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SHORT FORM ORDER

INDEX NO. 40943/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

LAWRENCE SIMMS,

Plaintiff,

-against-

GROVER ALUMINUM PRODUCTS, INC.
d/b/a GROVER HOME HEADQUARTERS,

Defendant.

ORIG. RETURN DATE: APRIL 21, 2009
FINAL SUBMISSION DATE: JUNE 4, 2009
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: APRIL 21, 2009
FINAL SUBMISSION DATE: JUNE 4, 2009
MTN. SEQ. #: 002
CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 11 read on this motion FOR DEFAULT JUDGMENT AND CROSS-MOTION TO VACATE DEFAULT. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Affirmations in Opposition to Cross-Motion and in Reply and supporting papers 7-9; Replying Affidavits and supporting papers 10, 11; it is,

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 3215, granting plaintiff leave to enter judgment on default in favor of plaintiff and against the defendant GROVER ALUMINUM PRODUCTS, INC. d/b/a GROVER HOME HEADQUARTERS ("defendant"), in the amount of $30,230.00 in compensatory damages plus $75,000.00 in punitive damages, with

interest thereupon from November 20, 2006, or in the alternative, directing this matter be set down for an inquest as to plaintiff's damages, based upon defendant's failure to appear or timely respond to the summons with notice, is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant for an Order vacating defendant's default herein and permitting defendant to answer or otherwise respond to the summons with notice, is considered under CPLR 5015 (a) (1) and 3012 (d), and is hereby **GRANTED** for the reasons set forth hereinafter.

This action was commenced by plaintiff on November 13, 2008, by summons with notice. The summons with notice indicates that the nature of this action is for money damages arising out of defendant's alleged breach of contract, breach of express and implied warranty, fraudulent inducement, fraudulent misrepresentation, fraud, and negligence arising out of and related to the installation of sliding doors at plaintiff's residence. Plaintiff contends that in or about April of 2001, he entered into a written contract with defendant for the installation of four sets of sliding doors, but that defendant "secretly altered" and "incorrectly" installed the doors, causing extensive damage to the residence.

Plaintiff now moves for a default judgment in favor of plaintiff and against defendant based upon defendant's non-appearance herein. Plaintiff alleges that on January 13, 2009, he served the defendant corporation with the summons with notice by personally serving the managing agent of the corporation (*see* CPLR 311). In addition, plaintiff alleges that on January 20, 2009, he served defendant with the summons with notice by serving the Secretary of State of the State of New York, pursuant to BCL 306. Plaintiff further alleges that on January 30, 2009, he complied with the additional notice requirement of CPLR 3215 (g) (4) (i) by mailing the summons with notice to defendant. Plaintiff contends that defendant failed to appear or otherwise respond to the summons with notice, and the time to do so has since expired. In support of the application, plaintiff has submitted, among other things, the summons with notice, an affidavit of plaintiff, and affidavits of service demonstrating service of the summons with notice upon defendant in accordance with the foregoing.

In opposition, defendant has filed the instant cross-motion seeking an Order vacating defendant's default in appearing. Defendant alleges that it has

a meritorious defense and can demonstrate excusable neglect. Further, defendant argues that the Court should address this case on the merits, and that there would be no prejudice to plaintiff if defendant's default was vacated.

Defendant contends that its default was the result of its office manager not being aware that the summons with notice required a response, and as such, the office manager failed to notify the principals of defendant of the existence of the summons. In addition, defendant claims that the office manager received the summons approximately two weeks prior to her layoff at defendant corporation on January 26, 2009, and that she failed to review and inform her supervisors of the summons prior to her departure. In support thereof, defendant has submitted an affidavit of the former office manager of defendant, who avers that the oversight was "simple human error" and was "not in disregard of the legal process." Further, defendant indicates that upon learning of this action by way of service of the motion for a default judgment, defendant promptly moved to vacate its default. The Court notes that the affidavit of service submitted by defendant indicates that defendant served its cross-motion on May 6, 2009 by overnight delivery, approximately three months after the deadline for defendant to appear in this action.

With respect to a meritorious defense, defendant argues that plaintiff's only cognizable claims are for breach of contract and warranty. These claims, however, are now eight years old and thus defendant argues that they are barred by a six-year statute of limitations (*see* CPLR 213). Moreover, defendant alleges that plaintiff has no cognizable claim for fraud or negligence as those claims are based on the same facts giving rise to the breach of contract claim. Defendant further alleges that even assuming, *arguendo*, that plaintiff has cognizable claims for fraud and negligence, such claims would also be time-barred by the applicable statutes of limitation (*see* CPLR 213 [8]; 214). Finally, defendant alleges that the parties' contract limits plaintiff's damages to the value of the product, or $9,360.00, and that an arbitration clause in the contract preludes the instant action. Consequently, defendant alleges that plaintiff has no basis for the entry of any judgment against defendant.

A motion to vacate a default may be made upon a showing of a reasonable excuse and a meritorious defense (*see e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal

merit to warrant vacating the default (*see* CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (*see I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]). Further, CPLR 3012 (d) provides that "[u]pon 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 3012 [d]).

Here, defendant argues that it did not act wantonly or intentionally in failing to appear in this action, but rather that its default was the result of defendant's office manager's failure to notify the principals of the corporation of the existence of the summons with notice. Plaintiff disputes defendant's claim of lack of knowledge of the instant action until service of plaintiff's motion for a default judgment, given that plaintiff also served defendant via the Secretary of State and provided defendant with an additional notice pursuant to CPLR 3215 (g) (4) (i). Notwithstanding the foregoing, the Court finds the delay of approximately three months in defendant's appearance herein to be minimal and that plaintiff has suffered no prejudice as a result thereof. The Court notes that on or about August 6, 2007, plaintiff was paid by his own homeowner's insurance carrier in the amount of $32,046.00, as a result of a claim he filed arising out of the subject incident. Moreover, the Court finds that defendant has submitted detailed affidavits of the president and product manager of defendant, as well as an affirmation of counsel demonstrating its potential meritorious defenses to this action as described hereinabove.

Therefore, given the short period of delay, the absence of any prejudice to plaintiff, the existence of potential meritorious defenses, the lack of willfulness on the part of defendant, and the strong public policy in favor of resolving cases on the merits, plaintiff's motion for a default judgment is **DENIED**, and defendant's cross-motion to vacate its default is **GRANTED** (*see Giacopelli v Guiducci*, 36 AD3d 853 [2007]; *Giladi v City of New York*, 34 AD3d 733 [2006]; *Jolkovsky v Legeman*, 32 AD3d 418 [2006]; *Kaiser v Delaney*, 255 AD2d 362 [1998]; *I.J. Handa, P. C. v Imperato*, 159 AD2d 484, *supra*; *see also 2M Realty Corp. v Boehm*, 13 AD3d 361 [2004]). Defendant shall have thirty (30) days from

the date of service upon defendant of the within Order with notice of entry to appear or otherwise respond to the summons with notice.

The foregoing constitutes the decision and Order of the Court.

Dated: November 20, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court