

**Long Is. Lighting Co. v Payton Lane  
Nursing Home, Inc.**

2007 NY Slip Op 33499(U)

October 17, 2007

Supreme Court, Nassau County

Docket Number: 4665-06/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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LONG ISLAND LIGHTING COMPANY  
d/b/a LIPA, KEYSpan GAS EAST  
CORPORATION d/b/a KEYSpan ENERGY  
DELIVERY LONG ISLAND,

Plaintiffs,

-against-

PAYTON LANE NURSING HOME, INC.  
and PAYTON LANE PROPERTIES, INC.,

Defendants.

TRIAL/IAS, PART 6  
NASSAU COUNTY

INDEX No. 004665/06

MOTION DATE: Oct. 10, 2007  
Motion Sequence # 001

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The following papers read on this motion:

Notice of Motion..... X  
Affirmation/Affidavit in Opposition..... XX  
Reply Affirmation ..... X  
Memorandum of Law..... X

This motion, by the defendants, for an order (1) pursuant to Rule 5015 and Sections 3012 and 2005 of the CPLR, vacating the default judgment on the ground the defendants' default was excusable and their defense is meritorious, and permitting defendants to interpose an answer; and (2) granting such other and further relief as this Court deems just and proper including the costs and disbursement of this action, is determined as hereinafter set forth.

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### **FACTS**

The defendants contracted with IDI Construction (“IDI”) for the construction of a nursing home, which premises was delivered to the defendants on February 17, 2006. During the construction of the premises, LIPA supplied electric service via three accounts, commencing December 12, 2004, November 28, 2005, and December 24, 2004; and KeySpan supplied gas service via two accounts, commencing November 21, 2005 and May 6, 2005. These accounts went unpaid for some time, resulting in arrears and LIPA and KeySpan taking collection action against the defendants. In late 2005, following that action and after telephone discussions between the plaintiffs’ supervisor of collections, Richard Maklary, and the defendants’ former general counsel, John J. Martin, the defendants made some payments to the plaintiffs. Soon after, however, the defendants stopped making payments and the plaintiffs filed their complaint on March 17, 2006. On March 28, 2006, Mr. Martin contacted plaintiffs’ counsel to confirm the extension of time for defendants to file their appearance and answer until April 27, 2006. Plaintiffs’ counsel consented to this extension. The defendants failed to answer by April 27, 2006, and the plaintiffs sought a default judgment. Default judgment was entered May 26, 2006. The defendants now seek an order vacating the default judgment.

### **DEFENDANTS’ CONTENTIONS**

The defendants argue that their default was excusable and their defense is meritorious. Defendants initially claim that their default occurred because they either never received the plaintiffs’ summons and complaint or because of an inadvertent oversight on the part of defendants’ former general counsel, Mr. Martin, resulting in his failure to respond to the complaint and this constitutes law office failure. Additionally, the defendants claim that they never entered into an agreement with the plaintiffs for the receipt of utility services, and therefore they were not responsible for payment for such services. Instead, IDI was responsible for such remittance because, as part of their contract for the construction of the nursing home, the defendants and IDI agreed that IDI would be responsible for all temporary utilities.

As a result of Mr. Martin’s negligence, the defendants claim they first received notice of the default judgment on or about October 5, 2006.

**PLAINTIFFS' CONTENTIONS**

The plaintiffs contend that the defendants have failed to provide a reasonable excuse because the defendants did in fact receive their summons and complaint and therefore had notice of their action. The plaintiffs specifically claim that defendants had a designated process address, and they personally served at this designated address a Ms. "Roxanne", who was authorized to accept service on behalf of the defendants. Additionally, the plaintiffs offer email correspondence documenting a request by the defendants' then general counsel for an extension of time to answer the complaint. Thus, in light of their purported prima facie evidence of proper service, the plaintiffs argue that the defendants' conclusory denial of receipt of the complaint is insufficient to raise an issue of fact. Next, the plaintiffs assert that the defendants' claim of law office failure is an insufficient ground for reasonable excuse. The plaintiffs argue that inadvertence and oversight on the part of counsel is an inadequate excuse for delay, especially given that such excuse is unsubstantiated, undetailed, and uncorroborated.

The plaintiffs also contend that the defendants have failed to provide a meritorious defense. They claim that any contractual issues of responsibility for utility bills, as between the defendant and IDI, are just that: issues between the defendant and IDI. Such issues, the plaintiffs assert, have no bearing on the defendants' relationship to the plaintiffs. Additionally, the plaintiffs argue that the defendants' then general counsel never raised the issue of IDI's purported responsibility for payment of utility bills in discussions with the plaintiffs' supervisor of collections.

**DEFENDANT'S REPLY**

The defendants assert that their failure to answer the complaint was excusable because of their former general counsel's failure to fulfill his professional duties. Defendants concede that the then-general counsel requested an extension to answer the complaint. However, the general counsel was at the time preparing to terminate his employment with the defendants and seek employment elsewhere. As a result of activities related to his employment status, the general counsel neglected his duties to the defendants and failed to respond to the complaint. This, the defendants say, constitutes law office failure for which they should not be punished.

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The defendants maintain that they are an improper party, not responsible for the utility charges at issue, and this establishes a meritorious defense. They assert that plaintiffs have offered nothing to conclusively dispute the merits of their defense and, in fact, the plaintiffs all but concede that, with the exception of accounts briefly opened by the defendants in November 2005, the defendants were not the party responsible for utility charges. The defendants further assert that they did not in any way agree to be liable for IDI's purported responsibility to the plaintiffs for utility charges.

Additionally, the defendants note that the plaintiffs have not contended that they, the plaintiffs, will be prejudiced if the default judgment is vacated; and the defendants also direct the Court's attention to an action pending by the defendants against the plaintiffs in New York County Supreme Court. That action concerns an incident caused by an electrical anomaly in November and December 2006 that caused damages to Payton Lane Nursing Home and delayed its opening. According to the defendants, to the extent they are found liable for any charges at issue in the instant action, such charges are likely to be offset by the damages defendants incurred in connection with the November and December 2006 incident.

**DECISION**

In order to vacate a default judgment, the moving party must demonstrate 1) a reasonable excuse for their default, and 2) a meritorious defense. (see, CPLR 5015(a)(1); **Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.**, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 10, 1986 ; **Segovia v. Delcon Constr. Corp.**, 2007 NY Slip Op 6977, 1, 2007 N.Y. App. Div. LEXIS 9951, 1, 2<sup>nd</sup> Dept., 2007).

The defendants contend that their default is reasonably excused based on either lack of service or law office failure. The plaintiffs, however, provide affidavits of service completed by their process server that all but rebut the defendants' default by reason of lack of service. Further evidencing the apparently infirmity of this excuse is the defendants' decision, whether consciously made or not, not to reassert the lack of service excuse in their reply affirmation.

The defendants, however, also maintain law office failure as a reasonable excuse for their default. A court may consider law office failure as a reasonable excuse. (see, CPLR 2005; **Montefiore Med. Ctr. v. Hartford Acc. & Indem. Co.**, 37 A.D.3d 673, 673, 830 N.Y.S.2d 336, 337, 2<sup>nd</sup> Dept., 2007). Here, the defendants have offered as an

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excuse their former general counsel's failure to fulfill his professional duties. They contend that, due to Mr. Martin's preoccupation with his own employment concerns and an ongoing job search, he failed to satisfy his duties as general counsel to the defendants. In determining whether to excuse a default, a court may also consider the lack of prejudice to the plaintiff from the delay, the existence of potentially meritorious defenses, the strong public policy to resolve actions on their merits, and the defendants' lack of willfulness. (see, A & C Constr. Inc. of N.Y. v. Flanagan, 34 A.D.3d 510, 510, 823 N.Y.S.2d 682, 682, 2<sup>nd</sup> Dept., 2006). Here, the plaintiffs have not contended that they will be prejudiced if the default is vacated. The defendants have presented as a potentially meritorious defense that they were not responsible for payment to the plaintiffs for utilities. Finally, there is also no indication of a pattern of willful default by the defendants' former counsel. (see, Santiago v. New York City Health & Hosps. Corp., 10 AD3d 393, 394, 780 N.Y.S.2d 764, 766, 2<sup>nd</sup> Dept., 2004). In light of the foregoing, and given the strong public policy in favor of resolving cases on their merits, (see, Harris v. City of New York, 30 A.D.3d 461, 466, 817 N.Y.S.2d 99, 103, 2<sup>nd</sup> Dept., 2006; Beizer v. Funk, 5 A.D.3d 619, 620, 774 N.Y.S. 2d 781, 782, 2<sup>nd</sup> Dept., 2004), the court views the defendants' excuse of law office failure as reasonable.

It is also incumbent on the defendants to demonstrate the existence of a meritorious defense. Here, the defendants claim that they were not responsible for the payment of utility charges at issue and that, in fact, IDI had agreed in its contract with the defendants to cover such expenses. The defendants have submitted relevant parts of their construction contract with IDI, which they claim set forth IDI's responsibility for electric and gas utilities provided by the plaintiffs. Thus, the defendants have offered more than mere conclusory statements, (Melish v. Melish, 267 A.D.2d 218, 218, 699 N.Y.S.2d 305, 305, 2<sup>nd</sup> Dept., 1999; Peterson v. Scandurra Trucking Co., 226 A.D.2d 691, 691-92, 642 N.Y.S.2d 540, 540, 2<sup>nd</sup> Dept., 1996), and have alleged facts sufficient to satisfy their burden of demonstrating a potentially meritorious defense. (see, Franklin v. 172 Aububon Corp., 32 A.D.3d 454, 455, 819 N.Y.S.2d 785, 787, 2<sup>nd</sup> Dept., 2006).

Therefore, for the foregoing reasons, the defendants' motion for an order vacating the judgment of default and permitting the defendants to interpose an answer is **granted**.

The defendants shall, within 20 days after service of a copy of this order upon their counsel, serve and file their Answer(s) upon plaintiffs. The third-party Summons & Complaint shall be simultaneously served and filed.

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A Preliminary Conference has been scheduled for December 18, 2007 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated OCT 17 2007

  
J.S.C.

**ENTERED**  
OCT 19 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE