

Friesland Corporation v I. Grace Company, Inc.

2008 NY Slip Op 32063(U)

July 18, 2008

Supreme Court, New York County

Docket Number: 0602958/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Friestland Corp.

- v -

I. Grace Co.

INDEX NO.

602958/04

MOTION DATE

MOTION SEQ. NO.

006

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
JUL 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/18/08

J. GISCHE
HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
FRIESLAND CORPORATION,

Plaintiff,

-against-

THE I. GRACE COMPANY, INC., 838 ASSOCIATES,
LLC and JEFFREY FLANIGAN

Defendant,
-----X

MITSUI MARINE AND FIRE a/s/o/ MITSUI &
COMPANY (U.S.A), INC.,

Plaintiff,

-against-

I. GRACE COMPANY, INC., 838 ASSOCIATES,
LLC, ATHENA GROUP, LLC, JEFFREY FLANIGAN,
R.A. F.W. SIMS, INC. NICLIN BUILDERS, INC. and
WIND MECHANICAL, INC.,

Defendants.
-----X

Decision/Order

Index No.: 113941/06

Seq. No. : 007

Present:

Hon. Judith J. Gische

J.S.C.

Index No.: 100633/06

Seq. No. : 007

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
4 th Party Def motion [vacate] w/GDS affirm, PW affid, exhs	1
4 th Party Pltf opp w/ YRS affirm, exhs	2
4 th Party Def Reply affirm (GDS)	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This matter arises out of an action for property damage. Fourth Party Defendant

Niclin Builders, Inc. ("Niclin") moves, pursuant to CPLR § 317 and § 5015, for an order vacating the default judgment entered against it on May 7, 2007, and allowing Niclin to interpose an answer to the Fourth Party Complaint.

In order to obtain relief from a default judgment, a movant must show both a reasonable excuse and a meritorious defense. CPLR § 5015 (a) (1). Niclin has not shown either, and thus the motion is denied.

This matter arises out of a property damage claim which occurred on or about January 19, 2003, on the premises known as 838 Fifth Avenue, 8th Floor, New York, New York (the "premises"). On that date and at that location, Defendant Friesland Corporation ("Friesland") allegedly failed to properly maintain the temperature of the premises, causing a pipe to freeze and break, resulting in property damage. On or about April 7, 2005, Mitsui Marine and Fire, a/s/o Mitsui & Company (U.S.A.), Inc. ("Mitsui") commenced a lawsuit against Friesland for its alleged negligence, at which point Friesland commenced a third-party action, claiming negligence on the part of third-party defendant I. Grace, among others.

At all relevant times, I. Grace was a general contractor that entered into a Subcontract ("Subcontract") with Niclin, as subcontractor. In the Subcontract, Niclin agreed to provide labor and services at a project located at the premises. In turn, I. Grace sought contractual indemnification from Niclin and commenced a lawsuit against Niclin, among others.

I. Grace served Niclin on October 31, 2005 by personally delivering the fourth party summons and verified complaint to the New York Secretary of State. While the

other fourth party defendants appeared in the action, Niclin did not. I. Grace then moved for entry of a default judgment against Niclin on or about December 11, 2006. That motion was submitted to the court on default and was granted by the court's decision and order dated April 24, 2007. Niclin claims that it filed the instant motion to vacate the default judgment against it when it received Notice of Entry of Judgment.

Niclin now argues that it has a reasonable excuse for its default and a meritorious defense to the underlying action.¹ Niclin claims as a reasonable excuse that it forwarded the summons and complaint to Attorney Silva, who then forwarded the summons and complaint to Niclin's insurance broker, Palmucci Insurance Agency ("Palmucci"). Niclin asserts that it was under the assumption that the summons and complaint would then be forwarded to its Insurance Company so that an answer could be interposed. Niclin claims as a meritorious defense that its construction project was unrelated to the damages sustained, and for which I. Grace seeks contribution and indemnification from Niclin.

Discussion

The court may vacate a party's default judgment upon a showing of both a reasonable excuse and a meritorious defense. CPLR §5015 (a) (1). See also Gillingham v. Robinson, 45 AD3d 467 (1st Dept 2007). The determination of what

¹ In the instant motion, Attorney Silva claimed as a reasonable excuse that Niclin was never served with a summons and complaint, while Niclin's Principal Mr. Wohning, claimed he did in fact receive the summons and complaint, but that he forwarded the papers to his insurance agency, which did not forward the summons and complaint to his insurance company. In Niclin's Reply, Attorney Silva asserted that the inconsistency was "an honest mistake" and Niclin abandoned the excuse of lack of service.

constitutes a reasonable excuse for a default lies within the discretion of the court. 38 Holding Corp. v. New York, 179 AD2d 486 (1st Dept 1992). Specifically, the court can consider an excuse for default reasonable if based on law office or insurance company failure. Gulledge v. Adams, 108 AD2d 950 (3d Dept 1985). Once the moving party establishes a reasonable excuse for the default, the party is required to establish a meritorious defense through an affidavit by a person with sufficient firsthand knowledge of the facts. Fidelity & Deposit Co. v. Arthur Andersen & Co., 60 N.Y.2d 693 (1983).

In support of its motion, Niclin offers an affirmation of attorney George D. Silva and a one page affidavit of Peter Wohning, a principal of Niclin. The reply consists entirely of a further affirmation of attorney Silva. To the extent the Silva affirmations state "facts" that are not within the Wohning affidavit or based on personal knowledge, they are ineffective to support the relief requested. Peacock v. Kalikow, 239 AD2d 188 [1st Dept 1997].

Niclin's principal, Wohning, claims that he forwarded the summons and complaint to his attorney, who then forwarded it to his insurance broker, Palmucci. He assumed that Palmucci would forward the summons and complaint to the appropriate Insurance Company. The statement made is bare-boned and not based on personal knowledge. Wohning has no personal knowledge and no proof of what Niclin's attorney did with the summons and complaint. Wohning also does not include proof of what Palmucci did or did not do with the summons and complaint. Even if the court accepts Wohning's excuse for Niclin's default, no colorable defense to the underlying complaint is offered.

A party seeking to vacate a default judgment entered against it must submit

affidavits from individuals with firsthand knowledge of the facts in order to establish its meritorious defense. Fidelity & Deposit, supra. The affidavits must make sufficient factual allegations based on the complaint; conclusory statements and vague assertions are not adequate to support a meritorious defense (Peacock v. Kalikow, 239 AD2d 188 [1st Dept 1997]).


The purported meritorious defense offered by Wohning in his affidavit consists of mere conclusory statements; Wohning's denial of liability on behalf of Niclin is completely unsubstantiated by any facts. He states: "My attorneys have informed me that I have a meritorious defense as I neither caused, created or allowed for the occurrence complained of by third-party defendant The I. Grace Company, Inc. to result in the damages alleged therein." His affidavit does not directly refute nor otherwise address the allegations laid out in I. Grace's Complaint.

In his affirmation, Attorney Silva makes factual allegations to wit: that the type of construction done by Niclin did not require Niclin to come in contact with heating or cooling systems on the property at issue. However, Attorney Silva's affirmation is not based on personal knowledge of Niclin's responsibilities on the jobsite at issue.

Conclusion

Accordingly, the motion to vacate the default judgment is denied in its entirety. This shall constitute the decision and order of the Court.

Dated: New York, New York
July 18, 2008

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.