

Kreppein v Linda Kleban Management

2005 NY Slip Op 30098(U)

October 6, 2005

Supreme Court, New York County

Docket Number: 0108005/2004

Judge: Faviola Soto

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. FAVIOLA SOTO

PRESENT: _____

PART 7

Index Number : 108005/2004

KRPPEIN, MICHAEL

vs

LINDA KLEBAN MANAGEMENT

Sequence Number : 003

VACATE DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE 9/27/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
OCT 14 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 6 2005

HON. FAVIOLA SOTO J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

MICHAEL KREPPEIN,

INDEX NO. 108005/04

Plaintiff,

-against-

LINDA KLEBAN MANAGEMENT, 309 WEST 109TH
STREET CORP., and SILVERBOW REALTY CO., INC.

DECISION & ORDER

Defendants

HONORABLE FAVIOLA S. SOTO, J.:

Defendants move to vacate this court's order of June 10, 2005, for leave to renew and reargue, and to compel plaintiff to accept defendants' late answer. Plaintiff opposes.

Prior History

In this action, plaintiff tenant alleges that he sustained personal injuries as a result of the ceiling falling and striking him on May 30, 2001. The summons and complaint were filed with the court and, by ex parte order dated October 1, 2004, plaintiff's time to serve the summons and complaint was extended, nunc pro tunc, from September 23, 2004. Defendants were served with the summons and complaint on December 30, 2004 and January 3, 2005. Defendants did not answer or move.

By notice of motion dated April 8, 2005, plaintiff moved for default judgment. Defendants cross-moved, by notice dated May 6th, to dismiss, arguing that the summons and complaint were not timely served, that the action was time barred, and that the court lacks personal jurisdiction, and sought costs and that counsel be sanctioned for frivolous conduct in bringing the default motion. Defendants did not cross-move to vacate their default, or set forth their meritorious defenses, or attach a proposed answer; while not noticed or supported, they requested in the last paragraph of the attorney affirmation that in the event the cross-motion is

denied, they be granted thirty days after service of the order to interpose an answer. Plaintiff opposed the cross-motion, noting that he timely served the summons and complaint in accordance with the October 1, 2004 ex parte order of Justice McCooe extending his time nunc pro tunc to do so. The motion was submitted May 18th, and the parties appeared on June 8, 2005.

By decision and order dated June 10, 2005, the court granted plaintiff's motion, with inquest as to damages directed, and denied the cross-motion.

The Motion

Defendants now move to vacate this court's decision, to renew or reargue, and to compel plaintiff to accept their late answer.

In their supporting affirmation and affidavits, they recount their version of the procedural history of the action, and assert that it was plaintiff's counsel that significantly delayed this action and it was plaintiff's actions that led them to default.

In addition to arguing that this court overlooked or misapprehended the law and facts and otherwise erred, they also challenge the order of Justice McCooe, dated October 1, 2004. They argue that plaintiff's supporting affirmation of September 30, 2004, seeking additional time to serve the summons and complaint, failed to establish a meritorious claim and failed to establish a reasonable excuse and failed to apprise the court that plaintiff's counsel exchanged correspondence with defendant and therefore failed to establish due diligence. They do not argue, however, that the order was not in the court file. They fault plaintiff's counsel for serving them with a copy of the ex parte order only on May 2nd (although counsel did not previously file a notice of appearance); defendants' notice of cross-motion to dismiss is dated May 6, 2005.

They challenge the sufficiency of the medical documents provided by plaintiff to them

when the parties were attempting to resolve the dispute between themselves. The point to various correspondence

They argue that they are unfairly prejudiced by this court's decision, and that the court misapprehended the salient facts of this case and the procedural history and the applicable statutes. They argue that this court abused its discretion. They assert that their prior set of motion papers requested an alternative relief, and that the court erred in not granting that request. They refer to documents which they argue were not previously before the court: plaintiff's September 2004 affirmation, correspondence between plaintiff's counsel and defendant, and correspondence between counsel, including defendants' letter of June 7, 2005 in which defendants request that plaintiff correct the verified complaint as it stated the amount of damages sought, which they assert should be served in a separate documents.

They also refer to counsel's attempt, on June 8th, to serve plaintiff's counsel with an answer, which they now attach as an exhibit; plaintiff rejected the answer.

As their reasonable excuse, they assert they were under their justifiable impression that plaintiff's action was not instituted within the applicable statute of limitations, and that the court should not be precluded from exercising its discretion to excuse delay or default from law office failure.

In addition to counsel's affirmation, they submit the affidavits of the claims examiner and the property manager. The claims examiner, who has twenty years of experiences, devotes five papers to defendants' version of the procedural history. He refers to prior correspondence, and states that there was no activity on the file until January 19, 2005, when defendants forwarded the summons and complaint to the insurance company. He recounts that he made notations in

September and October 2004 that the lawsuit was not instituted by service of process and that therefore the statute of limitations has passed.

In the final paragraph, he relies on the affidavit of the property manager to assert that plaintiff failed to establish notice, prior complaints, prior repairs, or a recurring condition, and notes that in connection with the rewiring of an overhead fixture in April 2001, defendants' employees were in the apartment and did not note any cracks or leaks or defects.

The second affidavit is submitted by the principal of defendant management; she is also the president of the defendant cooperative and the president of defendant realty corporation. The affidavit does not state that it is based on personal knowledge or a review of the books and records maintained in the ordinary course of business. This affiant similarly recounts portions of the procedural history, noting in particular prior correspondence in 2001 in which plaintiff does not refer to injuries or the ceiling collapse.

In one paragraph, the affiant asserts as the meritorious defense that plaintiff fails to establish notice, prior complaints, prior occurrences, prior repairs, a recurring condition; she also asserts that in connection with the rewiring of an overhead fixture in plaintiff's apartment, the superintendent and assistant superintendent were in the apartment on April 19, and 20, 2001, and that there were no cracks or ceilings or leaks or defects in the subject ceiling and there is no prior notice of knowledge of any defective conditions.

Plaintiff opposes. Plaintiff recounts the procedural history and the prior dealings between the parties, including prior attempts of resolving the action with the insurance company, plaintiff's filing of the summons and complaint when those attempts did not succeed and the statute of limitations approached, plaintiff's additional attempts to resolve the dispute after the

insurance carrier was given a copy of the filed complaint on June 23, 2004, and plaintiff's service of the summons and complaint.

Plaintiff argues that defendants have failed to meet their burden. As to their seeking to vacate the court's June 2005 decision, he argues that defendants have failed to show a basis to do so. He notes that they chose not to appear or move or answer the complaint, although defendants were served and the insurance carrier admits it received it from its insured in January 2005, and that he therefore brought his motion for a default judgment four months after service. He challenges defendants' various recitations of what occurred between the parties, the good faith basis for their various assertions justifying their failure to timely answer or move, and their assertions of impropriety or wrongdoing by others and himself.

He additionally argues that contrary to defendants' assertions, not only have they failed to establish a reasonable excuse for their default, they have failed to establish a meritorious defense. He further notes that contrary to defendants' approach, the issue is not whether plaintiff can establish summary judgment on liability, but whether the complaint sufficiently pleads its causes of action, which it does. Additionally, plaintiff argues that defendants' argument regarding the validity of Justice McCooe's order extending time is nothing more than a smoke screen.

As to defendants' motion to renew or reargue, plaintiff argues that defendants have failed to show that the court overlooked or misapprehended an issue of fact or law. Plaintiff further points out that defendants failed to comply with the requirements of CPLR Section 2221. Plaintiff additionally argues that defendants have failed to show good cause why the court now should extend their time to answer and compel plaintiff to accept their late answer.

Defendants reply that they did not interpose an answer because they believed in good

faith that the statute of limitations had elapsed, and it was for this reason that they brought their cross-motion by notice of cross-motion dated May 6, 2005. Defendants again challenge the ex parte order, noting that it was not until May 2nd that plaintiff's counsel advised them of the ex parte order, and argue that had they been served, they would have filed an answer. They argue that they demonstrated both a reasonable excuse for their default and a meritorious defense.

Discussion

Defendants' motion is denied.

Defendants have failed to show why the court's June 2005 order should be vacated. It is not disputed that defendants were served with the summons and complaint and that for four months following service defendants failed to appear, answer or move. It is not disputed that plaintiff moved for default judgment four months after service, that the ex parte order extending plaintiff's time to serve the summons and complaint nunc pro tunc was in the court file, and that plaintiff provided defendants' counsel with a copy of the ex parte order upon counsel's appearance after the making of default motion. It is not disputed that defendant did not then cross-move to vacate their default, or for an extension of time in which to answer the complaint, or to compel plaintiff to accept a late answer, or attach a copy of its proposed answer. It is not disputed that, instead, defendants served a cross-motion to dismiss on statute of limitations grounds, and the cross-motion, supported by attorney affirmation only, does not set forth a meritorious defense.

Accordingly, defendants have failed to show any basis for the court to vacate its decision: plaintiff showed his entitlement to default and the court accordingly granted the motion and directed the matter to inquest on damages, and defendants' cross-motion to dismiss on the

basis that the action was untimely and barred by the statute of limitations was properly denied. Nor have defendants shown that the court erred when, even though defendants failed to cross-move for the relief, the court denied defendants' request for leave to file a late answer, as defendants failed to show a basis to vacate defendants default or a meritorious defense.

Defendants' attempt in this motion to challenge Justice McCooe's order of October 1, 2004 is not properly before this court, and it is denied. Were the court to consider it, the court notes that the arguments are without merit.

Nor have defendants met their burden to renew or reargue. First, defendants' motion on its face fails to comply with the requirements of CPLR Section 2221, and it is denied on this basis. Were the court to consider the motion, defendants have failed to show that the court overlooked or misapprehended an issue of fact or law, or that defendants are now in possession of facts not previously available to them.

Defendants similarly have failed to show good cause for the court now to extend their time to file an answer and to compel defendants to accept the late answer.

Even were the court to permit defendants to have yet another bite at the apple, and the court does not so permit, defendants even now have failed to show a reasonable excuse for their default. Indeed, defendants affirmatively chose not to timely answer the complaint and not to timely move against the complaint. Defendants affirmatively chose not to cross-move to vacate their default, and not to cross-move for leave to file a late answer, but, instead, proceeded to make a cross-motion to dismiss. Nor have defendants otherwise shown a reasonable explanation sufficient to vacate their default and this court's decision.

In the absence of a reasonable explanation for the default, the court need not look to

whether defendants have shown a meritorious defense. Were the court to examine this second prong, the court finds that defendants' showing is insufficient. The court notes that the affidavits do not state that they were based on the requisite personal knowledge or from an examination of books and records kept in the ordinary course of business. Further, they contain only conclusory assertions, and do not otherwise sufficiently set forth a meritorious defense.

Defendants' remaining arguments are without merit and will not be specifically addressed herein.

As the matter is directed to inquest on damages, defendants may contest plaintiff's damages at inquest.

Accordingly, it is

ORDERED that defendants' motion to vacate this court's decision date June 10, 2005, to renew or reargue, and to compel plaintiff to accept a late answer, is denied.

Dated: New York, New York
October 6, 2005

FAVIOLA A. SOTO, J.S.C.

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FILED
OCT 14 2005
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NEW YORK