

Travato v Little W. 12th LLC
2008 NY Slip Op 33696(U)
July 31, 2008
Supreme Court, New York County
Docket Number: 109702/06
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
RICHARD TRAVATO

Plaintiff,

-against-

Index No.: 109702/06

DECISION
and ORDER

LITTLE WEST 12TH LLC, and JOHN DOE
"1" THROUGH "5", said names being fictitious
and unknown.

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action for, *inter alia*, negligence, arises out of personal injuries plaintiff allegedly sustained during an assault outside of defendant's place of business on March 7, 2005. JEC II, LLC, d/b/a One Little West 12th Street possibly i/s/h/a Little West 12th Street LLC (Little West 12th) now moves to vacate the default judgment entered, on default, against it on May 22, 2008 and to dismiss plaintiff's complaint as abandoned pursuant to CPLR § 3215(c). Plaintiff opposes.

I. Background

The affidavit of service alleges that service of the summons and verified complaint was effected upon Little West 12th by personally serving its general agent, a person authorized to accept service, on July 20, 2006. In a motion dated January 16, 2008, plaintiff moved, pursuant to CPLR § 3215, for a default judgment. In his affirmation in support of the motion, plaintiff's counsel stated that service was properly made on July 20, 2006, "[i]t has now been more than fifteen (15) months since [d]efendant was served" and that defendant had neither answered nor

opposed the motion. On May 22, 2008, the court granted plaintiff's motion on default and referred the issue of damages, costs and reasonable attorneys' fees to a special referee to hear and determine (May Decision).

After receiving notice of entry of the default, Little West 12th made the instant July 25, 2008 Order to Show Cause seeking to vacate the default and dismiss the action arguing that, pursuant to CPLR § 3215(c), plaintiff had abandoned his cause of action by failing to move for the entry of judgment within one year of the alleged default. In opposition, plaintiff's counsel states that a former associate at his firm began handling the action in 2006 until "abruptly" leaving the firm due to emotional and physical issues. Counsel contends that many of this former associate's files were misplaced and that after a diligent and "exhaustive search," the instant case file was located in December 2007. After reviewing the case file, counsel argues he expeditiously moved for default.

II. Conclusions of Law

CPLR § 3215(c) states, *inter alia*, that, "if [a] plaintiff fails to take proceedings for entry of judgment within one year after default, the court shall not enter judgment but shall dismiss the complaint as abandoned...unless sufficient cause is shown as to why the complaint should not be dismissed." Pursuant to CPLR § 2005, law office failure no longer constitutes a *per se* unreasonable excuse for a party's default or delay. *LaValle v. Astoria Constr. & Paving Corp.*, 266 AD2d 28 (1st Dept 1999). The extent of an attorneys negligence "must instead be weighed against the merits of the claim and the lack of prejudice to the other side." *Id.* A court retains discretionary power to vacate its own judgment for a sufficient reason and in the interests of substantial justice. *Goldman v. Cotter*, 10 AD3d 289, 293 (1st Dept 2004).

In its May Decision, the court overlooked plaintiff's failure to timely move for default. Plaintiff clearly made its motion for a default judgement more than one year after Little West 12th allegedly defaulted in violation of CPLR § 3215(c). Therefore, the court vacates its May 22, 2008 entry of default against defendants.

Nonetheless, dismissal of the case is denied. Plaintiff's counsel alleges law office failure as its reason for not timely moving for default. Plaintiff's verified complaint sets forth a meritorious cause of action, and Little West 12th has not put forth any evidence to show that it suffered any prejudice as a result of the delay. *See Bazac v. Odelia Enters. Corp.*, 272 AD2d 226 (1st Dept 2000) (plaintiff's attorney's failure to track progress of action was excusable law office failure that reasonably accounted for failure to timely move for default where meritorious cause of action existed and defendant suffered no prejudice from delay); *LaValle*, 266 AD2d at 28 (court exercised proper discretion in denying motion to dismiss complaint pursuant to CPLR 3215(c) where even though inadvertent error by counsel was not "compelling" meritorious cause of action existed and no tenable showing made that plaintiffs' delay prejudiced defendant).

Little West 12th also argues that it was not duly served with process in this action. Therefore, it contests the court's personal jurisdiction over it. CPLR § 3215(c) states, in relevant part, that "[a] motion by the defendant under this subdivision does not constitute an appearance in the action." Therefore, any jurisdictional objection claimed by the defendant does not have to be included in the motion. *See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:11, at 493.* "If the motion is denied and the plaintiff's omission to take the default within the year is excused, the defendant may afterwards move to dismiss the action, having done nothing to waive the jurisdictional objection." *Id.* Accordingly, it is

ORDERED that Little West 12th's motion to vacate this court's May 22, 2008 order granting plaintiff's motion for a default judgment is granted and this court's order of May 22, 2008 is hereby vacated; and it is further

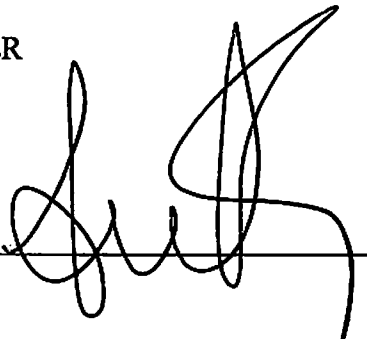
ORDERED that Little West 12th's motion to dismiss the complaint pursuant to CPLR § 3215(c) is denied; and it is further

ORDERED that Little West 12th shall either serve plaintiff with its answer to the verified complaint or make a motion to dismiss this action within thirty days (30) of entry of this order; and it is further

ORDERED that Little West 12th shall serve a copy of this order with notice of entry upon both the Trial Support Office (Room 158) and the County Clerk.

ENTER

DATE: July 31, 2008
New York, NY


J.S.C.

FILED
AUG 04 2008
NEW YORK
COUNTY CLERK'S OFFICE