

Lehane v Town of E. Greenbush

2007 NY Slip Op 30332(U)

March 23, 2007

Supreme Court, Rensselaer County

Docket Number: 0202995

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

KAREN K. LEHANE,

Plaintiff,

-against-

Index No.: 202995

RJI No.: 41-0143-2003

TOWN OF EAST GREENBUSH,
ALAN T. HEDGE and MARYLOU HEDGE,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

THE PROSKIN LAW FIRM
Attorneys for Plaintiff
(Marc D. Greenwald, Esq., of Counsel)
423 Loudon Road
Albany, New York 12211

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C.
Attorneys for Defendant Town
(Kimberly B. MacLeod, Esq., of Counsel)
20 Corporate Woods Boulevard
Albany, New York 12211

DECISION/ORDER

George B. Ceresia, Jr., Justice

Defendant Town of East Greenbush has moved for an order pursuant to CPLR §
3215 (c) dismissing the plaintiff's complaint on the ground that plaintiff failed to move

for a default judgment within one year of defendant Town's default in appearing or answering, or in the alternative, for an order pursuant to CPLR § 3012 (d) compelling plaintiff to accept its answer.

The instant action arises out of a motor vehicle accident involving the plaintiff and an SUV owned by defendant Marylou Hedge and driven by defendant Alan Hedge. The complaint alleges that defendant Town was negligent in failing to install and maintain any warning signs to inform drivers that they were approaching an intersection. The defendant Town was insured by Reliance Insurance Company, which shortly after commencement of this action was declared insolvent and placed in liquidation. Through various successive orders, all applications for default judgments against Reliance policy holders and insureds were stayed. The last order staying such proceedings was entered on May 5, 2004 and by its terms expired on October 5, 2004. The order required that it be published in the New York Law Journal. It was never served upon plaintiff's attorneys.

Defendant Town contends that because plaintiff did not move for a default judgment on or before October 5, 2005 the action should be dismissed as against the Town. Plaintiff has established that her attorneys did not receive actual notice of the provisions of the order imposing the stay until the instant motion was served. Moreover, her attorneys have shown that they diligently sought to determine the status of the stay throughout the pendency of this action by repeated requests to the defendant Town, this Court and the New York State Insurance Department.

While the order imposing the final stay provided for service by publication, it is questionable whether such method of notice was reasonably calculated to provide actual notice to persons whose identities and addresses could be readily ascertained (see Case v Monroe Community Coll., 89 NY2d 438, 442 [1997]; Harrison v Harrison, 116 AD2d 553, 555 [2d Dept 1986]). Furthermore, it has been held that service by publication does not comply with the requirements for service of papers in an action (see Shaw v Russell, 60 NY2d 922, 924 [1983]). Moreover, defendant Town has not offered any proof that the order was in fact published according to the terms of the order. The Court finds that in the absence of any effective service upon plaintiff, the one year period for taking a default judgment never commenced to run (see Matter of Raes Pharm. v Perales, 181 AD2d 58, 63-64 [1st Dept 1992]).

Even if it were determined that plaintiff was required to move for a default judgment within one year of expiration of the stay, dismissal would not be warranted. The general rule is that in order to show sufficient cause to avoid dismissal after failing timely to seek a default judgment, a plaintiff must show a reasonable excuse for the delay and a meritorious cause of action (see Costello v Reilly, 36 AD3d 581 [2d Dept 2007]; Riccardi v Otero, 33 AD3d 571 [1st Dept 2006]; Turner v Turner, 216 AD2d 910 [4th Dept 1995]; Memorial Hosp. v Wilkins, 143 AD2d 494 [3d Dept 1988]). However, with respect to the related issue of being relieved of a default, the requirement of showing a meritorious defense has not been strictly enforced (see e.g. Ayres Mem. Animal Shelter,

Inc. v Montgomery County Socy. for Prevention of Cruelty to Animals, 17 AD3d 904, 905 [3d Dept 2005]). Rather, courts have held that the determination should be based upon an exercise of discretion after considering factors such as the length of the delay, the excuse for the delay, willfulness and the possibility of prejudice, as well as the merits of the claim or defense (see Guzetti v City of New York, 32 AD3d 234 [1st Dept 2006] [concurring opinion]; Busa v Busa, 196 AD2d 267, 269 [3d Dept 1994]; Arred Enters. Corp. v Indemnity Ins. Co. of N. Am., 108 AD2d 624, 625-626 [1st Dept 1985]).

Plaintiff herein has established a reasonable excuse for the failure to seek a default judgment based upon her attorneys' inability to determine the status of the stay despite due diligence. Moreover, if the stay had continued, plaintiff's attorneys would have been risking contempt to proceed to take a default judgment. While the delay can not be considered of short duration, there was clearly no willfulness or intent to abandon the claim. Moreover, defendant Town can not possibly claim that it has been prejudiced by plaintiff's failure to take a default judgment. While plaintiff has not provided any admissible proof of the merits of her cause of action (the complaint was not even verified), the nature of the claim indicates a likelihood of the existence of triable issues of fact with respect to the defendant Town's duty to warn and whether there was a dangerous condition. As such, defendant Town's motion to dismiss the action shall be denied.

As above, in order to be relieved of its default, the defendant Town must show a

reasonable excuse for its delay in answering and a meritorious defense to plaintiff's claims (see Dodge v Commander, 18 AD3d 943 [3d Dept., 2005]; Aaron v Carter, Conboy, Case, Blackmore, Napierski & Maloney, 12 AD3d 753 [3d Dept., 2004]).

Defendant Town has certainly shown a reasonable excuse for the default associated with the insolvency and liquidation of its insurance carrier (see Ayres Mem. Animal Shelter Inc. v Montgomery County Socy. for Prevention of Cruelty to Animals, 17 AD3d at 905).

While the defendant Town has also failed to offer any admissible proof showing a meritorious defense, its excuse for the default is equally as compelling as plaintiff's.

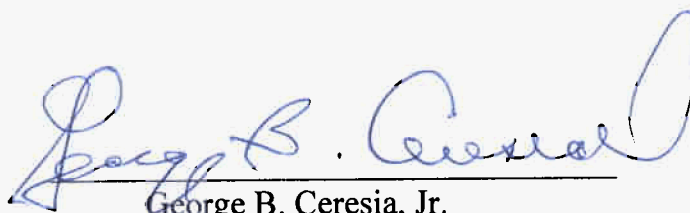
There was clearly no willfulness or intent to default and no indication that plaintiff has been prejudiced. Moreover, as above, the nature of the claim indicates a likelihood of triable issues of fact with respect to whether there was an unreasonably dangerous condition with a consequent duty to warn. It is therefore determined that defendant Town should be relieved of its default.

Accordingly it is

ORDERED that the motion is hereby granted to the extent that plaintiff is directed to accept the answer served with the moving papers and is otherwise denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendant Town, who are directed to enter this Decision/Order without notice and to serve plaintiff's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
March 23, 2007

A handwritten signature in blue ink, reading "George B. Ceresia, Jr.", written over a horizontal line.

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated October 31, 2006; Affidavit of Kimberly B. MacLeod, Esq. sworn to October 31, 2006, with Exhibits A-E annexed;
Memorandum of Law dated October 31, 2006;

Affirmation of Marc D. Greenwald, Esq. dated November 13, 2005, with Exhibits A-D annexed;

Affidavit of Kimberly B. MacLeod, Esq. sworn to November 20, 2006.