Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

S & A Machine and Tool Co.

Plaintiff

-against-

Lawrence Ripak Co.,Inc.
Meade Testing Laboratories, Inc.

Defendants

Motion date: 9/29/06
Submitted: 1/17/07
Motion Sequence No.: 004 MG
005 MG
Index No.: 13014-05

Attorney for Plaintiff:
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Attorney for Defendant Meade Testing Laboratories Inc.:
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Upon the following papers numbering 1 to 11 read upon this motion:

Notice of Motion and supporting papers 1 - 3;
Order to Show Cause and supporting papers 4 - 7;
Affidavit in Opposition and supporting papers 8 - 9, 10 - 11;
it is

ORDERED that this motion by defendant Meade Testing Laboratories, Inc. ("Meade Testing") brought by order to show cause (Blydenburgh, J., 10/24/06) for an order vacating the default judgment against Meade Testing signed by Justice Blydenburgh on June 19, 2006 is granted; and it is further

ORDERED that defendant Meade Testing is granted leave to serve its Verified Answer within 20 days of this order; and it is further

ORDERED that this motion by defendant Lawrence Ripak Co. ("Ripak Co.") for an order pursuant to CPLR 2221 granting leave to reargue its previous motion to vacate its default is granted and upon reargument, the default judgment entered against Ripak Co by Justice Blydenburgh on June 19, 2006 is vacated; and it further

ORDERED that defendant Ripak Co. is granted leave to serve its Verified Answer within 20 days of this order; and it is further

ORDERED that all counsel are directed to appear for a preliminary conference at the Office of Differentiated Case Management, Suffolk County Supreme Court, 1 Court Street, Riverhead, New York on April 11, 2007.

Examination of the record before this court on these two motions indicate that plaintiff's ex parte application for a default judgment was not properly supported. More specifically, the application for a default judgment failed to include either a complaint verified by a party or an affidavit signed by a personal with knowledge of the facts constituting the claim as required by CPLR 3215(f). The complaint is verified by counsel and therefore inadequate to support an application for a default (see eg Hazim v. Winter, 234 AD2d 422, 651 NYS2d 149 [2d Dept. 2000]). Courts have held that failure to properly support an application for a default judgment renders the default judgment a nullity (see Natradeze v. Rubin, 33 AD2d 535, 822 NYS2d 541 [1s Dept. 2006]; Goodyear v. Weinstein, 224 AD2d 387, 638 NYS2d 108 [2d Dept. 1996]) and that such defect could not be cured by testimony at an inquest (see Fransisco v. Soto, 286 AD2d 573, 729 NYS2d 889 [1st Dept. 2001]).

However, the Second Department's more recent decisions split from the First Department and its own previous decisions in that it now holds that plaintiff's failure to properly support an application for a default judgment does not render the same void. Rather, defendant must still show a reasonable excuse for the default and a meritorious defense (see Araujo v. Aviles, 33 AD3d 830, 824 NYS2d [2d Dept. 2006]; Coulter v. Town of Highlands, 26 AD3d 456, 809 NYS2d 466 [2d Dept. 2006]). The court finds that defendant Meade Testing has sufficiently demonstrated a reasonable excuse for its default as well as a meritorious defense. Accordingly, the default as to Meade Testing is vacated.

Defendant Meade Testing, through its president Michael Meade, admits that it was personally served with the summons and verified complaint in October 2005. He offers as an excuse for his default, plaintiff's counsel's assurances to him that plaintiff was primarily going after co-defendant Ripak Co. and that he would be given an extension of time to answer the complaint. Such assurances are supported by the letter of plaintiff's counsel to plaintiff dated November 11, 2005 wherein he states: "We served papers on Meade as a protective measure.* * * I have told Meade that I will defer taking a position on his matter until such time as we resolve our action against Ripak, which I believe is the stronger of the two". It was plaintiff's counsel

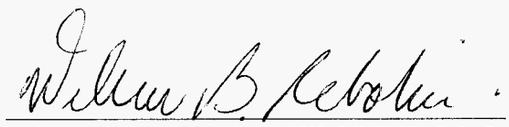
who sought to have this letter introduced at the traverse hearing which Justice Blydenburgh ultimately marked as exhibit 12 to plaintiff's opposition to Ripak's motion to vacate the default. Moreover, Michael Meade states, and is not contradicted, that he was not served with the Inquest Order dated June 19, 2006 and the court finds Michael Meade's explanation as to why he did not appear on September 12, 2006 reasonable in that the caption of the order listed only Ripak Company as a defendant. Finally, the court finds that the motion is adequately supported by an affidavit of merits, especially since the application for a default judgment was not so supported.

The court now turns to defendant Ripak's motion to reargue. While the court is reluctant to rule on a matter previously decided by another justice of this court (see Leone v. Silverman, 153 AD2d 862, 545 NYS2d 582 [2d Dept. 1989]), the court finds the previous justice acquiesced to the same when he recused himself on the record on December 19, 2006. More specifically, Justice Blydenburgh cautioned counsel that a decision on his motion submitted on November 8, 2006 (the instant motion to reargue) would be pushed into March 2007 since a jew judge would be assigned. The court has reviewed all papers and transcripts submitted in support of and in opposition to this motion and finds that the default entered against defendant should be vacated. Initially the court notes again that the application for a default was itself inadequate in that it was not supported by an affidavit of merit or a complaint verified by the plaintiff. Defendant Lawrence Ripak, Inc. denies it was served with the summons and complaint. In light of all the testimony presented at the traverse hearing, plaintiff inadequately explained why the affidavit of service was signed approximately seven months after the alleged service. There is a strong public policy in favor of resolving cases in the merits (Jeffrey L. Rosenberg & Associates, LLC v. Lajaunie, 35 AD3d 668, 824 NYS2d 920 [2d Dept. 2006]). As noted by Justice Blydenburgh, a potentially meritorious defense exists. This court further finds that plaintiff did not demonstrate prejudice, inasmuch as being required to litigate a case on its merits without more is not prejudice, no matter how costly or inconvenient. Under all of these circumstances, the court, in its discretion vacates the default against Ripak.

Defendants are directed to serve a copy of this order upon plaintiff and the calendar department no later than March 14, 2007.

Counsel for all parties are encouraged to litigate this matter in a fair and professional manner with due regard for rules of civility. The pre-trial proceedings shall proceed expeditiously to avoid further delay in this case.

Dated: March 1, 2007



HON. WILLIAM B. REBOLINI, J.S.C.