SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 100546/09**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 3**

JOHN NICOLINI

Plaintiff

against

DECISION & ORDER

T & S CLEANING AND MAINTENANCE SERVICE, INC.

HON. JOSEPH J. MALTESE

Defendant

The following items were considered in the review of this Order to Show Cause why a default order should not be vacated:

Papers	Numbered
Order to Show Cause	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant's Order to Show Cause seeks to vacate the default judgment pursuant to CPLR § 2221, CPLR § 5015, and CPLR § 317. The Order to Show Cause also seeks to extend time to answer under CPLR § 2004 and would compel the plaintiff to accept a proposed answer under CPLR § 3012 (d). The defendant's Order to Show Cause is granted in its entirety.

Facts

This is an action founded upon alleged negligence. On September 22, 2008, Gregory Goffphine, the defendant's employee, was cleaning a men's locker room in the United States Post Office located at 228 Main Street, Staten Island, New York 10307. T&S Cleaning and Maintenance, Inc. ("T&S") asserts that an area of the locker room had just been mopped and was wet. A sign warning of the wet floor was present. T&S alleges that the plaintiff, John Nicolini ("Nicolini") was also verbally warned the floor was wet by Goffphine. According to T&S, the plaintiff dismissed the warning and chose to enter the locker room. Nicolini fell and was injured.

He was transported to the hospital by ambulance. In opposition, the plaintiff asserts that the defendant created a dangerous condition, and denies any negligence attributable to himself.

T&S asserts that its insurance carrier, United States Liability Insurance Group ("USLIG"), was notified at the onset of this action. According to T&S, it undertook no further action concerning the matter believing that USLIG was acting on its behalf. USLIG sent a letter to T&S dated January 8, 2009. That letter disclaimed coverage for the accident, disclaimed any assistance to T&S, and advised T&S to obtain personal counsel. However, the letter also advised T&S that it should keep USLIG advised of developments.

On January 3, 2010 a default judgment struck the answer of T&S and awarded the plaintiff $875,997.70. The plaintiff's counsel informed USLIG by mail of the Notice of Entry of a Judgment on January 7, 2011. In a letter dated February 3, 2011, USLIG informed T&S that legal counsel had been retained for T&S, but that any defense funded by USLIG was ultimately subject to a determination that USLIG had an obligation to defend or indemnify. On May 6, 201, USLIG interceded on behalf of the defendant by filing an Order to Show Cause why the default judgment should not be vacated and request an extension of time.

Discussion

The defendant has met the requirements for reversal of a default judgment.

"In any action to recover damages for personal injury ... culpable conduct attributable to the claimant ... shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant ... bears to the culpable conduct which caused the damages."[1] Here, the defendant asserts that the plaintiff was allegedly advised of a wet floor by the presence of an appropriate warning sign as well as by a verbal warning from the defendant's employee. The plaintiff implies that the defendant accepted the risk of entering the area with the wet floor.

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[1]CPLR § 1411.

Although its use was disfavored, in the past the doctrine of assumption of risk had been interposed as a primary defense in actions arising from negligence.[2] However, assumption of risk should be limited to activities such as sports and recreational activities.[3] In contrast, the doctrine of comparative culpability allows relative responsibilities to be apportioned among the parties.[4] Admissibility and credibility of the evidence have yet to be determined. However, T&S does have a meritorious defense to put forth in its reliance on comparative negligence of the plaintiff..

That part of the Order to Show Cause pursuant to CPLR § 2221 is denied.

The defendant moves under CPLR § 2221 to dismiss the default judgment. "A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made."[5] A motion under CPLR § 2221 may be a motion for leave to reargue, a motion for leave to renew, or a combined motion for leave to reargue and to renew. "A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."[6] Leave to reargue is based upon the discretion of the court.[7]

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[2]*Trupia v. Lake George Central School Dist.*, 14 NY 3d 392, 394 [2011].

[3]*Id.* at 394.

[4]*Id.* at 394; *see also Dole v. Dow Chem. Co.*, 30 NY 2d 143, 153 [1972].

[5]CPLR § 2221 (f).

[6]CPLR § 2221 (d).

[7]*McGill vs. Goldman*, 261 AD 2d 593, 594 [2d Dept 1999].

A motion for leave to reargue does not offer the previously unsuccessful party successive opportunities to present arguments not previously advanced.[8] The defendant does not specify that its motion is specifically a motion for leave to reargue. The defendant previously offered no facts. Therefore, the affidavit now presented does not offer facts presented earlier, but overlooked or misapprehended upon the prior motion. The order the defendant would wish to reargue was entered over thirty days before the Order to Show Cause was proposed. Therefore, the elements of a motion to reargue are not met. That part of the Order to Show Cause seeking to vacate the default judgment based upon a motion to reargue is denied.

A motion under CPLR § 2221 may also seek leave to renew. "A motion for leave to renew: 1. shall be identified specifically as such; 2. shall be based upon new facts not offered in the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on prior motion."[9]

T&S does not identify the basis for the proposed order as a motion to renew. There is no new change in the law presented by the defendant. The defendant presents an affidavit dated April 4, 2011. In its affidavit, the defendant now offers its new version of events. Newly asserted is the defendant's claim that T&S expected USLIG to defend the action. This assertion provides a reasonable justification. Therefore, considered as leave to renew, the defendant's motion is granted.

That part of the Order to Show Cause pursuant to CPLR § 5015 is granted.

By an order to show cause, the defendant seeks to have the court vacate the default order under CPLR § 5015. "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court

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[8] *Pryor vs. Commonwealth Land Title Ins. Co.*, 17 AD 3d 434, 436 [2d Dept. 2005].

[9] CPLR § 2221 (e).

may direct upon the ground of: 1. excusable default ... if the moving party has entered the judgment or order, within one year after such entry."[10] The party seeking refuge in this provision must none the less "demonstrate a reasonable excuse for delay in appearing and answering the complaint and a meritorious defense to the action."[11]

There is a public policy to resolve disputes on the merits rather than by a default judgment.[12] The defendants cited an action where the "outrageous tactics of their attorney" contributed to a default judgment against the defendants in that action. The Appellate Division, First Department vacated that judgment on appeal.[13] In that action, the many faults of the defendants' attorney caused led to the default judgment, but the defendants themselves were not at fault.

The defendant points out that when there is an expectation that an insurance carrier will defend, there may be an excusable reason for a default.[14] There must be a "good faith belief" in that expectation.[15] Here, USLIG sent T&S a letter on February 3, 2010. On the one hand, USLIG disclaimed responsibility. But on the other hand USLIG requested to be kept informed of the progress of the action. In fact, ultimately USLIG assumed the responsibility of providing legal representation when it learned that an adverse ruling was made. Therefore, T&S's reliance on USLIG was reasonable and in good faith.

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[10]CPLR § 5015 (a) (1.).

[11]*Di Lorenzo v. A. C. Dutton Lumber Co.*, 67 NY 2d 138, 141 [1986].

[12]*Zolna v. Lupino*, 251 AD 2d 658, 659 [2d Dept 1998], *in which the "plaintiff demonstrated a reasonable excuse and that his cause of action may have merit"*; *Classie v. Stratton*, 236 AD 2d 505 [2d Dept 1997], *where the parties were negotiating a settlement between themselves and there was minimal prejudice to the plaintiff*; *and Mindick v. Certified Lumber Corp.*, 204 AD 2d 285 [2d Dept 1994], *in which the defendant had missed only a single conference, there was a meritorious defense*, *and absence of prejudice to the plaintiff*.

[13]*Zissu, Lore, Halper and Robinson v. Siegel* 60 AD 2d 531 [1st Dept 1977].

[14]*Gerdes v. Canales*, 74 AD 3d 1017, 1018 [2d Dept 2010].

[15]Id. at 1018.

The courts favor resolution of an action on the merits. In order to strike a default judgment, there must be a meritorious defense, an absence of unfair prejudice to the opposite party, and a reasonable excuse for the default leading to a default judgment. All three conditions must coincide. Here, the defendant has a meritorious defense. The plaintiff has not made an argument for unfair prejudice other than delay. The defendant has demonstrated a reasonable excuse for its default in its belief that USLIG was engaged in the process. Therefore, the defendant has met all the conditions required to reverse a default judgment.

That part of the Order to Show Cause pursuant to CPLR § 317 is denied.

By its Order to Show Cause, T&S seeks to vacate the default judgment under CPLR § 317. "A person served with a summons other than by personal delivery to him or to his agent for service or to his agent for service designated under rule 318 ... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment ... upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense."[16] "[S]ervice 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*."[17] Additionally, "[a]s has been emphasized in numerous cases, there is no necessity for a defendant moving pursuant to CPLR 317 to show a "reasonable excuse" for its delay.[18] The burden is on the party moving pursuant to CPLR § 317 to show that personal service was not made.[19] If the defendant was not properly served, the Court may grant relief. Relief is at the court's discretion and not automatic.[20] Here, T&S has not borne the burden of showing that service was not made, and relief under CPLR § 317 is denied. However, this denial is not dispositive because the default judgment has been vacated on other grounds.

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[16]CPLR § 317.

[17]*Di Lorenzo, Inc. v. A. C. Dutton Lumber Co., Inc.*, 67 NY 2d at 142.

[18]*Id.* at 141.

[19]*Giraldo v. Weingarten*, 81 AD 3d 885, 886 [2d Dept 2011].

[20]*Di Lorenzo, Inc. v. A. C. Dutton Lumber Co., Inc.*, 67 NY 2d at 143.

The Court extends the defendant's time to appear or plead.

The Order to Show Cause further seeks an extension of time under CPLR § 2004. The defendant also requests an extension of time to appear or plead under CPLR § 3012. "[T]he court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown..."[21] This provision merely confers discretion upon the court.[22] Here, the application for an extension of time to appear or plead and to cause the plaintiff to accept the defendant's answer is appropriate and follows granting the order to vacate the default judgment.

Accordingly, it is hereby:

ORDERED, that the Order to Show Cause made by the defendant T&S Cleaning and Maintenance Service, Inc. seeking to vacate the Default Judgment against it; to extend the time to answer; and to compel the plaintiff John Nicolini to accept its answer is granted; and it is further

ORDERED, that the parties shall appear for a conference at **DCM Part 3, 130 Stuyvesant Place, Third Floor,** on **Wednesday, August 31, 2011** at **9:30 A.M.**

ENTER,

DATED: August 2, 2011

Joseph J. Maltese
Justice of the Supreme Court

[21]CPLR § 2004.

[22]*Tewari v. Tsoutsouras*, 75 NY 2d 1, 9 [1989].