

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - February 4, 2009

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2008-02162

DECISION & ORDER

Mega Construction Corp., respondent, v
Benson Park Associates, LLC, appellant.

(Index No. 103592/06)

Tsyngauz & Associates, P.C., New York, N.Y. (Yevgeny Tsyngauz of counsel), for
appellant.

John P. Gulino, P.C. (Arnold E. DiJoseph, P.C., New York, N.Y., of counsel), for
respondent.

In an action to recover damages for breach of contract, the defendant appeals from a judgment of the Supreme Court, Richmond County (Maltese, J.), entered February 19, 2008, which, upon an order of the same court dated January 22, 2008, granting the plaintiff's motion pursuant to CPLR 3215 for leave to enter judgment against it upon its default in answering the complaint, and denying its cross motion, inter alia, pursuant to CPLR 2221 to vacate so much of a preliminary conference order of the same court dated August 7, 2007, as directed it to serve its answer by September 14, 2007, and pursuant to CPLR 2004 to extend its time to answer, is in favor of the plaintiff and against it in the principal sum of \$276,000.

ORDERED that the judgment is affirmed, with costs.

We agree with the defendant's contention that the Supreme Court erroneously treated its cross motion, inter alia, to vacate so much of a preliminary conference order of the same court dated August 7, 2007, as directed it to serve its answer by September 14, 2007, and to extend its time

March 17, 2009

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to answer as one for leave to renew and reargue. As the August 7, 2007, preliminary conference order which directed the defendant, inter alia, to serve its answer by September 14, 2007, was not appealable as of right, it was procedurally proper for the defendant to cross-move to vacate and or modify that portion of the order and to extend the time to serve its answer (*see Koczen v VMR Corp.*, 300 AD2d 285; *Pagan v Penthouse Mfg. Co.*, 121 AD2d 374; *Cohalan v Johnson Elec. Constr. Corp.*, 105 AD2d 770; *Levine v St. Luke's Hosp. Ctr.*, 109 AD2d 694).

However, contrary to the defendant's contentions, it was not an improvident exercise of discretion for the court to deny the defendant's cross motion. In addition to engaging in a pattern of willful neglect and delay, the defendant also failed to demonstrate the existence of a meritorious defense (*see Gainey v Anorzej*, 25 AD3d 650, 651; *Palermo v Rodriguez*, 255 AD2d 567).

The defendant's remaining contentions are without merit.

SKELOS, J.P., SANTUCCI, ANGIOLILLO, DICKERSON and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court