasions to extend plaintiff's time to serve and file the complaint – first, until July 1, 2010; second, until August 1, 2010; and third, until October 31, 2010. Between the second and third extensions, plaintiff's counsel withdrew as counsel. Plaintiff did not oppose the motion but requested additional time to obtain new counsel and prepare her pleadings. Based on the motion and resulting order, defendant's counsel entered into a stipulation with plaintiff which allowed her until November 12, 2010 to serve and file the complaint. Plaintiff did not obtain an attorney and instead served her November 11 Verified Complaint, which she prepared pro se, on November 12, 2010.

Plaintiff served the Verified Complaint without a summons on November 12, 2010. Defendant had 20 days from the service of the Verified Complaint to serve its Verified Answer. See CPLR § 3012(a). Defendant served the Answer by mail on December 17, 2010; plaintiff states she received it on December 23, 2010. Plaintiff rejected the Verified Answer in her document entitled ""COMBINED NOTICE: NOTICE OF REJECTION OF VERIFIED ANSWER AND ATTORNEY'S AFFIRMATION . . . AND NOTICE OF DEFAULT," alleging that it was verified, improperly, by counsel rather than an officer of defendant, and that defendant served it 10 days late. This document is dated December 23, 2010 and allegedly was served by mail on that date. Defendant claims no knowledge of the rejection.

Despite the rejection of the Answer, plaintiff proceeded to serve discovery demands on defendant; and, on January 11, 2011, served an Amended Verified Complaint, which was dated January 7, 2011. As defendant acknowledges, it accepted the Amended Verified Complaint. According to defendant, this was due to its belief that plaintiff had accepted its Answer. However, as plaintiff notes, defendant did not respond to this amended pleading.

Now, based on her rejection of the Verified Answer, on defendant's failure to serve an Amended Verified Answer, and for the reasons that she set forth in the rejection, plaintiff moves to strike the Answer and obtain an order granting her summary judgment, including judgment in full for the amount she seeks in the Complaint. Defendant opposes the motion and cross-moves to compel plaintiff to accept its Amended Verified Answer.

Analysis

The history of this litigation is convoluted, as are the arguments in the motion and cross-motion. The Court shall attempt to proceed logically and clearly and will address all those arguments the parties appear to have raised.

If plaintiff merely had served the Verified Complaint and rejected the Verified Answer and if defendant had supported its cross-motion adequately, the Court would have been inclined to deny the motion for a default judgment and grant the cross-motion. There is a strong policy in New York favoring the resolution of cases on their merits. Berardo v. Guillet, 86 A.D.3d 459, 459, 925 N.Y.S.2d 521, 522 (1st Dept. 2011). Moreover, as defendant points out, when a corporation is not located in the county in which an attorney practices, it is acceptable for counsel to verify the answer on the client's behalf. CPLR § 3020(d)(3). Also, defendant notes, plaintiff has not asserted that she suffered any prejudice due to its brief delay in serving its Answer. See Verizon New York, Inc. v. Case Const. Co., Inc., 63 A.D.3d 521, 880 N.Y.S.2d

476 (1st Dept. 2009). As plaintiff herself points out, on numerous occasions defendant stipulated to extend plaintiff's time to serve her Complaint. The Court strongly encourages this sort of cooperation between litigants, and would have encouraged plaintiff to behave with equal civility here, were defendant to seek the courtesy it extended to her. Finally, as defendant notes in its opposition/ cross-motion, although she rejected the Answer plaintiff proceeded with the litigation, even going so far as to serve discovery demands, and arguably through her conduct waived her initial objection.

The Court does not decide the motion as framed, however, because – as defendant points out – plaintiff amended her Complaint on January 7, 2011. Plaintiff served the Amended Verified Complaint by mail on January 10, 2011 and again on January 31, 2011. Defendant also concedes that it accepted the amended pleading, noting that it would have been timely only if defendant's Verified Answer had been accepted. Thus, it contends, by the service of the amended pleading and its acceptance, the parties implicitly also treated the Answer as proper. To the Court, however, the critical point is this: Because plaintiff served an Amended Verified Complaint, the timeliness and other issues concerning defendant's original Verified Answer are moot. Instead, the parties and the Court must focus on the Amended Verified Answer.

This unfortunately brings the Court to a new problem. It is evident that prior to its receipt of plaintiff's motion, which plaintiff served by mail on November 21, defendant had not answered the Amended Verified Complaint. Contrary to plaintiff's suggestion, defendant does not hide this fact – instead, in its cross-motion to compel plaintiff to accept its amended pleading, it acknowledges that it served the Amended Verified Answer on November 28, 2011. Under CPLR § 3025 (d), defendant had 20 days – or until around January 30, 2011 – to serve its Amended Verified Answer. Thus, its Answer is nearly 10 months late. In her reply and

opposition to the cross-motion plaintiff points out the extreme delay and lack of explanation for the late Answer, which the Court reads as pro se plaintiff's rejection of the Amended Verified Answer. Moreover, in her reply, she annexes her document, "PLAINTIFF'S NOTICE OF REJECTION OF DEFECTIVELY VERIFIED AMENDED VERIFIED ANSWER SERVED BY DEFENDANT IN RESPONSE TO NOTICE AND AFFIDAVIT IN SUPPORT FOR DEFAULT JUDGMENT." Thus, defendant is in default unless the Court grants the cross-motion and compels plaintiff to accept the new, Verified Amended Answer.

After careful consideration, the Court grants the motion for default judgment in part and denies the cross-motion in its entirety. Where a motion for default judgment and/or a cross-motion to compel acceptance of an untimely answer is before a court, the court must determine whether the defendant has provided a reasonable excuse for the untimeliness. Terrones v. Morera, 295 A.D.2d 254, 255, 743 N.Y.S.2d 860, 861 (1st Dept. 2002). Moreover, in this Department, where, as here, there is no default judgment or order against the defendant, the defendant need not provide an affidavit of merit to oppose the motion for default or support its cross-motion to compel. See Cirillo v. Macy's Inc., 61 A.D.3d 538, 540, 877 N.Y.S.2d 281, 282 (1st Dept. 2009). The trial court has great discretion in determining whether a defendant has provided a reasonable excuse and meritorious defense. Id.

Though, as defendant notes in its initial papers, plaintiff asserts no prejudice, see Jones v. 414 Equities, LLC, 57 A.D.3d 65, 866 N.Y.S.2d 165 (1st Dept. 2008), the Court does not reach this issue because defendant has not presented a reasonable excuse for the delay. In fact, it has presented no excuse or explanation for the delay at all or even mentioned the extreme lateness of this application. Indeed, it is not clear that it would have answered at all but for plaintiff's current motion for default judgment. Under these circumstances, it would be improvident for

this Court to allow defendant to serve its answer. See Holloman v. City of New York, 52 A.D.3d 568, 569, 861 N.Y.S.2d 356, 357 (2nd Dept. 2008).

Based on the above, therefore, the Court denies the cross-motion to compel and grants plaintiff's motion for a default judgment to the extent of awarding judgment on the issue of liability and scheduling a hearing before a referee on the issue of damages. Although, as stated, plaintiff has shown merit to her claim and defendant, in default, cannot oppose her argument that it is liable, plaintiff has shown insufficient evidence to support an award of $196,479.92. Instead, she provides her verified complaint, in which she swears that this amount is outstanding; and, she annexes a list of those documents she allegedly provided, in binder form, to defendant on March 25, 2011. Both the Complaint and the list of documents make reference to contractors' estimates and bill summaries. However, there is no firsthand evidence – that is, the Court does not have before it the bills for the work performed or the estimates, or any other documents which might be necessary for it to evaluate plaintiff's contention that $196,479.92 is due to her in addition to the $59,498.63 defendant already provided to her. Moreover, she has not submitted a copy of the insurance contract and, as a result, the Court cannot determine whether the liability limit was, in fact, $448,400.00 and/or whether there were any deductibles or other offsets which should be applied.

For all these reasons, there is insufficient evidence to establish the precise amount of damages due to plaintiff. Therefore, a hearing is proper even though defendant is in default and the court is granting plaintiff judgment on default on the issue of liability. See Fuchs v. Midali America Corp., 260 A.D.2d 318, 318, 689 N.Y.S.2d 80, 81 (1st Dept. 1999). The Court finds that this is by far the more prudent course of action, as well, because of the high amount of damages plaintiff seeks to recover.

Thus, for the reasons above, it is

ORDERED that the cross-motion is denied; and it is further

ORDERED that the motion is granted and plaintiff is awarded defaulted judgment on the issue of liability; and it is further

ORDERED that this matter is referred to the Referee's Clerk on the issue of liability, and the Clerk is directed upon filing of a copy of this Order to place this action on the appropriate referee's calendar to hear and decide the amount due on the Complaint, including interest and costs, and to enter a Judgment thereon.

Dated: 4/16/, 2012

Enter:

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.S.C.

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J.S.C.