Hanover Ins. Co. v TJ Piping & Heating Inc.
2020 NY Slip Op 33039(U)
September 15, 2020
Supreme Court, New York County
Docket Number: 150952/2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

HANOVER INSURANCE COMPANY

INDEX NO. 150952/2018

MOT. DATE

- v -

MOT. SEQ. NO. 005, 006 & 007

TJ PIPING & HEATING INC.

The following papers were read on this motion to/for default judgment (005 and 006) and vacate (007)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s)._____
Replying Affidavits ECFS DOC No(s)._____

This is a property damage action arising from defendant T.J. Piping's alleged breach of contract "to service, repair, renovate, and/or inspect the sprinkler system in a workmanlike manner and in accordance with New York City Code." This action has been pending for more than two years. Previously, in an order dated February 6, 2020, the court struck defendant's answer due to its "repeated failure to appear for court conferences…" In the 2/6/20 Order, the court explained:

> This order stems from defendant's third failure to appear for a duly scheduled conference in these joined actions. In an order dated October 30, 2018 under Index Number 150952/18 (Action 1), the court noted that defendant had failed to appear for a conference scheduled that day. The·10/30/18 Order warned defendant that its failure to appear on the adjourned date may result in an order striking its answer.
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> In another written order dated June 18, 2019 in Action 1, the court noted defendant's second failure to appear for a conference scheduled on June 18, 2019. The 6/18/19 Order advised defendant that "[t]his is defendant's second failure to appear. Defendant is already on notice that its failure to appear may result in an order striking its answer."
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> Finally, both actions were on the Part 8 calendar on February 4, 2020 at 9:30am for conferences (see consolidation order dated January 22, 2020). Defendant is represented by the same counsel in both actions. Again, there was no appearance by defendant by 11:00am that day.

Notice of entry of the 2/6/20 Order was filed on February 14, 2020. Defendant then filed an order to

Dated: 9/15/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

show cause to vacate the 2/6/20 Order on March 10, 2020 (motion sequence 4) while plaintiffs each filed motions for a default judgment on March 13, 2020 and May 13, 2020 (motion sequences 5 and 6, respectively). Due to the ensuing Covid-19 pandemic which resulted in the shutdown of NYSCEF to court filings for a lengthy period of time, the OSC on sequence 4 was not presented to the court for signature and was not considered until on or about May 14, 2020, when the court declined to sign same, stating in relevant part:

> Movant's counsel has failed to address each of the defaults identified by the court as a basis for striking the defendant's answer. Having failed to do so, movant is unable to demonstrate a basis for vacating the 2/6/20 Order. Nor did movant address the substantial delay in bringing this application… movant waited more than a month to file the first unsigned order to show cause, failed to present it for signature before the court system shut down on March 16, 2020 and now makes a barebones application for extraordinary relief.

On June 11, 2020, defendant filed another order to show cause to vacate the 2/6/20 Order which also requested that the affirmation and exhibits in support be sealed (motion sequence 007). This second OSC contained a temporary restraint submitted on consent of all sides temporarily sealing the affirmation and exhibits in support to all except for a party and counsel of record, which the court signed. Plaintiffs oppose the motion to vacate.

Motion sequence numbers 005, 006 and 007 are hereby consolidated for the court's consideration and disposition in this single decision/order. For the reasons that follow, the motion to vacate is granted in part and upon certain conditions and the motions for default judgment are denied as moot.

Defendant's default is excusable provided it has a reasonable excuse for failing to comply with the prior orders and a meritorious defense (CPLR § 5015). As a matter of public policy in New York, cases should be decided on the merits rather than by default judgment (*US Bank Nat. Ass'n v. Richards*, 155 AD3d 522 [1st Dept 2017]). Upon review of the pleadings, the court finds that defendant has met its burden as to the latter prong.

As to the former prong, the 2/6/20 Order struck defendant's answer due to three separate failures to appear for court ordered conferences. The first two failures to appear resulted in orders which warned the defendant that another default in appearing could result in an order striking the defendant's answer. In the order to show cause on sequence 007, defense counsel Michael Rawlinson, Esq. explains that not only were there failures within his firm in terms of calendaring, but that he also suffered significant personal issues which even plaintiffs' counsel is sympathetic to, as is the court.

The issue here is whether the calendaring issues described by defense counsel coupled with his own personal issues establish a reasonable excuse for failing to appear for three separate conferences. Plaintiffs' counsel, specifically Kaveri Arora, Esq., explains in detail a very troubling procedural history which she argues "reflects not only Defendant's failures to appear for conferences, but also persistent delays and unjustifiable excuses during the entirety of this proceeding which has prevented the parties from moving towards a final resolution in this matter." Indeed, there can be no dispute that both the defendant and defense counsel's conduct has caused plaintiffs to incur significant and unnecessary costs.

On the issue of defendant's own conduct, Attorney Arora explains:

> Defendant's witness appeared for a deposition on December 11, 2019. However, the witness was hostile and refused to answer even the most basic questions (even against the advice of counsel), forcing the parties to terminate the deposition and agree that the witness would need to be produced again. After this deposition, the parties emailed and agreed that the deposition of Defendant's witness

> should take place before a referee. The parties planned to raise this issue with the Court at the status conference scheduled for February 4, 2020.

Attorney Arora details further deficiencies regarding defendant's discovery responses. Meanwhile, Attorney Rawlinson claims that "the events of my personal life over the months preceding and including the date of the default were such that my attention from the matter was diverted to where I did not supervise the workings of staff and calendaring of appearances as I would have done under normal circumstances."

At the outset, the court must address defendant's request to seal. As a general rule, the public is entitled to access to judicial proceedings and court records (*Mosallem v. Berenson,* 76 AD3d 345 [1st Dept 2010] *citing Mancheski v. Gabelli Group Capital Partners*, 39 AD3d 499 [1st Dept 2007]). The public's right to access, however, is not absolute (*id. citing Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1 [2000]).

Pursuant to 216.1(a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1[a]):

> Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.

"Although the term 'good cause' is not defined, 'a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action'" (*Mosallem, supra* at 349, *quoting Gryphon Dom. VI, LLC*, 28 AD3d 322, 325 [1st Dept 2006]). The party seeking to seal court records must demonstrate compelling circumstances to justify restricted public access (*Mancheski*, *supra* at 502; see also *Maxim, Inc. v. Feifer*, 145 AD3d 516 [1st Dept 2016]). The First Department, however has been reluctant to allow the sealing of court records, even when both parties have presented a joint application (*see i.e. Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 28 AD3d 322 [1st Dept 2006]).

The court does not find that either defendant nor Attorney Rawlinson have met their burden and established that sealing the entire motion to vacate is warranted. Indeed, sealing would prevent a meaningful inquiry as to whether defendant is even entitled to the relief it seeks herein, absent a cursory dispatch of the present motion or an order sealing the court's own decision. The mere potential for embarrassment or damage to professional reputation does not necessarily warrant sealing (*see i.e. Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 28 AD3d 322 [1st Dept 2006]; *see also Doe v. New York University*, 6 Misc3d 866 [Sup Ct, NY Co 2004]; *P.D. & Associates v. Richardson*, 64 Misc3d 763 (Sup Ct, Westchester Co 2019]).

However, the sensitive nature of the family matters raised by Attorney Rawlinson do outweigh any of the public interest in accessing such information. Therefore, that portion of the motion to seal is granted only to the extent that within 15 days from entry of this order, Attorney Rawlinson is directed to provide a redacted copy of his affirmation in support of the motion which blacks out all references to his family, only. The balance of his affirmation and all other documents submitted in support of the motion shall be unsealed by the clerk within 60 days. The court will review the redacted affirmation of Attorney Rawlinson and issue a separate order directing the clerk to permanently seal NYSCEF Document Number 112 and "replace" said document with the redacted affirmation which shall be available to the public.

Turning to the balance of the motion, the court finds that the confluence of errors at defense counsel's firm, which were compounded by his own personal issues, presents a reasonable excuse for defaulting in appearing on 2/6/20 and warrants vacatur of the order striking defendant's answer subject to the following conditions.

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false.

Defendant's firm and Attorney Rawlinson's conduct has unnecessarily delayed and prolonged the resolution of this case. Indeed, Attorney Rawlinson admits that his own personal issues caused him to fail to supervise and even pay attention to this litigation, all at plaintiffs' expense. The failures described by Attorney Rawlinson at his firm and his own failure to supervise and meet his obligations as counsel of record in this case evince frivolous conduct.

By vacating the 2/6/20 Order, plaintiffs' subsequent motions for a default judgment are necessarily moot and therefore were a waste of their resources. Accordingly, the court finds that as a condition of vacating the 2/6/20 Order, defendant must reimburse plaintiffs for the fees they reasonably expended in connection with the 2/6/20 appearance and making the motions for a default judgment. In the event that the parties cannot agree on a sum for such attorneys fees, the parties shall settle an order supported by affirmations attesting to the fees incurred and such other appropriate proof as is necessary (i.e. hourly billing records) so that the court may fix an award for fees incurred. In the event that the defendant fails to pay plaintiffs' attorneys fees, the 2/6/20 Order shall remain and plaintiffs may renew their motions for a default judgment.

Conclusion

Accordingly, it is hereby

ORDERED that motion sequence 007 is granted to the following extent:

> within 15 days from entry of this order, Attorney Rawlinson is directed to provide a redacted copy of his affirmation in support of the motion (NYSCEF Document Number 112) which blacks out all references to his family, only, and email a courtesy copy of same to Eric Wursthorn, Esq., Principal Court Attorney, at ewurstho@nycourts.gov. The balance of his affirmation and all other documents submitted in support of the motion shall be unsealed by the clerk within 60 days of entry of this decision/order upon service of notice of entry of this decision/order upon the County Clerk and the Clerk of Trial Support. The court will review the redacted affirmation of Attorney Rawlinson and issue a separate order directing the clerk to permanently seal NYSCEF Document Number 112 and "replace" said document with the redacted affirmation which shall be available to the public.
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> And
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> The 2/6/20 Order striking the defendant's answer is vacated upon the condition that defendant pay plaintiffs' attorneys fees which they each incurred in connection with appearing in court on 2/6/20 and making motion sequence numbers 005 and 006. In the event that the parties cannot agree on a sum for such attorneys fees, within 90 days from entry of this order, the parties shall settle an order supported by affirmations attesting to the fees incurred and such other appropriate proof as is necessary (i.e. hourly billing records) so that the court may fix an award for the fees incurred.

And it is further

ORDERED that motion sequence number 005 and 006 are denied as moot and without prejudice to renew upon defendant's failure to pay the attorneys fees awarded as a condition of vacating the 2/6/20 Order.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 9/15/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.