SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 153415/2018

214 LAFAYETTE HOUSE LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

AKASA HOLDINGS, LLC,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 67, 68, 69, 70, 71, 72

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this action seeking declaratory relief, specifically the enforcement of certain easements, plaintiff 214 Lafayette House LLC ("Lafayette") moves, pursuant to CPLR 2221(d), for reargument of its motion (motion sequence 001) seeking a default judgment against defendant Akasa Holdings, LLC ("Akasa") ("the underlying motion"). Akasa opposes the motion and cross-moves, pursuant to CPLR 2221(e), to renew that branch of its cross motion (motion sequence 001) for the costs it incurred in opposing the underlying motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the decision and order of this Court dated June 5, 2019 and entered June 11, 2019 ("the underlying order"), pursuant to which this Court denied Lafayette's motion for a default judgment against Akasa; granted that branch of Akasa's

cross motion seeking to compel Lafayette to accept its untimely answer; and denied that branch of Akasa's cross motion seeking costs and attorneys' fees against Lafayette. Doc. 59. Any additional relevant facts are set forth below.

In the underlying order, this Court noted that Akasa appealed the March 2018 order in the 2016 action and that the appeal was still pending. However, by order dated September 3, 2019, the Appellate Division, First Department modified the March 2018 order "to declare in [Lafayette's] favor on the first cause of action that [Akasa] purchased 57 Crosby with constructive notice of the 1981 easement", and otherwise affirmed the order. *Akasa Holdings, LLC v 214 Lafayette House, LLC*, 177 AD3d 103 (1st Dept 2019).

Lafayette now moves (motion sequence 002), pursuant to CPLR 2221(d), to reargue its motion for default.[1] In support of its motion, Lafayette argues that this Court misapprehended the law and the facts of this case in finding that: 1) Akasa was not properly served; 2) it was required by CPLR 3215(g)(4) to serve a copy of the summons and complaint on Akasa; 3) it failed to mail a copy of the summons and complaint to Akasa at the latter's last-known (and still current) address; 4) it failed to establish the facts constituting the claim; 5) Akasa had a reasonable excuse for failing to answer the complaint; and 6) Akasa was not required to demonstrate a meritorious defense to the complaint.

In opposition, Akasa argues that Lafayette's motion must be denied because the latter raises the same arguments that it did in support of its motion for a default judgment. Akasa further asserts that, even if this Court misconstrued the facts and/or the law in deciding the underlying order, it properly exercised its discretion in allowing it to serve a late answer.

[1] Lafayette also filed a notice of appeal from the underlying order on July 12, 2019. Doc. 66.

In support of its cross motion, Akasa argues that it is entitled to over $8,000 in legal fees as a result of having to oppose Lafayette's motion for default and cross-moving for Lafayette to accept its answer.

LEGAL CONCLUSIONS:

A. LAFAYETTE'S MOTION FOR REARGUMENT

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992] [internal quotation marks and citation omitted], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221 [d] [2]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). It is well settled that "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted" (*Matter of Setters v Al Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]).

Service of Process

Lafayette correctly asserts that this Court erred in determining that Akasa was not properly served. As Lafayette asserts, service on Akasa was complete once it was served via the Secretary of State pursuant to Limited Liability Company Law section 303(a). Lafayette is also correct that 3215(g)(4) is inapplicable herein given that that section only applies to service

effectuated pursuant to Business Corporation Law section 306.[2] Further, Lafayette is correct that CPLR 3215(g)(4) solely requires an additional mailing of the summons, and not of the complaint. Thus, this Court grants reargument based on these correct arguments by Lafayette.

Facts Constituting the Claim

Although, as Lafayette asserts, its principal, Marcus Nispel, indeed set forth certain facts within his personal knowledge in his affidavit in support of the underlying motion, the portions of his affidavit addressing the core issues in the case consist of either legal conclusions based on what "Lafayette's attorneys have advised [him]", or his own legal conclusions. Doc. 22 at pars. 11-13. Thus, this Court properly determined that Nispel's affidavit failed to set forth the facts constituting the claim.

Reasonable Excuse/Meritorious Defense

Lafayette argues that this Court "disregarded its obligation to require [that] Akasa demonstrate a meritorious defense to the [c]omplaint" (Doc. 63 at par. 5; see also Doc. 63 at pars. 54, 55) and that Akasa had no reasonable excuse for its failure to serve a timely answer. Doc. 63 at par. 56.

Initially, Lafayette's assertion that Akasa was required to establish a meritorious defense is incorrect. "An affidavit of merit is not required on a motion for leave to serve a late answer where, as here, no default order or judgment [was] entered." *Cirillo v Macy's*, 61 AD3d 538 (1st Dept 2009).[3]

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[2] Curiously, despite its vigorous argument that it was not required to serve an additional copy of the summons and complaint on Akasa, it admits that it made such service on Akasa at its last known address and on its attorney on October 17, 2019. Doc. 63 at par. 26.

[3] Thus, Lafayette's argument that the March 2018 order in the 2016 action establishes the lack of merit of Akasa's claim (Doc. 63 at par. 57) is of no moment herein.

Additionally, even assuming, arguendo, that Lafayette satisfied the requirements of CPLR 3215(f) for a default judgment, Akasa established that it had a reasonable excuse for failing to serve a timely answer. *See Peg Bandwidth, LLC v Optical Communications*, 150 AD3d 625, 626 (1st Dept 2017). As this Court stated in the underlying order:

> Under CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading "upon such terms as may be just," provided that there is a showing of a reasonable excuse for the delay. In reviewing a discretionary determination, the proper inquiry is whether the court providently exercised its discretion.
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> In *Artcorp Inc. v Citirich Realty Corp.* (140 AD3d 417, 30 NYS3d 872 [1st Dept 2016]), [the Appellate Division, First Department] adopted the factors set forth in *Guzetti v City of New York* (32 AD3d 234, 238 [1st Dept 2006, McGuire, J., concurring]) as those that "must . . . be considered and balanced" in determining whether a CPLR 3012 (d) ruling constitutes an abuse of discretion. Those factors include the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense (32 AD3d at 238).

Emigrant Bank v Rosabianca, 156 AD3d 468, 472-473 (1st Dept 2017).

An examination of these factors confirms that this Court properly exercised its discretion in granting Akasa leave to submit a late answer.

Pursuant to a change of attorney filed April 5, 2018, David Slarskey, Esq. of Slarskey LLC ("Slarskey") became counsel for Akasa in the 2016 action. See Ind. No. 155738/16, Doc. 143. Just a few days later, on April 13, 2018, Lafayette commenced the captioned action. Doc. 1. Thus, as of the time this action was commenced, Lafayette and/or its counsel knew or should have known that Akasa was represented by counsel, even if it was not certain that Akasa would be represented by the same attorney in this action.

Lafayette served Akasa via the Secretary of State on April 13, 2018. Doc. 2. On May 29, 2018, Lafayette served Akasa with the motion for a default judgment. Doc. 24. The following

day, an amended notice of motion for a default judgment was served. Doc. 25. Both the notice of motion and amended notice of motion were served on Akasa's designated agent for service in Buffalo, New York. Docs. 24-26.

On September 25, 2018, Slarskey LLC filed a notice of appearance on Akasa's behalf and wrote to this Court requesting a conference, representing that it had just discovered the existence of this action through a "routine review of the Court's docket." Doc. 28.[4] Slarskey further stated that, although he had spoken to Lafayette's attorney, Claudia Jaffe, Esq. of Butler, Fitzgerald, Fiveson & McCarthy, about the dispute only two weeks before the default motion was filed,[5] and Jaffe thus knew that he was representing Akasa, she did not ask Slarskey whether he would accept service on behalf of Akasa in this action. Doc. 29.

During a telephone conference with this Court held on or about September 26, 2018, Jaffe refused to agree to accept Akasa's answer and Slarskey stated his intention to move to compel Lafayette to accept its late answer.

On September 28, 2018, Lafayette filed an affidavit of service reflecting that the summons and complaint, as well as a notice reflecting service on the Secretary of State on April 19, 2018, were mailed to Akasa at 40-55 Crosby Street, New York, New York and to Slarskey, the prior day.[6]

Krantz maintains that, until he learned of the existence of this action in September 2018, he never received the summons and complaint from Lafayette, its attorney Jaffe, or the Secretary

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[4] In an affidavit in support of the underlying motion, Tony Krantz, principal of Akasa, attested to the fact that he did not become aware of this action until September 12, 2018, when he was retrieving documents from the court's docket to prepare for the appeal in the 2016 action. Doc. 35 at par. 7.

[5] It is unclear from Slarskey's letter whether he spoke to Jaffe two weeks before the filing of the summons and complaint or two weeks before the motion for default was filed. Doc. 29.

[6] Lafayette does not explain why it did not mail its motion for default to Akasa at the Crosby Street address. This Court finds Lafayette's failure to do so rather curious given Krantz's representation that he had a personal and professional friendship with Nispel. Doc. 35 at par. 6.

of State, and that within two weeks after learning of the existence of the captioned action, Akasa retained Slarskey as its counsel. Doc. 35 at pars. 7, 9. Akasa then cross-moved on October 10, 2018 to compel Lafayette to accept its answer. Doc. 33. The same day, Akasa filed an answer with counterclaim, which was rejected by Lafayette. Docs. 41, 42.

The foregoing facts establish that any delay by Akasa was not excessive or unreasonable. This action was filed on April 13, 2018 and, although Akasa's answer was due in May 2018, it did not learn about the action until September 2018. It then promptly retained Slarskey as counsel in this matter approximately two weeks after learning of the action, and Slarskey filed an answer and counterclaim on October 10, 2018. Doc. 41. Thus, Akasa's delay in answering was, at most, five months, and Lafayette fails to explain how it was prejudiced, if at all, by this delay.

This Court has "broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve a timely answer." *Cirillo*, 61 AD3d at 540 (*citation omitted*). Since Akasa was served with process via the Secretary of State, service upon it was presumptively valid. *See Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev.*, LLC, 111 AD3d 800 (2d Dept 2013). As this Court stated in its underlying order, although Akasa's "less than compelling" excuse for failing to serve a timely answer is that it never received the summons and complaint, such excuse is acceptable given the "strong preference in our law that matters be decided on their merits in the absence of demonstrable prejudice." *Elemery Corp. v 773 Assoc.*, 168 AD2d 246, 247 (1st Dept 1990); *see also Peg Bandwidth*, 150 AD3d at 626; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). Here, Lafayette fails to establish any prejudice it sustained as a result of Akasa's delay or any willfulness on the part of Akasa.

Finally, Akasa, through Krantz's affidavit, has established the potential merits of its defense. Specifically, Krantz asserts that there are structures belonging to Akasa encroaching across the 1981 easement which could give rise to a defense of adverse possession.

Given this Court's analysis of the foregoing factors, as well as the fact that Akasa is represented by counsel and clearly wishes to participate in this litigation, this Court, upon reargument, adheres to its original determination granting Akasa leave to serve a late answer. This Court also reiterates that it considers Jaffe's actions to constitute "sharp practice" insofar as she knew that Akasa was represented by counsel in the 2016 action but nevertheless moved against it for a default judgment in the captioned action without even the courtesy of a telephone call to Slarskey seeking to ascertain whether Akasa had received the summons and complaint.

B. AKASA'S CROSS MOTION TO RENEW

Akasa's cross motion to renew its prior motion seeking attorneys' fees is denied.

On a motion to renew, a movant must demonstrate that there are "new facts not offered on the prior motion that would change the prior determination or . . . [that] there has been a change in the law that would change the prior determination" and there must be a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Ezzard v One E. Riv. Place Realty Co., LLC*, 137 AD3d 648, 649 [1st Dept 2016]).

In its underlying order, this Court held that, although it did not condone Jaffe's conduct, her actions were not punishable pursuant to 22 NYCRR 130-1.1. Doc. 59. Similarly, it finds that Jaffe's arguments in connection with the instant motion are not frivolous. Moreover, although Akasa asserts that it is entitled to collect over $8,000 in legal fees from Lafayette, the invoices annexed to its renewal motion (Doc. 71) are not consistent with this claim.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff 214 Lafayette House LLC seeking reargument of its motion for a default judgment against defendant Akasa Holdings, LLC (motion sequence 001) is granted to the extent set forth above and, upon reargument, this Court adheres to its prior decision; and it is further

ORDERED that the cross motion by defendant Akasa Holdings, LLC seeking renewal of its motion for sanctions against plaintiff 214 Lafayette House LLC (motion sequence 001) is denied; and it is further

ORDERED that, within 20 days after entry of this order, counsel for defendant Akasa Holdings, LLC shall serve a copy of this order, with notice of entry, upon plaintiff 214 Lafayette House LLC by efiling protocol; and it is further

ORDERED that counsel are directed to appear for a previously scheduled preliminary conference in Room 280, 80 Centre Street, on February 11, 2020, at 2:15 PM; and it is further

ORDERED that this constitutes the decision and order of the court.

12/3/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE