

Malester v Trade- Winds Env'tl. Restoration, Inc.
2008 NY Slip Op 31677(U)
June 11, 2008
Supreme Court, Nassau County
Docket Number: 9747-07/
Judge: F. Dana Winslow
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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ANDREA MALESTER and TZVEE WOOD
Plaintiffs,

-against-

TRADE-WINDS ENVIRONMENTAL
RESTORATION, INC.; WINDSWEPT
ENVIRONMENTAL GROUP, INC.; MICHAEL
O'REILLY; CHRISTOPHER WALSH; and John and
Jane Does 1-10,

Defendants.

**MICHELE M. WOODARD
J.S.C.**
TRIAL/IAS Part 16
Index No.: 07-009747
Motion Seq. No.: 01, 02

DECISION AND ORDER

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Papers Read on this Motion:

- 1. Plaintiff's Notice of Motion.....01
- 2. Defendant's Opposition.....xx
- 3. Plaintiff's Reply.....xx
- 4. Defendants' Notice of Cross-Motion.....02
- 5. Plaintiff's Affirmation in Opposition.....xx
- 6. Defendant's Affirmation in Reply to Opposition.....xx

In Motion Sequence Number One, the Plaintiffs move for an order pursuant to CPLR §3215(a) requesting that the Court enter a default judgment against the Defendants for their failure to answer or make a motion concerning the Plaintiffs' Summons and Verified Complaint served on them; and in the event the Motion is denied, granting relief of \$1,500 to cover the costs of this Motion and as a punitive measure in response to the Defendants' flouting of the statutory requirements. This action was commenced by the filing and service of the Notice of Motion on or about January 5, 2008.

In Motion Sequence Number Two, the Defendants move in a cross-motion for an order pursuant to CPLR §3012(d) permitting the Defendants an extension of time to file an Answer.

The Defendant, Trade-Winds Environmental Restoration, Inc. (hereinafter "Trade-Winds"), is a subsidiary of the Defendant, Windswept Environmental Group, Inc. (hereinafter "Windswept"). The Defendant, Christopher Walsh, was at all times relevant to the Complaint the Vice-President of

Construction of the Trade-Winds. The Plaintiffs maintain that Christopher Walsh also held himself out as project manager of the job in question. The Defendant, Michael O'Reilly was at all times relevant to the Complaint the Chairman, President and Chief Executive Officer of Windswept. Defendants John and Jane Does 1-10, are persons alleged to have committed various acts of negligence, fraud, conversion, and breach of contract, but whose exact identities are not known to the Plaintiffs at this time.

With regard to Motion Sequence Number One, the Plaintiffs maintain that on August 31, 2001, the Plaintiff, Andrea Malester, contracted with the Defendant, Trade-Winds, to perform restoration-related services to the Plaintiffs' possessions. Said restoration-related services were performed with regard to water damage to the residence owned by Andrea Malester located at 271 Magnolia Boulevard, Long Beach, New York, 11561. The Plaintiffs further maintain that Andrea Malester acted as a representative of the Plaintiff, Tzvee Wood, in any dealings involving possessions of Tzvee Wood, and that both Plaintiffs had possessions stored with Trade-Winds. On or about November 8, 2001, Trade-Winds faxed the Plaintiffs an invoice for the Plaintiffs' stored possessions. The Plaintiffs allege that said invoice was only a partial listing of the removed goods. The Plaintiffs allege that on numerous occasions, and to no avail, they made demands for the whereabouts of said personal property stored with Trade-Winds. On or about September 26, 2007, the Plaintiffs filed and served the Summons and Complaint seeking judgments for replevin, bailment, breach of contract, conversion, and trespass on all of the Defendants. On or about October 9, 2007, on behalf of all of the Defendants, Trade-Winds filed and served an Answer to the Plaintiffs' Complaint. On or about October 16, 2007, the Plaintiffs filed and served the Defendant, Trade-Winds, with Notice pursuant to CPLR §3022 that the Plaintiffs elected to treat the Answer as a nullity for its failure to provide sufficient verification. On or about October 26, 2007, the Defendants filed and served on the

Plaintiffs a second Answer and Corporate Verification. On or about October 29, 2007, the Plaintiffs filed and served the Defendant, Trade-Winds, with Notice pursuant to CPLR §3020 and CPLR §3022 that the Plaintiffs again elected to treat the Answer as a nullity for its failure to provide sufficient verification pursuant to CPLR §3020(d)(1).

With regard to Motion Sequence Number Two, the Defendants cross-move to serve an Answer to the Plaintiffs' Complaint, and also to request that the Court deny the Plaintiffs' motion. The Defendants maintain in their Notice of Cross-Motion that the party who verified the second Answer is no longer general counsel to Trade-Winds. The Defendants assert that it is an excusable neglect that the Answers filed were technically in violation of the CPLR; however, under the circumstances, this was an excusable neglect. The Defendants further assert that the Plaintiffs have not been prejudiced in any way by the delay of the Answer, having waited almost seven years to commence this action.

CPLR §3012(d) states in relevant part:

“Upon the application of a party, the Court may extend the time to appear or plead, or 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.”

CPLR §3020(d)(1) states in relevant part:

“The verification of a pleading shall be made by the affidavit of the party, or, if two or more parties united in interest are pleading together, by at least one of them who is acquainted with the facts, except...if the party is a domestic corporation, the verification shall be made by an officer thereof and shall be deemed a verification by the party.”

CPLR §3022 states:

“A defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects to do so.

Upon a review of the record, the Court finds that the Defendants violated CPLR §3020(d)(1). The Court also finds that pursuant to CPLR §3022, the Plaintiffs were entitled to elect to treat the unverified Answer as a nullity. Moreover, the Court finds that pursuant to CPLR §3022, the Plaintiffs properly notified the Defendants of their election. However, based on the circumstances, this violation is excusable. Moreover, pursuant to CPLR §3012(d), the Court finds that considering that the Defendants did Answer the Plaintiffs' complaint on two occasions, in the interest of justice, the Court will allow the Defendants seven (7) days to properly answer the Complaint.

As such, it is hereby

ORDERED, that the Plaintiffs' Motion Sequence Number One is **DENIED** in accordance with this order, and

ORDERED, that the Defendants' Motion Sequence Number Two is **GRANTED**, and the Defendant is directed to file and serve on the Plaintiffs an Answer within seven (7) days of receipt of this Order.

It is further

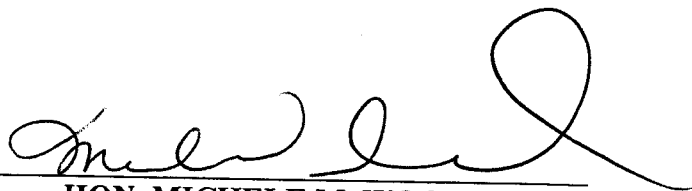
ORDERED, that the parties are directed to appear for a Preliminary Conference on July 24, 2008 at 9:30 am in DCM.

Any relief not specifically granted herein is denied.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: June 11, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

JUN 12 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE