

Makins v Green

2007 NY Slip Op 34342(U)

November 22, 2007

Supreme Court, New York County

Docket Number: 0118605/2006

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

James Makins

INDEX NO. 118605/06
~~118609/06~~

MOTION DATE _____

- v -
Jack Green et al

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

FILED

Replying Affidavits _____

JAN 28 2008

3, 4

Cross-Motion: Yes No

NEW YORK

Upon the foregoing papers, it is ordered that this motion

~~COUNTY CLERK'S OFFICE~~ by defendant

Venezia Interiors Corp., & cross-motion by plaintiff
to compel Venezia to accept the complaint are
decided in accordance with the attached
memorandum decision.

JUSTICE DORIS LING-COHAN

Dated: _____

1/27/08
[Signature]

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff commenced this action by filing a summons with notice on or about December 15, 2006. Plaintiff served a copy thereof on Venezia on or about February 3, 2007. Venezia served a notice of appearance and a demand for a complaint on May 30, 2007. On or about July 13, 2007, Venezia made the instant motion.

CPLR 3012 (b) provides that:

[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint within ... [20 days after service of the summons]. Service of the complaint shall be made within twenty days after service of the demand. ... The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.

Here, Venezia served its demand for the complaint more than two months after the time provided for in this subdivision. Venezia made its motion 24 days after plaintiff had failed to serve his complaint within the time allowed for such service.

CPLR 3012 (d) provides that

[u]pon the application of a party, the court may ... compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

Plaintiff's attorney avers that, when the demand was served upon his office, it was misfiled by one of his employees; that at that time, a number of Venezia's co-defendants had not yet responded to the service of the summons, and therefore, Venezia's apparent

Realty, Inc.'s motion (seq. 002) pursuant to CPLR 3212, for an order dismissing the complaint, on the ground that the court lacks personal jurisdiction over them, was granted to the extent that the motion was referred for a traverse hearing.

failure to respond did not stand out for him; and that when he came upon the demand by accident, on or about July 16, 2007, he immediately made personal service of the complaint upon Venezia's attorney, whose office is in the same building as his. Within a day, he received Venezia's notice of motion in the mail. On or about August 1, 2007, Venezia's attorney served plaintiff's counsel with a notice of rejection of the complaint.

Pursuant to CPLR 2005, law office failure may constitute a reasonable excuse for delay or default. Here, the demand was misfiled. As soon as plaintiff's attorney discovered it, he served the complaint. Between the time that Venezia's attorney served the demand and the time that he served the instant motion, he did not contact plaintiff's attorney. In these circumstances, plaintiff has shown a reasonable excuse for his default. Moreover, Venezia has not alleged any prejudice resulting from that default.

Where, as here, a complaint is not timely served because of law office failure, the plaintiff must submit an affidavit of merit, in order to avoid dismissal of the complaint. Kel Mgt. Corp. v Rogers & Wells, 64 NY2d 904 (1985); Dick v Doral Greens Ltd. Partnership, 289 AD2d 74 (1st Dept 2001). Plaintiff has submitted an affidavit from John F. Peachy, a licensed registered architect whose more than 30 years' experience includes the design of sprinkler systems. For the last 16 years, Mr. Peachy has held a Certificate of Fitness from the New York City Fire Department for inspection of sprinkler

systems. Mr. Peachy states in his affidavit that a Hugo Boss employee told him that the day on which the pipe burst, and the days just before, had been very cold. He also states that the pipe that burst was in an unheated space, just above the Hugo Boss kitchen areas, and that, as the general contractor, Venezia was responsible for seeing to it that the sprinkler system was protected from freezing. Mr. Peachy states, with a reasonable degree of architectural certainty, that at least one of the causes of the flooding in the building was Venezia's failure to ensure that the sprinkler pipes were heated, or provided with some other mechanism to prevent them from freezing, and Venezia's failure to see to it that the area surrounding the sprinkler was weather sealed.

In its reply papers, Venezia contends that plaintiff cannot prove a facially valid claim, because the summons and notice were served more than six years after Venezia's work was performed. However, plaintiff's causes of action against Venezia may not have accrued until the date of the alleged flood, and plaintiff served his summons and notice less than three years after that date.

Accordingly, it is hereby

ORDERED that, the motion to dismiss by defendant Venezia is denied, the cross motion by plaintiff is granted, and the complaint will be deemed served upon defendant Venezia Interiors Corp. upon service of a copy thereof, together with a copy of this

order with notice of entry;

it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: January 22, 2008



Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Dismiss\MAKINS.green.wpd

FILED

JAN 28 2008

NEW YORK
COUNTY CLERK'S OFFICE¹