Linton v City of New York
2022 NY Slip Op 32585(U)
July 29, 2022
Supreme Court, New York County
Docket Number: Index No. 153841/2021
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

---X

MICHAEL LINTON,

Plaintiff,

- v -

CITY OF NEW YORK, FRANK GANDOLFI, JOHN OR JANE DOE

Defendants.

---X

INDEX NO. 153841/2021

MOTION DATE 11/29/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for Default and to Compel Acceptance of Answer .

In the underlying action, plaintiff seeks compensation for personal injuries that he sustained on July 6, 2019, when he alleges that he was falsely arrested for possession of a forged instrument while in the vicinity of Mulberry Street and Spring Street in New York County.

Pending now before the court is Motion Sequence #001, which includes a motion and two cross-motions, that are further described below.

Relevant Facts and Procedural History

The procedural history of this case is as follows:

On April 21, 2021, plaintiff filed a Summons and Complaint.

Seven months later, on November 12, 2021, the Office of the Corporation Counsel ("Corp. Counsel") filed an Answer on behalf of defendant the City of New York (the "City").

On the same day, plaintiff filed a Notice of Rejection, rejecting the Answer as untimely served, without the consent of plaintiff or leave of court, in violation of Rule 320 of the Civil Practice Law and Rules ("CPLR").

Seventeen days later, on November 29, 2021, Corp. Counsel filed the instant motion seeking an order, pursuant to CPLR 2004, 2005, and 3012(d) compelling plaintiff to accept service of defendant City's Answer, filed on November 12, 2021, as timely served *nunc pro tunc*. This motion was only with respect to defendant City, and not with respect to any other defendants.

On March 2, 2022, plaintiff filed papers in opposition to the City's motion and filed a cross-motion seeking an order, pursuant to CPLR 3215(a) and 3215(b): (i) entering a default judgment against defendant the CITY OF NEW YORK and defendant FRANK GANDOLFI; (ii) setting the matter down for an inquest or trial as to damages; and (iii) awarding plaintiff costs and reasonable attorney's fees commensurate with the time and resources expended with respect to the instant opposition, cross-motion and all subsequent supporting papers.

Two days later, on March 4, 2022, Corp. Counsel filed an Amended Answer that included defendant police officer Frank Gandolfi (the "Officer").

Five days later, on March 9, 2022, plaintiff filed a "Notice of Rejection," rejecting the Amended Answer as untimely served, without the consent of plaintiff or leave of court, in violation of Rule 320 of the Civil Practice Law and Rules.

On June 29, 2022, Corp. Counsel filed a cross-motion under Motion Sequence #001, seeking an order: (1) denying plaintiff's request for a default judgment against the City and the Officer (collectively, the "City defendants") and (2) compelling plaintiff to accept service of the City defendants' Answer and Amended Answer *nunc pro tunc,* pursuant to CPLR 2005 and 3012(d).

Plaintiff did not file any opposition to the cross-motion by Corp. Counsel seeking to compel plaintiff to accept service of the Amended Answer.

Original Answer on Behalf of the City

Corp. Counsel argues that pursuant to CPLR 2004, 2005, and 3012(d), the court should compel plaintiff to accept service of defendant City's Answer to the Complaint, filed on November 12, 2021, as timely served *nunc pro tunc*. They argue that the City's delay in serving the Answer was reasonable under the circumstances; that there is a lack of prejudice to plaintiff; that the City has meritorious defenses; and that public policy favors the resolution of cases on the merits.

With respect to a reasonable excuse for the delay, Corp. Counsel argues that their office experienced a significant increase in filings in July, August and September of 2020, which caused a "substantial backlog to accrue that the office had not cleared up at the time the complaint in this action was filed in April of 2021." Corp. Counsel argues that the City's delay in answering the complaint here is a direct result of the high volume of cases commenced against the City, and the limited number of office personnel to process the volume of incoming cases, which was exacerbated by the COVID-19 pandemic.

As to plaintiff's claim of prejudice, Corp. Counsel argues that the City's Answer was filed prior to the Preliminary Conference in this case, which has not yet been scheduled, and that "no meaningful discovery has taken place to date." Corp. Counsel argues that there is no basis for plaintiff to argue that he was surprised by the affirmative defenses set forth by defendant City, and that plaintiff is not prevented from seeking discovery based on the defenses asserted.

As to the City's own defenses, Corp. Counsel argues that the City's Answer asserts several meritorious defenses which indicate the City's willingness and ability to defend this case on the merits.

Finally, Corp. Counsel argues that public policy strongly favors resolution of matters on the merits, especially where, as here, there is no demonstrable prejudice to plaintiff.

In opposition to the City's motion and in support of his cross-motion, plaintiff argues that the City has "undeniably failed to advance a single reasonable or even plausible excuse for the delay in answering or otherwise appearing to defend the allegations by Plaintiff, has not demonstrated a single potentially meritorious defense, and relies exclusively upon the affirmation of counsel that is entirely bereft of evidentiary value, as a matter of law."

The Appellate Division First Department has a strong public policy favoring the resolution of cases on the merits. *See* 38 Holding Corp. v. New York, 179 A.D.2d 486 (Sup. Ct. App. Div. 1st Dept. 1992) (preferring trial on the merits wherever possible and a liberal policy with respect to opening default judgments in furtherance of justice so that parties may have their day in court to litigate the issues); Gluck v. McDonough, 139 A.D.3d 628 (Sup. Ct. App. Div. 1st Dept. 2016) (referencing that "strong public policy favors resolving cases on the merits") and Acosta v. Riverdale Dev., LLC, 72 A.D.3d 525 (Sup. Ct. App. Div. 1st Dept. 2010) ("Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits").

Here, the Summons and Complaint were served on the City on April 21, 2021, and pursuant to CPLR 3012 (a), the City's Answer was to have been filed within 20 days, by May 11, 2021. Instead, the City's Answer was not served until November 12, 2021, which was a delay of six months. This court finds that the City has established good cause for the delay. *See* Nason v Fisher, 309 AD2d 526 (Sup. Ct. App. Div. 1st Dept 2003) ("The motion court properly exercised

its discretion in granting defendant's motion to compel plaintiff to accept service of its late answer since the delay in serving the answer was *relatively short* and attributable to law office failure [...] [emphasis added]).

Additionally, this court finds that the City asserts a meritorious defense and that given the preliminary nature of this case, plaintiff has not alleged to have suffered any actual prejudice.

For the aforementioned reasons, this court grants the City's motion seeking to compel plaintiff to accept service of the City's Answer, filed on November 12, 2021, as timely served *nunc pro tunc*. *See* Forastieri v Hasset, 167 AD2d 125, 126 (Sup. Ct. App. Div. 1st Dept 1990) ("In view of the existence of an apparently meritorious defense, the relatively short delay involved, the lack of prejudice to plaintiffs and the fact that the lapse in time was partially attributable to law office failure, this matter seems to present precisely the sort of situation which warrants the exercise of the court's discretion under CPLR 3012(d) to compel the acceptance of a pleading which has not been timely served 'upon such terms as may be just'").

Amended Answer on Behalf of the City and the Officer

In opposition to plaintiff's motion seeking a default judgment against all defendants, Corp. Counsel argues that pursuant to New York General Municipal Law ("GML") § 50-k, the Office of the Corporation Counsel is required to reach a conclusion as to whether an employee acted within the scope of his employment at the time of the underlying incident in order to assume that employee's representation. This assessment includes an investigation into the facts of the incident, as well as a representation interview of the employee. Assuming the employee is deemed eligible for representation, the employee must then decide whether they wish to be represented by their office, and if so, provide written authorization. Corp. Counsel argues that their office can only

proceed with filing an answer on behalf of an individually named defendant after this lengthy process concludes.

Corp. Counsel also argues that in the instant case, the process has been additionally affected by the high volume of cases commenced against the City and limited personnel to process them and these issues have only been exacerbated by the COVID-19 pandemic.

Here, with regard to the defendant officer, the record indicates that the officer was served with the Summons and Complaint on July 14, 2021, and pursuant to CPLR 3012 (a), the officer's Answer was to have been filed within 20 days, by August 3, 2021. Instead, the Amended Answer was not served until March 4, 2022, which was a delay of seven months. Nevertheless, as Corp. Counsel properly argues, appellate courts have routinely held that Corp. Counsel's necessary initial investigation into the representation of a municipal employee constitutes an excusable delay. *See, e.g.*, Hirsch v New York City Dept. of Educ., 105 AD3d 522 (Sup. Ct. App. Div. 1st Dept 2013) ("The City's delay in answering on behalf of the individual defendants was reasonable in that it was due to its investigation of its obligation to defend them").

With regard to plaintiff's alleged claim of prejudice, Corp. Counsel argues that plaintiff is unable to identify any prejudice based on the delay in serving the Amended Answer, as no depositions have been held and the matter remains at an early stage of litigation.

As determined above, resolution on the merits is preferred. In consideration of all the factors, which 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; this court grants this branch of defendants' cross-motion which, in opposition to plaintiff's cross-motion for default judgement, seeks to compel plaintiff to accept service of the Amended Answer, filed on March 4, 2022, as timely served *nunc pro tunc* (*see* Guzetti v City of New York, 32 AD3d

234 [Sup. Ct. App. Div. 1st Dept 2006] [affirming the trial court's ruling granting defendants' cross-motion to compel acceptance of an amended answer *nunc pro tunc*]).

Default Judgment Against Defendants

Plaintiff's cross-motion seeks an order, pursuant to CPLR 3215(a) and 3215(b): (i) entering default judgments against defendants CITY OF NEW YORK and FRANK GANDOLFI; (ii) setting the matter down for an inquest or trial as to damages; and (iii) awarding plaintiff costs and reasonable attorney's fees commensurate with the time and resources expended with respect to the instant opposition, cross-motion and all subsequent supporting papers.

At the time plaintiff filed the cross-motion on March 2, 2022, the Amended Answer that included the Officer had not yet been filed. In its cross-motion, plaintiff argued that the Officer was "personally served with the summons and verified complaint on July 14, 2021, and has therefore been in continuous and unabated default, since August 5, 2021, a span of Two Hundred and Ten (210) Days," and that the Officer "has never attempted to interpose an answer or otherwise appear to defend this action, despite being personally served with the summons and complaint."

As discussed herein, this court directs acceptance of the Answer and the Amended Answer *nunc pro tunc*. Accordingly, plaintiff's request for a default judgment against defendants is denied. *See* Silverio v City of New York, 266 AD2d 129 (Sup. Ct. Ap. Div. 1st Dept 1999) (finding that the trial court did not abuse its discretion in denying plaintiff's motion for default judgment against police officers and in granting leave for an answer to be interposed on the officer's behalf, where there was no showing that plaintiff suffered any prejudice by reason of the police officers' delay in answering the complaint, and there were no other circumstances warranting deviation from New York's strong public policy in favor of litigating matters on the merits"); Myers v City of New

York 110 AD3d 652 (Sup. Ct. App. Div. 1st Dept 2013) (unanimously affirming, without costs, an order of the trial court granting the cross motion to compel plaintiff to accept service of the late answer and denying plaintiff's motion for a default judgment against the City of New York. The court found that the City's delay in answering on behalf of the individual defendants was reasonable in that it was due to its investigation of its obligation to defend them; no prejudice to plaintiff had been shown; and New York's public policy strongly favors litigating matters on the merits).

Conclusion

For all of the aforementioned reasons, it is hereby:

ORDERED that the motion filed by Corp. Counsel seeking an order, pursuant to CPLR 2004, 2005, and 3012(d) compelling plaintiff to accept service of defendant City's Answer to the complaint, filed on November 12, 2021, as timely served *nunc pro tunc*, is GRANTED; and it is further

ORDERED that the cross-motion filed by Corp. Counsel seeking an order (1) denying plaintiff's request for a default judgment against the City and the Officer and (2) compelling plaintiff to accept service of the City defendants' Answer and Amended Answer *nunc pro tunc,* pursuant to CPLR 2005 and 3012 (d) is GRANTED; and it is further

ORDERED that, consistent with the findings made herein, plaintiff shall accept service of the Amended Answer, filed on March 4, 2022, as timely served *nunc pro tunc*; and it is further

ORDERED that the cross-motion filed by plaintiff seeking an order, pursuant to CPLR 3215(a) and 3215(b): (i) entering default judgment against defendants the CITY OF NEW YORK and FRANK GANDOLFI; (ii) setting the matter down for an inquest or trial as to damages; and

(iii) awarding plaintiff costs and reasonable attorney's fees commensurate with the time and resources expended with respect to the instant opposition, cross-motion and all subsequent supporting papers, is DENIED.

This is the Decision and Order of this court.

7/29/2022					
DATE			**J. MACHELLE SWEETING, 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	