

Moriano v Provident N.Y. Bancorp
2009 NY Slip Op 33425(U)
July 30, 2009
Supreme Court, Orange County
Docket Number: 3159-2009
Judge: Elaine Slobod
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ELAINE SLOBOD, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X
PATRICIA MORIANO, as Executrix
of the Estate of ARTHUR MARIANO,

Plaintiff,

-against-

PROVIDENT NEW YORK BANCORP,

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Defendant.

Index No. 3159-2009
Motion Date: July 20, 2009

-----X
The following papers numbered 1 to 7 were read on this motion by
plaintiff for default judgment:

- Notice of Motion-Affidavit-Affirmation-Exhibits A-D.....1-4
- Affirmation in Opposition-Affidavit in Opposition.....5-6
- Reply Affirmation.....7

Upon the foregoing papers it is ORDERED that this motion is
granted to the extent hereinafter indicated:

Plaintiff brings this action to recover monetary damages for
physical damage to property it had leased to defendant. The action
was commenced by filing on March 27, 2009. Defendant was served
pursuant to Business Corporation Law § 306 on April 9, 2009. On May
22, 2009, a copy of the summons and complaint was sent to defendant
by ordinary mail pursuant to CPLR 3215(g)(4). On June 17, 2009,
plaintiff served this motion for default judgment.

Meanwhile, on or about May 7, 2009, defendant's counsel
requested an extension of time to answer the complaint. Plaintiff's

counsel stated that he offered a two week extension of time on condition that defendant's counsel memorialize the agreement in a letter. According to plaintiff's counsel, defendant's counsel never did so. According to defendant's counsel, defendant forwarded process to its insurer, Chubb Insurance Company which, in turn, retained defendant's counsel. According to counsel, the extension of time obtained from plaintiff's counsel was made by a representative of the insurer and not counsel's office. Counsel served an answer on June 10, 2009 which plaintiff rejected as untimely on June 17, 2009.

Defendant does not cross-move to vacate a default or to compel acceptance of an answer. Instead, it relies upon a purported rule of law that "[i]n the case where an insured defendant acts promptly to protect itself and immediately turns over legal process that has been served upon it to its insurer, default is not appropriate" (Affirmation of Kenneth S. Ross, Esq., dated June 29, 2009, p.4). As for a meritorious defense, defendant proffers the affidavit of an Assistant Vice President, Elizabeth Roth, who states that any damage caused to plaintiff's premises was made by a corporation, Cal Mart Enterprises, Inc., which defendant had hired to remove a bank vault from plaintiff's premises. Moreover, Ms. Roth states, defendant is entitled to indemnity from Cal Mart Enterprises, Inc.

In the Second Department, the excuse that an insurance carrier failed to provide a timely defense is not a sufficient excuse to excuse a default (see Toland v Young, 60 AD3d 754 [2009]; Grinage v City of New York, 45 AD3d 729 [2007]; Juseinoski v Board of Education

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of the City of New York, 15 AD3d 353 [2005]; Ennis v Lema, 305 AD2d 632 [2003]).

Furthermore, nothing in CPLR 3215, which requires an additional mailing to a corporate defendant if service is effected by serving the Secretary of State, extends the time to answer, as defendant appears to contend (see CPLR 320).

In the absence of a cross-motion for such relief, it would be error for the court to grant defendant leave to serve a late answer (see Grinage v City of New York, supra).

Finally, the granting of a default against defendant does not deprive it of the only defense it presents; it may still maintain a plenary action against Cal Mart Enterprises, Inc. for indemnification should it be so advised.

The court may only grant a default judgment on papers, however, when the action is for a sum certain. Here, plaintiff presents an affidavit of a property manager who states in a conclusory manner that he has obtained estimates for unspecified work which require \$200,000.00 to restore the premises but the estimates are not attached as exhibits.

Accordingly, the motion is granted to the extent that the court will hold an inquest as to damages on a date to be scheduled at the conference ordered herein.

This matter is scheduled for status conference on August 18, 2009 at 9:15 a.m. at the Orange County Government Center, 255-285 Main Street, Courtroom #12, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: July 30, 2009
Goshen, New York

E N T E R

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