

Gershowitz v Greenfield

2007 NY Slip Op 31752(U)

June 7, 2007

Supreme Court, Greene County

Docket Number: 0020071/5310

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

BRUCE H. GERSHOWITZ and
PAMELA A. GERSHOWITZ

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 07-0153
RJI NO. 19-07-2984

NEIL GREENFIELD, MIRIAM GREENFIELD and
DUANE WINN, Individually, and Doing Business as
DUANE WINN CUSTOM FRAMING

Defendant.

Supreme Court Greene County All Purpose Term, May 21, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Angelo F. Scaturro, Esq.
Attorney for the Plaintiffs
186 Main Street
Ravena, NY 12143

Paul Briggs
Attorney for the Defendants Greenfield
Pemberton and Briggs
202 Union Street
Schenectady, NY 12305

Michael C. Magguilli
Attorney for Defendant Winn
109 State Street
Albany, NY 12207

TERESI, J.:

Plaintiffs, Mr. and Mrs. Gershowitz, seek an order of default judgment. Defendants, Mr. and Mrs. Greenfield, oppose the motion and cross move for an order extending the defendants' time to serve their answer pursuant to CPLR 3012(d).

Plaintiffs commenced this action on January 29, 2007, by filing a summons and complaint against the Defendants for \$770,000 in damages to their property (actual damages suffered in the amount of \$180,000, punitive damages in the sum of \$50,000, and treble damages as a result of the Real Property Actions and Proceedings Laws of the State of New York amounting to \$540,000) allegedly caused by Defendants' construction of a building on an adjacent lot. On March 7, 2007, Plaintiffs' summons and complaint were personally served upon defendant Miriam Greenfield. Plaintiffs also allege that on the same date, a summons and complaint were served upon Mr. Greenfield by substituted service by serving a copy of the summons and complaint upon his wife, followed by a mailing the same day. On April 13, 2007, Defendants served their answer, and on April 19, 2007, the Plaintiffs' attorney rejected the defendants' answer as being untimely.

First, Defendants contend that Mr. Greenfield was not properly served because his wife was not given a copy of the summons and complaint for him on March 7, 2007. Defendants further submit that if it is determined that he was properly served pursuant to CPLR 308(2), that he had 30 days to serve his answer from the effective date of service and therefore, his answer was timely. Second, Defendants request that the Court excuse Mrs. Greenfield for her default because she had a reasonable excuse and the delay was not willful. They contend that upon being served, Mrs. Greenfield immediately took steps to resolve the suit by submitting the claim for review by her contractor's insurance carrier, her own builder's risk insurance carrier, and her homeowner's insurance carrier. It is their submission that notice disclaiming coverage by both her contractor's insurance carrier and her builder's risk insurance carrier did not allow sufficient time to for Mrs. Greenfield to serve an answer. Third, Defendants contend that they did not know their contractor was trespassing on the Gershowitzs' property and when they became aware

of the problem they offered to pay for repairs estimated at \$1,500 and the Plaintiffs refused. Both defendants request an extension of time to serve their answer pursuant to CPLR 3012(d).

An extension of time to appear or plead may be awarded if the movant establishes the existence of a reasonable excuse for the default. See, CPLR 3012(d); see Watson v. Pollacchi 32 AD3d 565 (3rd Dept. 2006). It is the preference of courts that cases be decided on the merits rather than on default. See, DFI Communications, Inc. v. Golden Penn Theater Ticket Service, 87 AD2d 778 (1st Dept. 1982). Moreover, CPLR § 2001 allows the court to disregard a mistake, omission, defect or irregularity if a substantial right of a party is not prejudiced.

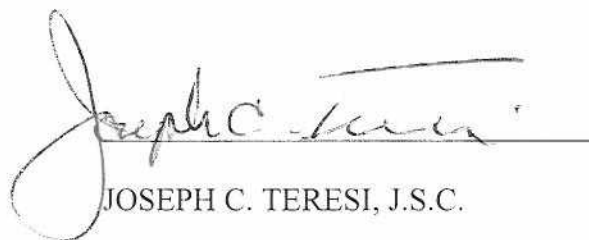
Defendants have offered a reasonable excuse to explain why their answers were issued upon default. While the Court recognizes the Plaintiff's submissions, this Court is inclined to have matters resolved upon the merits rather than by default.

The plaintiff's motion is denied and the defendant's cross motion is granted.

So ordered.

Dated: June 7, 2007

Albany, NY



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Verified Complaint of Angelo F. Scaturro, dated January 25, 2007
2. Verified Answer by Pemberton and Briggs, dated April 12, 2007
3. Demand for Bill of Particulars, dated April 12, 2007
4. Demand for Disclosure of Experts, dated April 12, 2007
5. Demand for Photographs, dated April 12, 2007
6. Demand for Statements, dated April 12, 2007
7. Demand for Names and Addresses of Witnesses, dated April 12, 2007
8. Affidavit of Neil Greenfield, dated April 13, 2007
9. Notice of Motion by Angelo F. Scaturro, dated May 3, 2007
10. Affidavit of Angelo F. Scaturro, dated May 3, 2007
11. Notice of Cross Motion by Paul Briggs, dated May 16, 2007
12. Affirmation by Paul Briggs, dated May 16, 2007
13. Affidavit by Miriam Greenfield, dated May 16, 2007
14. Reply Affidavit by Angelo F. Scaturro, dated May 21, 2007