

Nassau County v Richard Dattner Architect, P.C.

2009 NY Slip Op 33379(U)

October 8, 2009

Supreme Court, Nassau County

Docket Number: 002750/2004

Judge: Ira B. Warshawsky

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

NASSAU COUNTY,

Plaintiff,

INDEX NO.: 002750/2004
MOTION DATE: 08/26/2009
MOTION SEQUENCE: 009

-against-

RICHARD DATTNER ARCHITECT, P.C., DORMITORY
AUTHORITY OF THE STATE OF NEW YORK,
EMPIRE STATE DEVELOPMENT CORP., TISHMAN
CONSTRUCTION CORPORATION OF NEW YORK,
MARIANO D. MOLINA, P.C., COUNSILMAN
HUNSKER & ASSOCIATES, SEVERUD ASSOCIATES,
A. JAMES DEBRUIN & SONS, FEDERMAN
DESIGN & CONSTRUCTION CONSULTANTS, INC.,
ROBERT SCHWARTZ & ASSOCIATES, ROY KAY, INC.,
KEYSPAN CORPORATION, ANRON HEATING AND
AIR CONDITIONING, INC., DECTRON
INTERNATIONALE, STONEWALL CONTRACTING
CORP., NORBERTO & SONS, INC., CENTURY-MAXIM
CONSTRUCTION CORP., METROPOLITAN STEEL
INDUSTRIES, INC. and HATZEL & BUEHLER, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Memorandum of Law in Support	2
Affidavit of Stephen T. Treacy in Opposition to Motion to Vacate Default and Dismiss Complaint & Exhibits Annexed	3

Plaintiff's Memorandum of Law in Opposition to Stonewall's Motion to Vacate Default and Dismiss Complaint	4
Affirmation of Mark A. Rosen in Response	5
Defendant Stonewall Contracting Corp.'s Reply Memorandum of Law	6

In September 2007, Defendant, Stonewall Contracting Corp., moved to set aside a default entered against it on July 23, 2007 (Austin, J.) and dismiss the complaint. The matter was fully briefed by November 7, 2007. After that, this motion, along with two others, was held in abeyance while the parties entered lengthy mediation with a Court Attorney/Referee and then through private mediation (JAMS).

This matter was transferred to this Court after Justice Austin was elevated to the Appellate Division, and his replacement recused due to a prior relationship with the matter when he was employed by the County of Nassau.

This Court believes that the default should be addressed at this time so that, going forward, the parties will be aware of whether Stonewall Contracting does or does not remain in this matter. The basis for Defendant's motion is that Plaintiff failed to move for a default within one year of said default as required by CPLR 3215.

Stonewall Contracting was served at its last known place of business with the complaint on July 22, 2004 (prior service via Secretary of State on June 17, 2004 of Summons with Notice).

Defendant served Plaintiff with a demand for a complaint on or about July 7, 2004 (handwritten date) by movant's counsel and identifying itself as counsel for Stonewall Contracting. It was not received until July 29, 2004 at the County Attorney's Office after service of Complaint via mail on July 22, 2004 to Defendant's place of business.

Defense counsel appeared at a conference on March 10, 2006 (nearly twenty months from service of process). Plaintiff moved for a default judgment on March 30, 2007.

Counsel argues that papers in a pending action are to be served on the client's attorney pursuant to CPLR 2103(b). Plaintiff did not serve counsel, rather it claims it served Defendant, as noted above, on July 22, 2004, at its last known business address. Stonewall denies ever receiving said Verified Complaint. The Complaint has one cause of action vis-a-vis Stonewall re: leaks in the roof which they constructed. Stonewall never responded to the Complaint and

allegedly never participated in the litigation.

Stonewall's counsel does not deny what it calls a casual, drop-in, physical appearance at a conference with Justice Austin. His memory in March 2006 of that conference is not that of Plaintiff's counsel, nor does Stonewall recite or recall the history of the case following its letter requesting service of the Complaint in 2004.

In a correspondence of September 20, 2004, Plaintiff's counsel wrote to defense counsel, Mark A. Rosen, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP, sua sponte extending Defendant's time to answer the previously served Complaint until October 15, 2004. It also offered to forward another copy of the Complaint if the client had not sent it to counsel. There was no response to this letter. There followed, pursuant to the affirmation of Stephen T. Treacy, Esq., Special Counsel to Nassau County on this matter, teleconferences with Mr. Rosen and left messages for him, granting extensions of time to respond to the Complaint. Mr. Treacy states he was led to believe that a Stonewall response was forthcoming.

There is no issue that Mr. Rosen appeared at a status conference in Justice Austin's chambers on March 10, 2006 (Mr. Rosen said it was March 30, 2006, the Court docket reflects March 10, 2006). Mr. Treacy contends that Mr. Rosen "represented that Stonewall would answer the Verified Complaint and produce demanded documents... on April 28, 2006." (See also decision of Justice Austin dated July 23, 2007). Mr. Rosen denies ever committing "to serve an answer or to provide documents. Rather I stated that Stonewall would review the status of the case and determine how to proceed."

It is as of April 28, 2006 that Justice Austin determined the Defendant was in default. Therefore, it is quite clear that if that is the default date, Plaintiff's motion for a Default Judgment filed on March 30, 2007 (CPLR 3215) was timely made.

Plaintiff moved for default to which Defendant admits it never responded. It essentially claims "law office error" that said motion was mixed in amongst a deluge of documents in this case and it was "inadvertently overlooked."

As to the service of process, Judge Austin determined there was valid service of the Summons via the Secretary of State on June 17, 2007. If Defendant believed that service was invalid, it could have moved to dismiss in lieu of an answer, it could have waited a year from its

technical “default” then moved to dismiss on jurisdictional grounds. In fact, it could have done many things, rather Defendant chose to “hang out”, see what it could learn without putting in an answer and essentially “stonewalled” the Plaintiff.

The burden is on the Defendant to show a reasonable excuse for its default and a meritorious defense to set aside the default; the default motion filed by Plaintiff on March 30, 2007.

Defendant’s excuse for failing to oppose the default motion – too many documents were served on it, and it lost this motion amongst those documents – is simply insufficient. Its meritorious defense is never really raised. Rather, Defendant claims it has a jurisdictional defense. There is also no reason given for not appealing Judge Austin’s decision of July 23, 2007, rather than making this motion.

We are dealing with two defaults. The first was the default in failing to serve an answer. This Defendant blames on the fact that he never received a Complaint.

The second default was in failing to oppose the motion for a Default Judgment. The Austin decision does not discuss willful default, but it is clear that at best Defendant took under consideration as of March 10, 2006 whether it would file an answer and intentionally chose to not file it.

There is an age old legal theorem – that dates to 1546 – “Wolde you bothe eate your cake and have your cake?”¹ (Old English Spelling). Translated to: You can’t have your cake and eat it too.” Meaning: Sometimes you have to make a decision and live with it, or, you can’t have it both ways.

It is the opinion of the Court that at this stage of the proceeding and at this stage of the motions on this issue, that there is no valid challenge to jurisdiction. That the conclusion of the Court (Austin, J.) that the default occurred on April 28, 2006, is binding on this Court. That the motion for a Default Judgment was timely filed within one year of the default. There was no motion to renew or reargue the decision of Judge Austin nor to appeal it. The instant motion was originally returnable October 23, 2007, but not submitted due to consent adjournments until

¹Phrase appears in John Heywood’s “A Dialogue Conteynyng the Number in Effect of All the Prouerbes in the Englishe Tongue”

August 26, 2009.

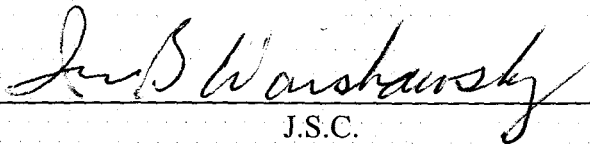
Further, that if the Court was to set aside the Default Judgment and then consider the validity of service, it would find said service had been validly made based upon the affidavit of service. It is regretful that the motion was put off for nearly two years, otherwise Judge Austin would have been able to consider it within the context of the action of which he was most knowledgeable.

The motion to set aside the Default Judgment is denied.

Enter Judgment on Notice.

It is **SO ORDERED**.

Dated: October 8, 2009



J.S.C.

ENTERED
OCT 14 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE