

Khoury v JLA Home Improvements, Inc.

2018 NY Slip Op 34475(U)

December 7, 2018

Supreme Court, Westchester County

Docket Number: Index No. 65635/2016

Judge: Sam D. Walker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
KAMIL KHOURY,

Plaintiff,

-against-

DECISION AND ORDER
INDEX NO: 65635/2016
Seq# 2

JLA HOME IMPROVEMENTS, INC.
LUIS MONGE,

Defendant.
-----X

The following papers were received and considered in connection with the above-captioned matter:

Order to Show Cause/Affidavit of Facts/Affirmation/Proposed Answer//Exhibits 1-5	1-9
Affirmation in Opposition/Exhibits A	10

The plaintiff, Kamil Khoury, commenced this action by the filing of a summons and complaint on October 15, 2016, alleging that in or about July 15, 2016, the defendant entered into an agreement with the plaintiff, whereby the defendant was to perform home improvement work in the plaintiff's home for payment of \$22,000.00. The plaintiff alleged that midway through the construction project, the defendant refused to honor the terms of the contract by failing to install insulation in the walls and ceiling; failing to perform in compliance with the building code; and walking off the job and refusing to complete the construction project.

The plaintiff filed an affidavit of service showing service upon the corporate

defendant, JLA Home Improvements, Inc. ("JLA"), but failed to serve the defendant, Luis Monge ("Monge"). JLA failed to file an answer to the complaint and the plaintiff moved for a default judgment. This Court granted the plaintiff's motion and a judgment was entered on September 8, 2017 in the amount of \$26,847.28, in favor of the plaintiff and against JLA. Monge, the president of JLA, now moves by order to show cause to vacate the default judgment entered.

Monge avers that he did not intentionally default but retained a lawyer when he received the summon and complaint in the mail from the Department of State and paid him \$500 to interpose an answer. He also states that he did not receive the photograph exhibits that were purportedly attached to the complaint. Monge states that when he did not hear from the lawyer, he assumed the matter was closed until he was served with the execution of the judgment from the sheriff. He states that he received no notice of inquest or notice of intent to enter judgment.

Monge further states that he has a meritorious defense, in that, he denies each and every allegation in the complaint. Monge states that the replacement contract requires plumbing and electrical work that was not specified in his contract. He states that the contract did not call for a new marble countertop, claimed by the plaintiff and that most of the work in the photograph(s), was performed by him and his four workers. Monge contends that he did not abandon the job but was discharged at a time when there was a balance due of \$8,000, because the bulk of the work had been completed. Monge asserts counterclaims for amounts allegedly owed to him.

The plaintiff opposes the motion arguing that the plaintiff clearly met the burden

of establishing, by a preponderance of the evidence, that JLA was properly served, thereby conferring the Court with jurisdiction over it.

Discussion

'CPLR 5015(a) provides that a party may be relieved from a judgment on the ground of, among others, "excusable default" (*Eugene Di Lorenzo, Inc v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 [1986]). Specifically, CPLR 5015(a)(1) entitles a defendant to relief from a default judgment on the ground of excusable neglect if the motion is made within one year from the date that defendant is served with a copy of the judgment. Relief upon this ground requires a showing of "both a reasonable excuse for [the defendant's] default and a meritorious defense" (*Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760, 761 [2d Dept 2006]). "The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court", (*Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904).

"A second provision for obtaining relief from a default judgment is found in CPLR 317" (*Eugene Di Lorenzo, Inc v A.C. Dutton Lumber Co., Inc.*, 67 NY2d @ 141). That section states that a defendant served other than by personal delivery may be allowed to defend the action within one year after knowledge of entry of the judgment, upon a finding of the court that the defendant did not personally receive notice of the summons in time to defend and has a meritorious defense (*Id.*). '[T]here is no necessity for a defendant moving pursuant to CPLR 317 to show a "reasonable excuse" for its delay' (*Id.*). Further, 'service on a corporation through delivery of process to the Secretary of State is not "personal delivery" to the corporation or to an agent designated under CPLR

318 (*Id.*). "Thus, corporate defendants served under Business Corporation Law § 306 have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend" (*Id.*)

While Monge admits to receiving the summons and complaint, he avers that he hired an attorney and thought that the attorney was taking care of the matter. As previously stated, the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of this Court and this Court finds that the defendant has provided a reasonable excuse. Additionally, the defendant made the motion to vacate within one year of notice of entry of the default and the defendant has a potentially meritorious defense.

Furthermore, "[a] strong public policy exists which favors the disposition of matters on their merits (*Ahmad v Aniolowiski*, 28 AD3d 692 [2d Dept 2006]) and the Court has considered the absence of evidence that the default was intentional, in bad faith of with an intent to abandon the action and the plaintiff has not alleged nor established prejudice in vacating the default (*Id.*).

Therefore, the defendant's motion to vacate the judgment is granted; and it is

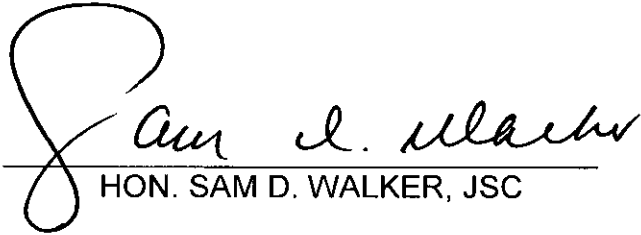
ORDERED that the judgment entered on September 8, 2017 in the amount of \$26,847.28 against JLA Home Improvements, Inc. in favor of Kamil Khoury, is vacated; and it is further

ORDERED that the defendant(s) shall serve and file an answer in NYSCEF within twenty days of the filing of this Decision and Order.

The parties are directed to appear before the Preliminary Conference Part in courtroom 811 on January 14, 2019 at 9:30 a.m.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, NY
December 7, 2018


HON. SAM D. WALKER, JSC