Moore v Somiprasad
2012 NY Slip Op 33258(U)
May 4, 2012
Sup Ct, Nassau County
Docket Number: 014528/11
Judge: Thomas P. Phelan

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

ORA MOORE,

Plaintiff,

-against-

CHETRAM SOMIPRASAD and
CHANDRASHEK RAMLAKAN,

Defendants.

Index No. 014528/11
ORIGINAL RETURN DATE: 04/17/12
SUBMISSION DATE: 05/02/12
MOTION SEQUENCE ## 002/003/004

The following papers read on these motions:

Notices of Motion.....	1, 2
Notice of Cross Motion.....	3
Opposition.....	4, 5
Reply.....	6, 7
Memorandum of Law.....	8, 9

Plaintiff moves for a default judgment. Defendants oppose the motion and cross move for an order, pursuant to CPLR 2005 and 5015(a)(4), vacating the default and, pursuant to CPRL 2004 and 3012(d), compelling plaintiff to accept their amended verified answer. Defendants also separately moved for similar relief pursuant to CPLR 5015(a)(1) prior to receiving plaintiff's motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of the emission of soot, smoke and gases from defendants' premises. The complaint also alleges nuisance and seeks injunctive relief.

The action was brought by the filing of a summons and complaint. Plaintiff submits affidavits of service of the summons and complaint showing service personally upon defendant Chetram Somiprasad on October 12, 2011, and upon

both defendants by mail on October 17, 2011. By short form order dated January 18, 2012 (Phelan, J.), the parties were directed to appear at a Preliminary Conference on February 28, 2012. The Preliminary Conference was adjourned to March 29, 2012. At that time plaintiff made application for a default based upon defendants' failure to appear on both occasions. The court struck defendants' answers and directed plaintiff to file a motion for a default judgment.

Unbeknownst to the court, an amended complaint was filed on March 26, 2012. By notice of motion dated March 30, 2012, plaintiff moved for a default judgment based upon this amended complaint. Counsel for defendants submits that the amended complaint, received by defendants on March 29, 2012, supersedes the original complaint and becomes the only complaint in the action citing to *Schoenborn v. Kinderhill Corp.*, 98 AD2 831 [3d Dept. 1983]. Counsel concludes that on March 29, 2012, defendants were not in default in appearing or answering.

It is well settled that on a motion to vacate a default, defendant must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense. (*Kaplinsky v. Mazor*, 307 AD2d 916 [2d Dept. 2003]). Equally well settled is the principle that "whether a default should be vacated is a matter within the sound discretion of the trial court (*see, Fidelity & Deposit Co v Anderson & Co.*, 60 NY2d 693)" (*Zachary v. County of Nassau*, 167 AD2d 537 [2d Dept. 1990]).

"Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (citations omitted)." (*Goldman v. City of New York*, 287 AD2d 482 [2d Dept. 2001]). Vacatur of a default under such circumstances is not an abuse of discretion since it furthers the "strong public policy" in favor of resolving cases on the merits. (*Altairi v. Cineus*, 45 AD3d 707 [2d Dept. 2007]). Permitting vacatur in such instances has also been described as warranted since "the interest of justice is best served by vacating the default and permitting the case to be decided on its merits (citation omitted)." (*Vita v. Alstom Signaling, Inc.*, 308 AD2d 582, 583 [2d Dept. 2003]).

So strong is the state's public policy favoring determinations on the merits that if defendant has demonstrated a potentially meritorious defense and the delay was both brief and without resultant prejudice to plaintiff, it has been held an abuse of discretion to deny vacatur notwithstanding that the proffered excuse is "somewhat dubious." (*Cotter v. Consolidated Edison Co.*, 99 ad2D 738 [1ST Dept. 1984]). The

approach adopted by the First Department in *Cotter* has been cited with approval by the Second Department in both *Shopsin v. Siben & Siben*, 189 AD2d 811 [2d Dept. 1993] and *DeCicco v. Cobble Hill Nursing Home, Inc.*, 196 AD2d 476 [2d Dept. 1993].

Defendants submit their affidavits, wherein they aver that they have a meritorious defense. Defendants deny all the material allegations of the complaint and submit that the premises are tenanted by Unique Duct Design Corp. ("Unique") pursuant to a written lease agreement. Defendants acknowledge that they are the owners of the premises and officers and employees of Unique. As out-of-possession landlords of the premises, defendants contend that they are not responsible for the emission of particulates. Counsel for defendants submits that the allegations in the amended complaint do not state a legal cause of action for nuisance or injunctive relief.

It is submitted that when the complaint was received, it was forwarded to Unique's general liability carrier. According to defendants, the general liability carrier accepted the tender and retained the law firm of Armienti, DeBellis, Guglielmo & Rhoden LLP (the "Armienti Law Firm"). Defendants allege that because their own carrier denied coverage to the individual defendants, they retained the firm of Meliot & Adolfsen, P.C. to represent them. Defendants aver that they never received a copy of the order scheduling the Preliminary Conference for February 28, 2012.

Counsel for defendants asserts that he was first contacted by defendants on March 22, 2012, at which time he was advised that the Armienti Law Firm had filed an answer on their behalf, although this was a mistaken belief. Counsel avers that he did not receive notice of the Preliminary Conference.

Defendants demonstrated a reasonable excuse for their default and "carried the burden of demonstrating a *potentionally* meritorious defense (citations omitted) (*Marinoff v. Natty Realty Corp.*, 17 AD3d 412, 413 [2d Dept. 2004]).

Based upon all of the foregoing, plaintiff's motion is denied and defendants' motions are granted to the extent of vacating defendants' default and compelling plaintiff to accept defendants' verified answer. Defendants' verified answer and affirmative defenses to the amended complaint served with the moving papers shall be deemed timely served.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held. The parties or their counsel are directed to appear on May 23, 2012, at 9:30 a.m. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: May 4, 2012

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

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