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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Kornreich, Shirley Werner, J.** PART 54

Justice

HESKEL'S WEST 38 TH STREET CORP. and KAREN MILLER, LTD.,

- v -

GOTHAM CONSTRUCTION COMPANY LLC et al.

INDEX NO. 603202/03

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to: vacate default judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	I
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing **papers,** it is ordered that this motion is decided in accordance with the annexed decision.

FILED

JUN - 3 2004

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 21, 2004

SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW *YORK*
COUNTY OF NEW YORK: PART 54

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HESKEL'S WEST 38TH STREET CORP.
and KAREN MILLER, LTD.,

Index No.: 603202/03

Plaintiffs,

DECISION and ORDER

-against-

GOTHAM CONSTRUCTION COMPANY LLC, f/k/a GOTHAM CONSTRUCTION CO., GOTHAM ORGANIZATION, INC., 1010 SIXTH **AVENUE** ASSOCIATES LLC, 10106TH AVE. CORP., 66-68 W. 38TH REALTY CORP., 1014 SIXTH **AVENUE** REALTY CORP., CLINTON 66 INC., CLINTON **38** DEVELOPER LLC, CLINTON 38 REALTY LLC and PICKET REALTY CONSTRUCTION CONSULTANTS LLC,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This is **an** action to recover for property damage to plaintiffs' building located at 60-64 West 38th Street, New **York,** N.Y. (the "Building"). Defendants failed to appear, and on March 2,2004, the Clerk of the Court granted plaintiffs' motion for a default judgment, on default, and set the matter down for an inquest and assessment of damages. Defendants now move, by order to show cause, to vacate that judgment. In support of their motion, defendants submit their attorney's affirmation **and** the affidavits of Trevor Marshall, defendant Gotham Construction Company LLC's ("Gotham's") construction project manager; Dina Scalice, Gotham's **legal** assistant; Lawrence W. Feiner, vice president of all defendants; and Thomas Peppel, claims specialist of American International Group Claims Services ("AIGCS"), as well as copies of: the summons **and** complaint; affidavits of service; **an** "Order Directing Inquest" dated March 2,

2004; defendants' verified answer and demands; correspondence from David B. Karel, plaintiffs' counsel; correspondence from Dina M. Scalice; correspondence to and from Thomas Peppel; a subcontract between Gotharn and Atlantic Demolition Corp. ("Atlantic"), executed in November 2000 ("Atlantic Subcontract"); and a subcontract between Gotham and Mayrich Contruction Corp. ("Mayrich"), executed in January 2001 ("Mayrich Subcontract"). In opposition, plaintiffs submit their attorney's affirmation; the affidavit of engineer Ronnie Becker, P.E.; the Engineer's Report of the subject Building, dated January 2,2001 ("Becker Report #1"); the Engineer's Damage Report of the subject Building, dated April 10,2001 ("Becker Damage Report"); correspondence from Mr. Becker; repair estimates; and inspection reports.

I. **Background**

It is undisputed that defendants were served with the summons and complaint in October 2003. On October 24, 2003, Dina M. Scalice, a legal assistant at defendant Gotham, forwarded the summons and complaint to Allied North America ("Allied"), defendants' insurance agency. See **Aff.** of Dina M. Scalice at ¶ 1; Aff. of David Persky at Ex. F. Thomas Peppel, AIGCS claims specialist, received a copy of the summons and complaint on October 29, 2003, faxed to him by Allied. See Aff. of Thomas Peppel at ¶ 2. Over three months later, on February 6,2004, Mr. Peppel forwarded the summons and complaint to the law firm of Fiedelman Garfinkel & Lesman ("Fiedelman"), the firm assigned to represent defendants. **See** id. at ¶ 2. Mr. Peppel avers that due to, inter alia, his being on his honeymoon between September 20 and October 2, 2003, his "preoccupation with wedding plans," and an increased workload, he was distracted and inadvertently filed the summons and complaint without forwarding it to counsel. Id. at ¶ **3.**

Plaintiffs' counsel contends that, pursuant to CPLR § 3015, he mailed additional notices

to each of the ten defendants named in this action. See Aff. of David B. Karel at ¶ 6. Additionally, plaintiffs' counsel, Mr. Karel, spoke with Mr. Peppel via telephone on December 2, 2003, when he returned Mr. Peppel's call of the prior day. At this time, Mr. Peppel advised Mr. Karel that AIGCS would be appearing on behalf of all defendants and requested an extension of time to answer the complaint. In response, Mr. Karel "advised Mr. Peppel that Plaintiffs had but a few days left on the statute of limitations, and therefore [he] would require that [Mr. Peppel] provide the names of the subcontractors in order that Plaintiffs could start suit."' Id. at ¶ 11.

On January 9, 2004, plaintiffs' counsel again spoke with Mr. Peppel and apprised him of defendants' default. See Karel Aff. at ¶¶ 5, 14. Mr. Karel advised Mr. Peppel that plaintiffs would accept a late answer if "all the subcontractors and contractor were covered by the same 'wrap-up' insurance policy, and if Defendants waived any statute as to said Defendants[.]" Id. at ¶ 14 [emphasis as in original]. Subsequently, on January 13, January 14, January 15 and February 4, 2004, Mr. Karel conveyed the same information to Mr. Peppel, finally advising him that plaintiffs would now seek a default judgment against defendants, "due to [defendants'] failure to answer." Id. at ¶ 15; see also Persky Aff. at Ex. H, Correspondence from Mr. Peppel ("I have requested an extension of time to answer [from plaintiffs' counsel] but none received to date").

On February 13, 2004, Mr. Karel was contacted by defendants' counsel, seeking an extension of time to answer the complaint and Mr. Karel informed them of the conditions upon which plaintiffs would accept a late answer. Id. at ¶ 16. Defendants' counsel again telephoned

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[1] Mr. Karel avers that on December 1, 2003, he was advised by Larry Feiner, vice president of Gotham, that "there were numerous subcontractors[,]" but he refused to provide the names of demolition and excavation subcontractors to Mr. Karel. See Karel Aff. at ¶ 12.

Mr. Karel on February 19,2004, at which point Mr. Karel advised that he:

> had already begun the process of taking a default [and that] Defendants had prejudiced Plaintiffs' ability to make claim against potential third parties, and that if any subcontractors were going to be alleged to have engaged in any of the work, the only way Plaintiffs would be able to permit the vacatur of the default, and to accept any late Answer, is if Defendants secured any waiver of any statute of limitation defenses against said entities.

Id. at ¶ 18 (emphasis in original). On February 26, 2004, defendants served their verified answer on plaintiffs. See Persky Aff. at Ex. D. In a letter dated March 2, 2004, plaintiffs rejected defendants' answer as "late." Id. at **Ex.** E.

II. Conclusions of Law

In order to vacate a default judgment, movant must demonstrate **a** good excuse for default and a "full **and** complete disclosure of a meritorious defense[.]" Benadon v. Antonio, 10 A.D.2d 40, 42 (1st Dept. 1960); see also Siegel, NY Practice § 108, at 187 (3d ed), It is in the discretion of the Court to determine the reasonableness of **an** excuse, the excuse that the delay in answering was caused by defendants' insurance carrier is insufficient. Ennis v. Lema, 305 A.D.2d 632,633 (2nd Dept. 2003) (internal citations omitted). ***An*** insurer's loss of defendant's file is **an** insufficient excuse where defendant does not explain its continued failure to answer the complaint "in disregard of plaintiffs attorney's written advice to defendant's insurer . . . of plaintiff's intention to enter a default if an answer was not received [and thereafter] enclosing a copy of the summons and complaint **and** again giving notice that a default would be entered if an answer was not forthcoming[.]" Straub **v.** Becker, 620 N.Y.S.2d 64, 65 (1st Dept. 1994). Cf. Price v. Polisner, 172 A.D.2d 422 (1st Dept. 1991) (reasonable excuse where neither plaintiff nor carrier was notified of institution of proceedings for entry of default judgment until order after

inquest was served).

Here, defendants have failed to offer a reasonable excuse for their default. The cases cited by defendants to support their delay as excusable are inapposite on the facts.[2] Further, plaintiffs contend, and defendants do not dispute, that they have been prejudiced by defendants' delay in answering. Indeed, plaintiffs' counsel has averred that he informed defendants of the prejudice that would result, viz., the statute of limitations would run and plaintiffs would be barred from bringing suit against subcontractors. In light of the facts of this case, defendants' delay in answering was not reasonable. Indeed, while their delay in answering may initially have been due to an oversight, plaintiffs have demonstrated that as of December 1, 2003–more than four months prior to moving to vacate the default–defendants were apprised of the default and the prejudice it would engender.

The Court further notes that defendants have failed to establish the existence of a meritorious defense. While the owner of property is generally not liable for an independent contractor's negligence, "[i]f the character of the work creates the danger or injury then the owner of the property who made the contract remains liable to persons who are injured by a failure to properly guard or protect the work even though the same in its entirety is intrusted to a competent independent contractor[.]" Murphy v. Perlstein, 73 A.D. 256, 259 (1st Dept. 1902).

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[2] See, e.g., Deming v. Renaissance Homes, 231 A.D.2d 888, 888-889 (4th Dept. 1996) (default was entered against defendant 21 days following service of summons and complaint and defendant "promptly moved" within 14 days to vacate default order); Abramovich v. Harris, 227 A.D.2d 1000 (4th Dept. 1996) (addressing denial, not vacatur, of a default judgment); Mitchell v. Mid-Hudson Medical Assocs. P.C., 213 A.D.2d 932, 933 (3rd Dept. 1995) ("delay was neither willful, lengthy nor prejudicial to plaintiff") (emphasis supplied); Zablocki v. Straley, 173 A.D.2d 1015, 1016 (3rd Dept. 1991) (no demonstration of prejudice attributable to delay).

Inherently dangerous work is defined as work that is necessarily attended with danger, "no matter how skillfully or carefully it is performed." Carmel Associates, Inc. v. Turner Constr. Co., 35 A.D.2d 157, 158 (1st Dept. 1970) (internal citations omitted) (defendant general contractor was under nondelegable duty to prevent damages from subcontractor's activities and hence liable for damages to plaintiffs property resulting from said activities). Additionally, pursuant to section 27-1031 of the New York City Administrative Code, absolute liability may be imposed upon both the owner and contractor who perform an excavation. Coronet Properties Co. v. L/M Second Ave., Inc., 166 A.D.2d 242,243 (1st Dept. 1990) (Admin. Code § 27-1031 provides one excavating more than 10 feet below curb level must "preserve and protect any adjoining structures from injury"); see also Victor A. Harder Realty & Constr. Co. v. City of New York, 64 N.Y.S.2d 310, 317-318 (Sup. Ct. N.Y. County 1946) (Administrative Code imposes absolute liability upon anyone who causes excavation to be made).

In the case at bar, it is undisputed that defendant Gotham was performing excavation and demolition work at the time of the damage to plaintiffs' real property. Plaintiffs have submitted the engineer's affidavit and reports of Ronnie Becker, P.E., which demonstrate that defendants' excavation was the cause of damages to plaintiffs' building. Defendants have not disputed the accuracy of this evidence.[3] Accordingly, it is

ORDERED that defendants' motion to vacate the liability judgment against them, is denied; and it is further

ORDERED that an assessment of damages against all defendants is directed; and it is further

[3] Defendants, of course, may participate in the hearing assessing damages.

ORDERED that, within sixty days from the date hereof, plaintiffs shall serve a copy of this order with notice of entry, a note of issue **and** a statement of readiness upon defendants and on the Clerk of the Trial Support Office, **and** shall pay the proper fees, if any, **and** said Clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that if the plaintiffs fail to comply with the immediately preceding paragraph, the action will be dismissed.

ORDERED that the Clerk shall notify all parties of the date of the assessment hearing; **and** it is further

The foregoing constitutes the decision and order of the Court.

Date: May 21,2004
New York, New York

SHIRLEY WERNER KORNREICH