

Kegelman v Town of Otsego

2020 NY Slip Op 34603(U)

June 17, 2020

Supreme Court, Otsego County

Docket Number: Ind. No. EF2019-0565

Judge: Brian D. Burns

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At a term of the Supreme Court of the State of New York, held in and for the County of Otsego, at Cooperstown, New York on June 17, 2020

PRESENT: HON. BRIAN D. BURNS, Acting Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

Brian J Kegelman and Joan C Kegelman

DECISION AND ORDER

Plaintiffs,

Ind. No. EF2019-0565

v.

The Town of Otsego,

Defendant.

The court held a hearing via Skype for Business on plaintiffs' motion for a default judgment. The parties were granted an opportunity to submit briefs after the hearing. Those briefs have been reviewed and considered. The court has also considered the witnesses' testimony at the hearing and was in a position to make determinations as to the witnesses' credibility regarding their testimony.

Relevant Background

Plaintiffs previously filed a petition pursuant to Article 78 of the CPLR. By decision and order dated August 1, 2019, the court dismissed the petition under Index Number 2019-0349 pursuant to CPLR 409(b). Plaintiffs filed a Summons and Complaint on July 10, 2019 in the NYSCEF system under Index Number EF2019-565 which is referenced under "Notice of Claim". A verification is annexed to the Complaint. Plaintiffs filed an Affidavit of Service on July 11, 2019 indicating service on the Town of Otsego Supervisor on July 10, 2020 at 2:30 pm. Plaintiffs filed the Complaint again on July 19, 2019 under Index Number EF2019-565. A

verification was annexed to the Complaint. Plaintiffs filed an Affidavit of Service on July 19, 2019 indicating service upon the Town of Otsego Town Supervisor on July 16, 2019. A separate verification to the Complaint was filed on August 6, 2019.

A motion seeking a default judgment was filed on January 24, 2020. Respondent opposed the motion on numerous grounds - most of which addressed the merits of the action. The court held that the respondents did not file an Answer within the time limits set forth in CPLR § 3012(a).

There is a purported Notice of Claim dated May 23, 2017 prepared by plaintiffs' attorney at the time. There is another Notice of Claim which was not verified. Finally, there is a Notice of Claim which was verified on December 11, 2018 and is directed to the "Town of Otsego County". The Town denies having ever been served with a valid Notice of Claim. There are no proofs of service which have been filed nor was there actual proof adduced at the hearing which indicates that the Town was actually served with a valid Notice of Claim.

Conclusions of Law

CPLR § 3215(a) permits entry of a default judgment when a defendant has failed to appear. Notwithstanding the failure of the Town of Otsego to file an answer, our appellate court has recently reiterated the strong public policy in favor of resolving cases on their merits (Preferred Mut. Ins. Co. v DiLorenzo, 2020 N.Y. App. Div. LEXIS 2945, 2020 NY Slip Op 02845 [3rd Dept. 2020]). Defendant has raised several jurisdictional issues which would make a default judgment inappropriate under the circumstances. For example, General Municipal Law § 50-i(1) requires, as a condition precedent to commencing the lawsuit, that a notice of claim be served upon the municipality within 90 days after accrual of the claim (see, Brunson v. New

York City Health & Hosps. Corp., 144 A.D.3d 854, 855, 42 N.Y.S.3d 34 [2nd Dept. 2016]). It is unclear, after a brief hearing, that plaintiffs met the condition precedent.

Further, while the court is required to give the plaintiffs, who are proceeding without the assistance of counsel, considerable liberties on procedural matters, their decisions to file the complaint twice, serve the second complaint prior to its filing, and enter of a bare verification several weeks after the second filing of the complaint all run afoul of the CPLR and created a confusing record. The court finds, under the circumstances, that is appropriate to permit defendant an opportunity to serve a late answer (see, CPLR 3012[d])). This will allow the parties to conduct discovery and fully litigate this matter on its merits - in accord with the public policy favored by the Appellate Division (see, Preferred Mut. Ins. Co. v DiLorenzo, supra).

Based on the forgoing, it is hereby

ORDERED AND ADJUDGED that the motion for a default judgment is denied, and defendant shall file an Answer by July 17, 2020.

Dated: July 17, 2020
Cooperstown, New York

E N T E R,



Hon. BRIAN D. BURNS
Acting Supreme Court Justice

TO: Clerk of the Supreme Court
Brian Kegelman
Joan Kegelman
Peter W. Hobaica, Esq.