Mastrangelo v Roosevelt Is. Operation Corp. of the State of N.Y.
2007 NY Slip Op 34500(U)
February 12, 2007
Supreme Court, New York County
Docket Number: 106667/06
Judge: Karen S. Smith

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

----------X

DARCY MASTRANGELO,

Plaintiff,

-against-

ROOSEVELT ISLAND OPERATION CORP. OF THE STATE OF NEW YORK, ROOSEVELT ISLAND HOUSING MANAGEMENT CORP., NORTH TOWN ROOSEVELT ASSOCIATES, NORTH TOWN ROOSEVELT ASSOCIATES, L.P., and NORTH TOWN ROOSEVELT, LLC.,

Defendants.

----------X

Index no.: 106667/06
Motion seq.: 003
Motion date: 12/15/06

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants' motion to vacate a default judgment and for an order directing plaintiff to accept defendants' answer is granted for the reasons set forth more fully below.

Plaintiff brought this action to recover for injuries she suffered when one or more assailants allegedly entered her apartment unlawfully and assaulted her. Plaintiff alleges that defendants Roosevelt Island Housing Management Corp., North Town Roosevelt Associates, North Town Roosevelt Associates, LP and North Town Roosevelt, LLC (hereinafter collectively the "Moving Defendants") are liable for her injuries because they were, *inter alia*, negligent in providing security in the building and for failing to properly maintain a window located next to plaintiff's apartment door, through which the assailant(s) entered. Plaintiff served the Moving Defendants with a summons and complaint by service upon the Secretary of State, as follows: Roosevelt Island Housing Management Corp. on June 6, 2006; North Town Roosevelt

003

Associates, L.P., North Town Roosevelt Associates, and North Town Roosevelt, LLC on May 22, 2006. Plaintiff subsequently mailed a copy of the summons and complaint to each of the Moving Defendants on July 10, 2006. On September 6, 2006, this Court issued an order granting plaintiff's motion for a default judgment on the issue of liability against the Moving Defendants, as they had not answered or appeared in the matter. At a discovery conference held on November 8, 2006, the Moving Defendants appeared and sought leave to file the instant motion seeking an order vacating this Court's September 6, 2006 decision and order. The Moving Defendants were ordered to file their motion no later than November 22, 2006, with opposition to be served by December 6, 2006, and reply papers to be served by December 13, 2006. All papers were to be served by personal service.

In the instant motion, the Moving Defendants argue that this Court's September 6, 2006 decision and order granting plaintiff a default judgment as to liability should be vacated pursuant to both CPLR §§5015(a)(1) and 317. CPLR §5015(a)(1) states that on a motion to the court which rendered the initial default judgment, such judgment may be vacated where the moving party can demonstrate an excusable default within one year. The moving party must provide 1) an excuse for the default, and 2) an "affidavit of merits" offering a meritorious defense. (*See Benadon v. Antonio*, 10 AD2d 40 [1960]). In determining a motion to vacate a default judgment, the Court is obliged to balance those factors in addition to the extent of the delay, the prejudice to the non-defaulting party, and the evidence or lack of evidence of deliberate default. (*Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 AD2d 624 [1st Dept. 1985]). The law favors disposition on the merits to disposition by default. (*Id.*)

The Moving Defendants allege that their delay in answering the complaint was due to the

incompetent handling of the claims file by a temporary employee with AIG Claims Services. It was only when the employee's files were transferred to Joe Dan Thompson, a Claims Examiner with AIG, according to Moving Defendants, that the default was discovered. The order granting a default judgment was signed by this Court on September 6, 2006 and entered by the County Clerk on September 18, 2006; the Moving Defendants did not obtain counsel for this matter until September 21, 2006, according to the moving papers. The Moving Defendants served an Answer on October 6, 2006, along with a stipulation seeking vacatur of the September 6, 2006 decision and order, but plaintiff would not agree to vacate. The instant motion was then filed.

Plaintiff argues that the Moving Defendants' delay was excessive and is not a reasonable excuse, as the Claims Examiner had the file for approximately three weeks before discovering the default, and the answer was not served until two weeks after counsel was retained. The Court disagrees. The answer was served within one month of the default judgment decision and order, and less than one month from date of entry of that decision. Plaintiff has pointed to no prejudice she would suffer as a result of the delay.

Even with a reasonable excuse for delay, the Moving Defendants must still establish that they have a meritorious defense. Such a defense must generally be established by an affidavit by someone with knowledge of the facts. Here, the Moving Defendants submit an affidavit of Geoffrey Fishman, the Housing Manager of Roosevelt Island Housing Management Corp., and an affidavit of Joe Dan Thompson, the AIG Claims Examiner who discovered the default and is handling the claim in this matter. The Moving Defendants allege they have a meritorious defense because 1) the alleged assailant was a legal tenant in the building and, therefore, was lawfully on the premises, distinguishing this case from cases in which a defendant failed to keep intruders out

of the building; 2) the plaintiff was not a lawful tenant in the building, but was there under an illegal sublet, raising issues of the Moving Defendants' duty to plaintiff; 3) the Moving Defendants were never apprised of any conflict between plaintiff and her assailant(s) or any potential danger to plaintiff; and 4) the plaintiff's own statements to police may be read to indicate that the assailant gained entrance through the window by breaking it, not by taking advantage of any alleged defect.

In opposition, plaintiff argues that the Moving Defendants submitted no evidence to prove their meritorious defense. However, the Moving Defendants need not demonstrate that they were not negligent in this matter, such as would be the standard under a motion for summary judgment, but need only demonstrate that they have a viable defense which they can offer. As this matter has not yet been joined, it would be inappropriate for the Court to determine whether the evidence fully supports the defense. Further, plaintiff cites to no cases to support her proposition that the Moving Defendants must prove their defense in order to obtain vacatur of the default judgment.

The Moving Defendants also argue that their motion should be granted pursuant to CPLR §317, which states that where a party was served by means other than personal service, such a party should be allowed to defend the case within one year of entry of such judgment upon a finding by the court that 1) the party did not actually receive notice of the summons in time to defend the case, and 2) the party has a meritorious defense. Plaintiff, in her opposition, misapprehends the Moving Defendants' argument, and counters that she has supplied an affidavit of service upon the Secretary of State and, therefore, the Moving Defendants were properly served. CPLR §317 does not mandate that the defendant show it was improperly served; rather it

requires a showing by the Moving Defendant did not actually *receive* the summons despite proper service by means other than personal service. The Moving Defendants have made no claim that they did not receive the summons and complaint; rather, they state that "[s]ervice was *attempted* via the Secretary of State" (emphasis added). However, according to the supporting affidavit, AIG Claims Services, which was responsible for processing the claim, had the summons and complaint prior to September 1, 2006 when Mr. Thompson was assigned to the claim. Therefore, the Moving Defendants fail to meet their burden under CPLR §317 to show that they did not actually receive the summons and complaint.

Accordingly, it is

ORDERED that this Court's September 6, 2006 decision and order granting plaintiff default judgment on the issue of liability against defendants Roosevelt Island Housing Management Corp., North Town Roosevelt Associates, North Town Roosevelt Associates, LP and North Town Roosevelt, LLC, is hereby vacated; and it is further

ORDERED that within 20 days of the date of entry of this decision and order, defendants Roosevelt Island Housing Management Corp., North Town Roosevelt Associates, North Town Roosevelt Associates, LP and North Town Roosevelt, LLC serve an answer to the summons and complaint, a copy of this decision and order, together with notice of entry, by personal service upon plaintiff; and it is further

ORDERED that defendants Roosevelt Island Housing Management Corp., North Town Roosevelt Associates, North Town Roosevelt Associates, LP and North Town Roosevelt, LLC cause a copy of this decision and order, together with notice of entry hereof, to be served upon Justice Milton Tingling's part at 60 Centre Street; and it is further

ORDERED that the parties appear for a preliminary conference on February 21, 2007 at 9:30 a.m. in Justice Milton Tingling's part, as previously scheduled.

This constitutes the decision and order of this Court.

Dated: February 12, 2007

ENTER:

Hon. Karen S. Smith, J.S.C.