

<b>Spectron Valuators, Ltd. v American Home Mtge. Corp.</b>
2007 NY Slip Op 30336(U)
March 21, 2007
Supreme Court, Suffolk County
Docket Number: 0008644
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:**

**Hon. Paul J. Baisley, Jr.**

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SPECTRON VALUATORS, LTD.,

Plaintiff,

-against-

AMERICAN HOME MORTGAGE CORP., and  
NICHOLAS J. LABELLA,

Defendants,  
\_\_\_\_\_

**ORIG. RETURN DATE:** March 12, 2007  
**MTN. SEQ. #:** 001-MG, 002-MD

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Upon the following papers numbered 1 to 38 read on this motion and cross motion: Notice of Motion and supporting papers 1 - 7; Notice of Cross Motion, opposition to motion and supporting papers 8 - 32; Affirmation in Opposition to cross motion, reply to motion and supporting papers 32 - 38; it is,

**ORDERED** that the motion (001) by the defendant American Home Mortgage Corp. for an extension of time to serve and file its answer is granted upon the terms as provided herein; and it is further

**ORDERED** that the cross motion by the plaintiff for a default judgment is denied; and it is further

**ORDERED** that the proposed verified answer submitted with this motion by the defendant American Home Mortgage Corp. shall be deemed served conditioned upon payment to counsel for the plaintiff, for the benefit of said plaintiff, of \$2,000.00 from the defendant American Home Mortgage Corp. itself within 20 days of service upon the movant by the plaintiff of this decision and order with Notice of Entry; and it is further

**ORDERED** that the defendant American Home Mortgage Corp. shall file its verified answer with proof of service and proof of payment with the clerk of the court within 20 days of said payment being made; and it is further

**ORDERED** that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on April 2, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action for monetary damages due to negligence, false and fraudulent misrepresentations, prima facie tort and malicious prosecution arising out of a dismissed federal lawsuit among these parties.

Although the defendant Nicholas J. LaBella timely answered the complaint, his co-defendant, the movant herein, American Home Mortgage Corp. (hereinafter American), concedes that it did not answer in a timely fashion and now seeks an extension of its time to answer pursuant to CPLR 3012(d). In response to this application, the plaintiff now cross-moves for a default judgment against American.

In support of its motion for the extension of time, American submits an affidavit from its in-house deputy general counsel, John Kalas, who concedes that 1) American was timely served and given notice of this action by the Secretary of State in March 2006; 2) American received additional notice of the action from counsel for the plaintiff in April 2006; and 3) American was served with copies of defendant LaBella's answer, discovery demands and demand for a bill of particulars in May 2006.

Mr. Kalas states that as in-house deputy general counsel to America, he is responsible for the review and handling of legal process. He also states, however, that due to clerical errors all of these papers were either misplaced or misfiled resulting in his never seeing them. It appears that Mr. Kalas' attention to this action came about as the result of the defendant LaBella filing a request for judicial intervention in February 2007 (10 months after American's answer was due) accompanying LaBella's request for a preliminary conference presumably due to the failure of the plaintiff to respond to LaBella's discovery, etc. demands.

American then contacted plaintiff's counsel to work things out, began work on the case and brought this motion for the extension of time to answer.

The plaintiff not only opposes this application but now cross-moves for a default judgment against American.

The court has broad discretion to extend the time to answer where, as here, a motion for such relief precedes a motion for default (*see Constable v Matie*, 145 AD2d 987, 536 NYS2d 357 (4<sup>th</sup> Dept 1988)). In considering a motion for the extension of time, the court should consider the reasonableness of the excuse for the delay, the merits of the defense, whether the delay was due to deliberate or willful conduct and whether there would be prejudice to the opposing party (*see Beizer v Funk*, 5 AD3d 619, 774 NYS2d 781 [2d Dept 2004]). In addition, public policy favors a disposition on the merits (*see Jolkovsky v Legeman*, 32 AD3d 418, 819 NYS2d 561 [2d Dept 2006]).

As to a meritorious defense, American raises arguments viable on their face in terms of res judicata, collateral estoppel and the failure of the plaintiff to allege all of the elements necessary to make out causes of action for false and fraudulent misrepresentations, prima facie tort and malicious prosecution.

As to the issue of willful or deliberate delay, American has made an adequate showing that it never intended to default on this matter and its actions after it discovered the problem are all consistent with doing everything possible to defend the action.

As to prejudice, American points out that up to the time this motion and cross motion were submitted there had been no preliminary conferences and no discovery orders issued. Moreover, up to the point of submission, the plaintiff had not yet responded to the discovery demands of the co-defendant who did answer. Accordingly, it submits, its delay has not prejudiced the plaintiff in any way. In opposition, the plaintiff merely makes a general statement that delay is prejudicial in and of itself. This is insufficient to controvert American's showing of lack of prejudice.

As to the excuse for the failure to timely answer, the excuse offered here is based upon clerical errors within American's offices which resulted in the pertinent papers never reaching the desk of the in-house deputy general counsel. This is a version of law office failure which has been recognized in other cases as a reasonable excuse for delay (see *Sound Shore Medical Center v Lumbermens Mutual Casualty Co.*, 31 AD3d 743, 819 NYS2d 102 [2d Dept 2006]; *Estate of Ajamian*, 225 AD2d 992, 639 NYS2d 540 [3d Dept 1996]).

In an affidavit in support of this motion for an extension of time, American's deputy general counsel also indicated that American is one of the nation's largest mortgage lenders, thus suggesting that things may sometimes get lost in the shuffle, and that as soon as he became aware of the problem he took steps in good faith to undo the effects of American's failure to act in time.

In opposition to this application, the plaintiff submits that the excuse offered is insufficient and cites *Robinson v New York City Tr. Auth.* (203 AD2d 351, 610 NYS2d 296 [2d Dept 1994]) where the misplacing of a file was found not to be an acceptable excuse. But the *Robinson* case is distinguishable from the instant case because the delay in *Robinson* was three years (as opposed to ten months), a default judgment had already been entered (here, there is no default judgment and the default application was made after the motion for the extension), there was no affidavit of merits (here there is a meritorious defense - as discussed herein) and there was a failure to show no prejudice (here there is a showing of no prejudice - as discussed herein).

Accordingly, American is granted, as provided herein, an extension of time to submit its answer pursuant to CPLR 3012(d) and this action shall proceed on its merits; and, the plaintiff's cross motion for a default judgment against American is denied.

However, although the excuse for the delay is reasonable under the totality of circumstances of this case to allow for the extension of time, nevertheless, the court feels that to the extent that these clerical errors caused considerable inconvenience and extra legal work to the plaintiff, such errors on the part of the plaintiff cannot be tolerated without the imposition of monetary sanctions. Accordingly, the extension of time granted to the defendant American Home Mortgage Corp. is conditioned upon payment by the defendant American, itself, of a sanction in the amount of \$2,000.00 to be paid to counsel for the plaintiff for the benefit of the plaintiff as provided herein (see *Kremer v Kremer*, 150 AD2d 759, 542 NYS2d 24 [2d Dept 1989][\$1,500 sanction]; *Aces Mech'l. Corp. v Cohen Bros. Realty & Constr. Corp.*, 99 AD2 455, 471 NYS2d 283 [1<sup>st</sup> Dept 1984][\$5,000 sanction]).

This decision constitutes the order of the court.

Dated: March 21, 2007

HON. PAUL J. BAISLEY, JR.  
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HON. PAUL J. BAISLEY, JR. J.S.C.