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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

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RMJ & SONS CONSTRUCTION INC.,

Plaintiff,

Index No. 117190/05

-against-

ORDER/DECISION

GEORGE LORDSON, RUTH W. LORDSON, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, 54, INC., NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOHN DOES I-X, the last names being fictitious and unknown to Plaintiff, the persons intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in lien or lien upon the premises described in the Complaint,

Defendants.

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KIBBIE F. PAYNE, J.:

Applications numbered 004 and 005 on the February 27, 2008 motion calendar are consolidated for deposition. Plaintiff's counsel moves, pursuant to CPLR 321(b), for an order permitting the Law Firm of Greenblatt Lesser LLP to withdraw as counsel of record for plaintiff RMJ & Sons, Construction, Inc. Counsel for defendants George and Ruth Lordson (Lordson) moves for an order dismissing the complaint, pursuant to CPLR 3126(a) and further seeks an order, pursuant to CPLR 3215(a), awarding defendant Lordson a default judgment on the unanswered counterclaims to the amended answer. In opposition, plaintiff cross-moves for an order permitting the February 4, 2008 service of a late reply to defendants' counterclaims.

005

The corporate plaintiff commenced this action in 2005, seeking to foreclose on a mechanic's lien and to recover damages for breach of contract. By so-ordered stipulation of counsel entered November 29, 2007, Lordson and their former attorney of record consented to the substitution of incoming counsel for said defendants. The parties' stipulation additionally provided for the taking of an oral deposition of Ray Coffie, the principal of plaintiff corporation. Coffie, however, neither responded to any of the attorneys' communications regarding the preparation for the deposition nor did he appear for oral deposition. Plaintiff's counsel eventually applied to this court for permission to withdraw as counsel of record for plaintiff on the grounds of its client's failure to communicate with its attorney and the client's failure to pay its outstanding legal fees. Defendants do not oppose the application to withdraw as counsel of record.

The Code of Professional Responsibility DR 2-110 (22 NYCRR 1200.15 [c][1]iv]), permits a lawyer to withdraw from representing a client if the client, by his or her conduct, "renders it unreasonably difficult for the lawyer to carry out employment effectively." (*See also, McCormack v Kamlian,* 10 AD3d 679; *Bok v Werner,* 9 AD3d 318). In this case, the principal of the plaintiff corporation has failed to respond to counsel's communications in order to confirm the deposition date and to

prepare for the oral deposition. Clearly, this refusal to cooperate and to communicate with counsel makes it unreasonably difficult for counsel to provide effective legal representation. The attorney-client communication issue is further compounded by plaintiff corporation's failure to tender payments for the claimed outstanding $13,295.92 balance of legal fees. As previously noted this application is not opposed by defendants. Accordingly, counsel is permitted to withdraw as counsel of record for plaintiff RMJ & Sons Construction, Inc.

With respect to Coffie's failure to appear for the oral deposition, Lordson seeks, pursuant to CPLR 3126(a), the drastic sanction of dismissal of the complaint. Counsel for Lordson through the pleadings have diligently defended their clients and have aggressively pursued their rights to pre-trial disclosure. Following the so-ordered stipulation, Lordson's attorneys provided their adversary with a list of six proposed dates for Coffie to appear in their offices for the oral deposition. Counsel asserts that the corporation's principal, Roy Coffie, failed to respond to his communications. In lieu of a reply with a confirmed deposition date, Lordson received no less than three notifications from his adversary that the attorney was unable to reach Coffie. As a result of Coffie's failure to comply with the so ordered oral deposition, Lordson applied to this court for an order dismissing the complaint and an order awarding Lordson

judgment with attorney fees.

The drastic remedy of striking a party's pleading must be exercised sparing and only imposed when it is demonstrated that a party wilfully, contumaciously or in bad faith repeatedly failed to comply with disclosure orders (*see, Weissman v Levine*, 48 AD3d 242, 243 [1st Dept 2008]; *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222). Clearly, Coffie had knowledge or should have known of the so ordered deposition. However, there is an open issue as to whether the failure to comply with the disclosure order was wilful, contumacious or in bad faith. Defendants have the right to depose Coffie and this court will not condone repeated failures to appear for oral deposition. In view of the totality of circumstances, this court will issue a conditional order directing Coffie to appear for deposition.

For reasons stated below the cross-motion is granted to the extent that plaintiff's default on the counterclaims is vacated. When defendants filed a motion to amend their pleadings, counsel entered into a stipulation that resolved the issue of the amended answer. In the stipulation plaintiff's attorney consented to the service of the amended answer. However the stipulation, also provided expressly that: "Plaintiff shall service a reply within 15 days after the Stipulation is so-ordered." It is undisputed that the attorney failed to a reply to the counterclaims within 15 days of the so ordered stipulation. A favorable reading of

counsel's supporting affirmation leads to a conclusion of law office failure to timely serve the reply. Defendants' counsel, on the other hand, denies his adversary's assertions, and maintains that in December 2007, he informed his advisory of the plaintiff's default in failing to serve a reply. In order to vacate a default it is incumbent for the movant to demonstrate a reasonable excuse for its default and a meritorious potential defense (*see*, CPLR 5015[a][1]; *see also*, *MMG Design, Inc. v Melnick*, 35 AD3d 823) Clearly, the parties had negotiated a 15 day period to serve the reply to the counterclaims. In 1983, the legislature enacted CPLR 2005 to encompass law office failure as grounds for an excusable default. Law office failure may constitute a reasonable excuse to vacate a default (*see*, *Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]).

The primary issue, however, is whether plaintiff has demonstrated a meritorious defense to the counterclaims. Generally, a movant seeking vacatur of a default is required to present a reasonable excuse for its default and to demonstrate a meritorious defense (*see Weissblum v Mostafzafan Foundation of NY*, 59 NY2d 815). It is preferable that cases are disposed upon the merits. Moreover in this case, as noted above counsel had negotiated for an extension, the default was relatively short in duration, and defendants have failed to demonstrate any prejudice. And most importantly to this unique case, there is an

appearance of a deterioration of the attorney-client relationship. For reasons not revealed to this court, there was a total failure of communications between counsel and its corporate client. Therefore, it would have been impossibility for counsel to procure an affidavit of merit from its client. Nevertheless, in light of the litigation necessitated by plaintiff's default and its failure to present Coffie for oral deposition, I condition the vacatur upon plaintiff's payment of $1,000.00 to defendants' attorneys.

Accordingly, it is

ORDERED that the Law Firm of Greeblatt Lesser LLP is permitted to withdraw as counsel of record for plaintiff RMJ & Sons Construction, Inc., and it is further

ORDERED that all proceedings shall be stayed for thirty (30)days from the service of the date of entry of this order in order to permit RMJ & Sons Construction, Inc. to obtain new counsel and it is further

ORDERED that the motion to dismiss the complaint is granted unless Ray Coffie appear for examination on or before June 18, 2008 at the law offices of defendants' at 10:00A.M. and it is further

ORDERED that plaintiff RMJ & Sons Construction, Inc. is directed to pay defendants' attorney $1,000.00 for its failure to present Ray Coffie for examination and it is further

ORDERED that plaintiff's reply to the counterclaims as set forth in the cross-motion is permitted to be accepted and it is further

ORDERED that defendants' motion for entry of a default judgment on the counterclaims, is in all respects, denied.

Dated: May 9, 2008

ENTER:

KIBBIE F. PAYNE
J.S.C.