[* 1]

Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

ALLAN JENNINGS,

Plaintiff,

-against-

QUEENS TRIBUNE PUBLICATION LLC, et al.,

Defendants.

Index No. 27481/10

Motion Date February 7, 2012

Motion Cal. No. 13

Motion Sequence No. 2

QUEENS COUNTY CLERK FILED 2012 MAR 12 AM 11:56

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPLR 2221 granting defendants' motion to reargue and/or renew and compelling plaintiff to accept defendants' verified answer of the above named defendants pursuant to CPLR 3012(d) is decided as follows:

According to the affidavit of service, plaintiff served a Summons and complaint on defendants on February 25, 2011. Defendants served plaintiff with a verified answer on August 10, 2011, asserting several defenses including improper service. On or about August 11, 2011, plaintiff made a motion for a default judgment. Defendants then cross-moved pursuant to CPLR 3012(d) for an order compelling plaintiff to accept defendants' verified answer. On November 2, 2011, the court issued a decision and order granting plaintiff's motion for a default judgment and set the matter down for an inquest hearing on February 7, 2012 and denying defendants' motion to compel plaintiff to accept defendants' untimely verified answer. Defendants now move pursuant to CPLR 2221.

That branch of defendants' motion seeking an order pursuant to CPLR 2221 granting defendants' motion to renew and/or reargue

this court's order dated November 2, 2011, and compelling plaintiff to accept defendants' verified answer is hereby granted to the extent that reargument shall be granted, since a motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (*see, Schneider v. Solowey*, 141 AD2d 813; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410) and defendants set forth controlling principles of law that this court misapplied; and upon reargument, the court finds as follows:

In a decision/order dated November 2, 2011, this court granted plaintiff, Alan Jennings' motion for a default judgment and for the assessment of damages pursuant to CPLR 3215 against all defendants and denied the cross motion of defendants pursuant to CPLR 3012(d) for an order compelling plaintiff to accept their Verified Answer to the Complaint, which was not timely served holding that defendants have failed to present a potentially meritorious defense to the action.

Plaintiff, Allan Jennings moves for a default judgment and for the assessment of damages pursuant to CPLR 3215 against all defendants. Plaintiff argues that he is entitled to a default judgment because more than thirty (30) days have elapsed since service of the Summons and Complaint upon defendants and defendants have not answered, appeared, or otherwise moved with respect to the Complaint. Plaintiff established that defendants failed to appear, submit an Answer, or move with respect to the Complaint herein (see, CPLR 3215). Plaintiff demonstrated the merits of his claim by submitting an affidavit of merits and a verified complaint as part of his motion (see, CPLR 3215[f]; *Henriquez v. Purins*, 245 AD2d 337 [2d Dept 1997]; *Rafiq v. Weston*, 171 AD2d 783 [2d Dept 1991]; *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]).

Defendants cross-move pursuant to CPLR 3012(d) for an order compelling plaintiff to accept their Verified Answer to the Complaint, which was not timely served. Pursuant to CPLR 3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default".

It is undisputed that the defendants received the summons and complaint by mail on March 1, 2011 and that a verified answer was served on August 10, 2011 and filed on August 15, 2011. Defendants present as their reasonable excuse for the delay that:

the defendants received by mail the summons and complaint on March 1, 2011, and upon receipt, the comptroller for the defendants, Annamarie Macpherson, faxed over the documents to the defendants' insurance broker, Grober-Imbey, and then the comptroller followed up to make sure the summons and complaint were being taken care of in a legally proper manner and she was informed by them that it was, on or about July 13, 2011, a representative of CAN Insurance contacted Ms. Macpherson with a claim number and the instant law firm was then retained to represent the defendants, thereafter defendants' attorney contacted plaintiff, informed him that there was a mistake involving the insurance broker and requested an extension of time to answer which request was denied, a verified answer was then served on August 10, 2011 and filed on August 15, 2011.

Defendants have provided a potentially meritorious defense to plaintiff's claim via their Verified Answer, which although it is only verified by an attorney as opposed to by defendants themselves, the Second Department has held that such a verified answer is sufficient to demonstrate the existence of a potentially meritorious defense in the context of a motion for leave to serve a late answer (*see, Goldman v. City of New York*, 287 AD2d 482 [2d Dept 2001]; *Grovice Properties, LLC v. 83-10 Astoria Boulevard LLC*, 2011 NY Slip Op 31004U [Sup Ct, Nassau County 2011]). Additionally, plaintiff failed to demonstrate how it was prejudiced by the delay. The Appellate Division, Second Department has held that where there is a lack of prejudice to the plaintiff, a meritorious defense, and a 2½ month delay in serving the answer, in light of the public policy of resolving cases on the merits, such a delay in serving the answer should be overlooked (*Kaiser v. Delaney*, 255 AD2d 362 [2d Dept 1998]). The instant court notes that the defendants' default in serving an Answer was only a matter of a little more than five (5) months (*see, Mulder v. Rockland Armor & Metal Corp.*, 140 AD2d 315 [2d Dept 1988], stating "[i]n view of the relatively short period of the delay, the absence of any claim of prejudice to the plaintiff, the existence of a possible meritorious defense, the absence of any willfulness on the appellants' part and the public policy in favor of resolving cases on the merits, the Supreme Court should have . . . granted the appellants leave to file late answers]."

Accordingly, plaintiff's motion for a default judgment is denied and plaintiff is compelled to accept defendants' Verified Answer attached as "Exhibit B" to the instant motion to renew/reargue. In light of this court's decision, the inquest hearing scheduled for February 7, 2012 is marked off calendar.

The parties are directed to appear for a Preliminary Conference to be held on Wednesday, April 18, 2012, 9:30 A.M., Preliminary Conference Part, Room 314, 88-11 Sutphin Blvd., Jamaica, New York.

A courtesy copy of this order is being mailed to plaintiff, pro se, and to defendant's attorney.

This constitutes the decision and order of the court.

Dated: March 1, 2012

.....

Howard G. Lane, J.S.C.