SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

RACANELLI CONSTRUCTION COMPANY, INC.,

Plaintiff,

-against-

ALLIED CONTRACTING II CORP., PARAGON BUILDING SOLUTIONS CORP., and RICHARD LAGNESE,

Defendant.

RICHARD LAGNESE,

Third-Party Plaintiff,

-against-

GEORGE KYRIAK a/k/a GEORGE KYRIAKOUDES

Third-Party Defendant.

Decision and Order

MOTION SEQUENCE: 04
INDEX NO.:601497/15

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
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The Defendant Allied Contracting II Corp. ("Allied") moves for an order; pursuant to CPLR 2221 (e) and (f), granting Allied Contracting II Corp.'s motion to renew Plaintiff's motion for default judgment; pursuant to CPLR 2221 (d)(f), granting Allied's motion to reargue Plaintiff's motion for default judgment; pursuant to CPLR 3215, denying Plaintiff's motion for a default judgment; and vacating that portion of the order dated September 26, 2016 which grants a default judgment against Allied.

The facts of the within action are set forth in the court's decision dated November 21, 2016, Nassau County Clerk's Office (*Racanelli Construction Company, Inc. v Allied Contracting, et al.*, Index No. 601497/15, motion seq. no. 3). In a prior order of this court, dated September 26, 2016, the court granted Plaintiff's motion for a default judgment against Defendant Allied to the "extent that judgment on liability shall enter in favor of the plaintiff and against the defendant Allied, with entry of judgment stayed and an inquest on damages to be held on a date to be determined by the court."

The court may vacate a default in appearing where the defendant can demonstrate a reasonable excuse for the failure to appear and a showing of a meritorious defense (*see DiLorenzo v Dutton Lbr. Co.*, 67 NY2d 138; *Szilaski v Aphrodite Constr. Co.*, 247 AD2d 532). The defendant must also show that the default was not willful and vacatur will not work prejudice on the opposing party (*see Asternio v Asternio*, 275 AD2d 517). Moving defendant has made these showings.

In support of the motion, Allied Paragon and Allied are both alleged to have breached the contract with Racanelli in a similar manner; and both defendants share the same defenses. Further, the facts outlined in Kyriak's affidavit submitted in July 2006 on behalf of Paragon also apply to Allied. Allied's principal, Kyriak, is the officer who executed the affidavit on behalf of Paragon. Kyriak contends he was under the impression that the affidavit would benefit Allied. Defendant Lagnese states that he was employed by Allied as its project manager, although real financial decisions were made by Kyriak who had the knowledge of how payments made to plaintiff by Allied were computed. Lagnese argues that Kyriak is the person who would have knowledge about defenses to the claims by plaintiff asserted in this action. According to Lagnese, decisions about payments, building supplies and materials for the project with respect to both Allied and Paragon were made by Kyriak, and it is likely that there will be factual overlap between the financial records for the two Kyriak companies.

In its decision dated November 21, 2016, this court recognized that:

> Lagnese's argument in favor of indemnification is predicated upon the claim that Kyriak is the wrongdoer, having allegedly siphoned and misdirected funds from the project to fund other projects which, in turn, caused Allied and Paragon to breach the construction agreements with Racanelli, triggering Lagnese's liability to Racanelli by virtue of the guaranties.

Defendants argue that the facts submitted by Paragon are similar to those submitted by Allied.

A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and set forth a reasonable justification for the failure to present such facts on the prior motion. *See* CPLR 2221(e), also *Renna v Gullo*, 19 AD2d 472, 743; *O'Connell v Post*, 27 AD3d 631.

Pursuant to CPLR 2221(e) leave to renew (i) must be based on new facts not offered on the prior motion, and (ii) must offer a reasonable excuse for the failure to present such facts on the prior motion. Prior to the adoption of CPLR 2221(d) in 1999, which was intended to clarify the case law on renewal, Courts generally interpreted the rule requiring newly discovered facts as a flexible one, and upheld the Court's discretion to act in the interests of justice. There were a number of cases in which leave to renew was granted even though the movant knew the additional facts at the time of the original motion and offered no reasonable excuse for not timely submitting them. *See, e.g., Karlin v Bridges*, 172 AD2d 644; *Weisse v Kamhi*, 129 AD2d 698; *Sciascia v Nevins*, 130 AD2d 649. Since the 1999 revisions, however, the Courts have tendered to interpret the rule more strictly, generally adhering to the requirement, codified in CPLR 2221(e)(3), that a reasonable justification be offered for the failure to submit the additional facts on the original motion. *See, e.g., Petsako*, 8 AD3d 355; *Mollin v County of Nassau,* 2 AD3d 600; *Bloom v Primus Automotive Financial Services, Inc.*, 292 AD2d 410. Where no valid excuse was offered, the Courts, generally have denied the motion, reasoning that "renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." *Chelsea Piers Mgmt. v Forest Electric Corp.*, 281 AD2d 252; *see also Pisciotto v Dries*, 306 AD2d 262; *Carota v* Wu, 284 AD2d 614.

In the interest of justice, unless Allied is permitted to present its meritorious defenses to the claims by plaintiff, all defendants will be hampered and may be prejudiced in their respective defenses by lack of knowledge of material facts and lack of access to obtain further information to present their claims. While it is not necessary for a defendant to establish the validity of its defense as a matter of law, it is necessary to demonstrate a defense that is potentially meritorious (*see Marinoff v Natty Realty*, 17 AD3d 412; *Cupoli v Nationwide Insurance Company*, 283 AD2d 961). Upon renewal, Allied has demonstrated defenses and claims that are potentially meritorious.

In *Mollin v County of Nassau, supra* at p. 601, the Appellate Division Second Dept. stated that:

> "While a motion for leave generally should be based on newly-discovered facts, the rule is flexible, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided the movant offers a reasonable justification for the failure to submit the additional facts on the original motion."

Given the absence of prejudice to the plaintiffs, the lack of willfulness on the part of Allied, the existence of a potentially meritorious defense, and the preference for resolution of cases on the merits (*Spence v Davis*, 139 AD3d 703), Allied's motion for renewal of Plaintiff's motion for a default judgment resulting in an order dated September 26, 2016 is granted.

Upon renewal, the Plaintiff's motion for default judgment is denied and the order dated September 26, 2016 is vacated.

In all other respects, the motion is denied.

This constitutes the decision and order of the court.

Dated: February 16, 2017

Hon. Vito M. DeStefano, J.S.C.