

**1855 Bronxdale Realty Corp. v Casey**

2020 NY Slip Op 33546(U)

September 22, 2020

Supreme Court, Bronx County

Docket Number: 24938/2019E

Judge: Jr., Kenneth L. Thompson

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X

1855 BRONXDALE REALTY CORP.,  
1857 BRONXDALE REALTY, INC.,

Index No: 24938/2019E

Plaintiffs.

-against-

JAMES CASEY, SEAMUS CASEY, DECLAN  
"DOE", GREEN CASTLE RESTORATION, INC.,  
GREEN CASTLE A. MANAGEMENT. CORP.,

**DECISION AND ORDER**

**Present:**  
**HON. KENNETH L. THOMPSON, JR.**

Defendants

\_\_\_\_\_ X

The following papers numbered 1 to read on this **motion to amend pleading/ motion to dismiss**

No	On Calendar of August 6, 2020	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____	<u>1</u>
Answering Affidavit and Exhibits-----	_____	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Green Castle A. Mgmt. Corp. (Management) moves pursuant to CPLR 3205 for leave to amend defendants' answer to include a counterclaim. Plaintiff cross moves for default judgment against defendants, Carey s/h/a Casey, Declan Doe and Green Castle Restoration, Inc., (Restoration). Defendants, James Casey, Seamus Casey, Declan Doe and Restoration move pursuant to CPLR 3211 to dismiss the complaint or in all the alternative, granting leave to file an answer to the complaint for said defendants. The motions and cross motion are hereby consolidated for purposes of decision and disposition

This action arose as a result of a dispute between the plaintiff who contracted with some or all of defendants to construct a six-family dwelling on plaintiff's property.

With respect to Management's motion to amend its answer:

It is well established that leave to amend a pleading is freely given “absent prejudice or surprise resulting directly from the delay” (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; see CPLR 3025 [b]).

“Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [2001]).

(*Anoun v. City of N.Y.*, 85 A.D.3d 694 [1<sup>st</sup> Dept 2011]).

There is no evidence that the proposed amendment of the answer is prejudicial and it is uncontroverted that there has been no depositions or exchange of written discovery. As defendant had previously initiated a mechanic’s lien on the subject property the counterclaim is no surprise. The order of Judge Julia Rodriguez dated January 7, 2020, cancelling and discharging defendants’ mechanics lien was not on the merits and therefore the discharge of the lien does not have res judicata nor collateral estoppel effect.

Accordingly, the motion for leave to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof.

With respect to that branch of the non-answering defendants’ motion seeking to dismiss the complaint, Restoration’s argument that it is not a proper party, is controverted by the appearance of Restoration’s name and address at the top of the contract executed by the parties for the construction of the six family home. With respect to service of process upon the individual defendants, service was at the Wicked Wolf, a restaurant which James/Seamus Casey/Carey

acknowledges he owns. His employee accepted service on behalf of defendants, without protest.

Accordingly, that branch of the motion seeking to dismiss the complaint is denied.

With respect to that branch of the non-answering defendants' motion to serve a late answer:

[A] showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where, as here, no default order or judgment has been entered (see *Nason v Fisher*, 309 AD2d 526 [2003]; *DeMarco v Wyndham Intl.*, 299 AD2d 209 [2002]; *Terrones v Morera*, 295 AD2d 254 [2002]). In light of the brevity of the delay, the absence of prejudice to plaintiff and the public policy favoring the resolution of disputes on their merits (see *Hosten v Oladapo*, 52 AD3d 658 [2008])" leave to serve a late answer is properly granted.

(*Jones v 414 Equities LLC*, 57 A.D.3d 65, 81 [1<sup>st</sup> Dept 2008]).

While the non-answering defendants have not answered for an extended period, part of that period was during the current COVID-19 pandemic, which is a reasonable excuse for their failure to serve a timely answer. (CPLR 3012 [d]).

Accordingly, that branch of the non-answering defendants' motion seeking leave to serve an untimely answer is granted, and the answer shall be served within 45 days of the entry of this decision and order.

With respect to plaintiff's cross motion for a default judgment the cross motion is denied. "While a verified pleading may be used in lieu of an affidavit of merit in default judgment cases (CPLR 105 [u]), it will not be sufficient if it fails to set forth evidentiary facts (*see, e.g., Bethlehem Steel Corp. v Solow*, 51 NY2d 870)." *Celnick v Freitag*, 242 AD 2d 436 (1<sup>st</sup> Dept 1997). The evidentiary facts needed for this Court to issue a default judgment has not been elucidated in plaintiff's affidavit. The verified complaint was verified by an attorney and is

therefore not evidence. A "complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR §3215." *Mullins v DiLorenzo*, 199 AD2d 218, 219 (1<sup>st</sup> Dept 1993).

It is hereby:

ORDERED that the motion of Green Castle A. Mgmt. Corp., for leave to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof, and it is further:

ORDERED that the motion of James Casey, Seamus Casey and Declan Doe, is denied to the extent it seeks dismissal of the complaint, and the motion is granted to the extent it seeks leave to serve an answer. The answer shall be served within 45 days of the entry of this decision and order, and it is further:

ORDERED that plaintiff's cross motion for default judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 9/22/2020

  
KENNETH L. THOMPSON JR. J.S.C.