

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

D25184  
W/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - October 28, 2009

PETER B. SKELOS, J.P.  
ANITA R. FLORIO  
RUTH C. BALKIN  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

---

2008-06917

DECISION & ORDER

Performance Construction Corp., appellant, v  
Huntington Building, LLC, et al., defendants,  
Corcoran Marble & Monument Co., Inc., et al.,  
respondents.

(Index No. 3225/08)

---

V. Anthony Maggipinto, St. James, N.Y., for appellant.

Brian P. Neary, P.C., Huntington, N.Y., for respondent Corcoran Marble & Monument Co., Inc.

Sinnreich Kosakoff & Messina LLP, Central Islip, N.Y. (Timothy F. Hill of counsel),  
for respondent Tritec Building Co.

In an action, inter alia, to recover damages for breach of contract and to foreclose a mechanic's lien, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Jones, J.), dated June 10, 2008, which denied its motion for leave to enter judgment against the defendants Corcoran Marble & Monument Co., Inc., and Tritec Building Co., upon their default in answering or appearing, and granted the cross motion of the defendant Corcoran Marble & Monument Co., Inc., for leave to serve a late answer.

ORDERED that the order is affirmed, with one bill of costs.

The Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to enter a default judgment against the defendant Corcoran

December 1, 2009

Page 1.

PERFORMANCE CONSTRUCTION CORP. v HUNTINGTON BUILDING, LLC

Marble & Monument Co., Inc. (hereinafter Corcoran), and in granting Corcoran's cross motion for leave to serve a late answer (*see* CPLR 3012[d], 5015[a][1]). Considering the lack of any prejudice to the plaintiff as a result of the relatively short 11-day delay in Corcoran's service of an answer, the existence of a potentially meritorious defense, and the public policy favoring the resolution of cases on the merits, the Supreme Court providently excused Corcoran's de minimis delay in answering the complaint (*see Klughaupt v Hi-Tower Contrs., Inc.*, 64 AD3d 545, 546; *Schonfeld v Blue & White Food Prods. Corp.*, 29 AD3d 673, 674; *Yonkers Rib House, Inc. v 1789 Cent. Park Corp.*, 19 AD3d 687, 688). Furthermore, the record reveals that Corcoran was actively engaged in settlement negotiations with the plaintiff's attorney, and that the plaintiff's attorney never mentioned that he would be moving for leave to enter a default judgment (*see Armstrong Trading, Ltd. v MBM Enters.*, 29 AD3d 835, 836; *Scarlett v McCarthy*, 2 AD3d 623; *Lehrman v Lake Katonah Club*, 295 AD2d 322).

Moreover, the Supreme Court properly denied that branch of the plaintiff's motion which was for leave to enter a default judgment against the defendant Tritec Building Co. (hereinafter Tritec). The record reveals that Tritec and the plaintiff entered into a stipulation extending Tritec's time to answer "to and until March 3, 2008." Accordingly, Tritec's service of an answer was timely since the answer was served on March 3, 2008 (*see* CPLR 320[a]).

SKELOS, J.P., FLORIO, BALKIN, BELEN and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court