

Hawthorne v 94 Saint Marks LLC

2014 NY Slip Op 31545(U)

June 16, 2014

Sup Ct, NY County

Docket Number: 158113/2012

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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BENJAMIN HAWTHORNE,

Plaintiff,

Index No. 158113/2012

-against-

DECISION/ORDER

94 SAINT MARKS LLC and HORSE TRADE
MANAGEMENT GROUP, INC.,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits..... | <u>2</u> |
| Replying Affidavits..... | <u>3</u> |
| Exhibits..... | <u>4</u> |

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained while present on defendants' property. Defendant Horse Trade Management Group, Inc. ("Horse Trade") now moves for an order pursuant to CPLR § 3215(a) granting default judgment against plaintiff for his failure to reply to Horse Trade's counterclaims. Plaintiff cross-moves for an order pursuant to CPLR § 3215(c) dismissing Horse Trade's counterclaims as abandoned or, in the alternative, an order granting it leave to submit a reply to said counterclaims. In response, Horse Trade has cross-moved for an order pursuant to CPLR § 3025(b) granting it leave to amend its answer to assert counterclaims against plaintiff. For the reasons set forth below, Horse Trade's motion and additional cross-motion are denied and plaintiff's cross-motion

is granted only in part.

The relevant facts are as follows. On or about August 10, 2012, plaintiff allegedly tripped and fell while present on defendants' property sustaining injuries to his right ankle (the "accident"). Thereafter, on or about November 19, 2012, plaintiff commenced the instant action to recover damages stemming from the accident. On January 22, 2013, Horse Trade served its answer with counterclaims on plaintiff by regular mail. In its answer, Horse Trade asserted counterclaims for common law and contractual indemnification and common law negligence. To date, plaintiff has not submitted a reply to said counterclaims.

Pursuant to CPLR § 3215, a party must seek entry of a default judgment within one year from the date of the alleged default. "If the [party] fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the [counterclaims] as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the [counterclaims] should not be dismissed." CPLR § 3215(c); *see also Clemente v. Clemente*, 50 A.D.3d 514 (1st Dept 2008). In order to demonstrate "sufficient cause," the party must present a valid excuse for the delay in moving for a default judgment and demonstrate the merits of the counterclaims. *See Valentin v. Rinder*, 65 A.D.2d 716 (1st Dept 1978); *Herzbrun v. Levine*, 23 A.D.2d 744 (1st Dept 1965). The First Department has made clear that "CPLR § 3215(c)'s mandate that an action is deemed abandoned unless "proceedings" towards a default are taken within one-year of the default, does not apply to indemnification [and contribution] claims until liability is established." *IMP Plumbing & Heating Corp. v. 317 E. 34th St., LLC*, 89 A.D.3d 593, 594 (1st Dept 2011).

In the present case, Horse Trade's motion for default judgment is denied in its entirety and

plaintiff's cross-motion to dismiss the counterclaims as abandoned is granted only as to the common law negligence claim. As an initial matter, Horse Trade's counterclaim for common law negligence must be dismissed as abandoned as it undisputed that Horse Trade failed to move for relief within one year of plaintiff's default and Horse Trade has failed to show sufficient cause why said counterclaim should not be dismissed. Indeed, Horse Trade fails to present any evidence demonstrating the merits of its claim for common law negligence. However, the portion of plaintiff's cross-motion for an order dismissing Horse Trade's counterclaims for indemnification is denied as liability on plaintiff's underlying claim has not yet been established. Thus, contrary to plaintiff's assertion, dismissal of the counterclaims for indemnification is not warranted at this time.

Additionally, Horse Trade's motion for default judgment is denied in its entirety as this court has already dismissed its common law negligence counterclaim and this court will otherwise use its discretion to direct Horse Trade to accept plaintiff's late reply as to the indemnification counterclaims. It is well settled that a default shall be granted unless, in opposition, the party demonstrates a reasonable excuse for the default. *See* CPLR § 3012(d); *see also Terrones v. Morera*, 295 A.D.2d 254, 255 (1st Dept 2002). However, due to the public policy favoring determination of cases on their merits, even if no excuse is proffered, a court has the discretion to direct the moving party to accept late service if there is evidence that the defaulting party never intended to abandon its defense of the action and the moving party will not be prejudiced. *See Leogrande v. Glass, M.D.*, 106 A.D.2d 431, 432 (2d Dept 1984). In the present action, while plaintiff has failed to articulate a reasonable excuse for his failure to timely submit a reply to Horse Trade's counterclaims, the court finds that there is evidence that plaintiff never intended to

abandon his defense to the counterclaims and there is no prejudice to Horse Trade in allowing plaintiff to now submit a reply. Plaintiff has appeared at several conferences in front of this court and both parties have been timely proceeding with discovery. Indeed, it is quite clear from plaintiff's involvement in this action and its opposition to the instant motion that plaintiff has no intention of abandoning the action he initiated. Moreover, there can be no prejudice to Horse Trade in ordering it to accept plaintiff's late reply as no liability has yet been established and the issue of indemnity is not yet ripe. Thus, although the court does not condone the plaintiff's failure to act in a timely manner, in the interest of deciding cases on the merits it shall exercise its discretion and order Horse Trade to accept plaintiff's untimely reply.

Finally, Horse Trade's cross-motion for leave to amend its answer is denied as procedurally improper. A moving party cannot subsequently cross-move off of an opposing party's cross-motion. If Horse Trade still seeks the relief requested in its attempted cross-motion, it must move by separate notice of motion for such relief.

Based on the foregoing, Horse Trade's motion is denied in its entirety and plaintiff's motion is granted only to the extent that Horse Trade's counterclaim for common law negligence is hereby dismissed and Horse Trade is directed to accept plaintiff's untimely reply to its counterclaims. Thus, it is hereby

ORDERED that plaintiff is to serve a reply to Horse Trade's counterclaims within twenty (20) days of the date of this order. This constitutes the decision and order of the court.

Dated: 6/16/14

Enter: _____

PK
 J.S.C.
 CYNTHIA S. KERN
 J.S.C.