

Rutgers Cas. Ins. Co. v LGB Dev., Inc.

2010 NY Slip Op 32780(U)

September 29, 2010

Supreme Court, New York County

Docket Number: 104490/08

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

RUTGERS CASUALTY INSURANCE COMPANY,
Plaintiff,

Index No.: 104490/08

-against-

Seq. #003

LGB DEVELOPMENT, INC., AMY YEN, 28 EAST
4TH STREET HOUSING CORP., DAVID HU
ARCHITECTS, PLLC, RIZWAN ABOUS SALAM,
P.E. and CARLOS FRUA,
Defendants.

The following papers, numbered 1 to 2 were read on this motion by plaintiff(s) for a default Judgement.

FILED
OCT 07 2010
COUNTY OF NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

Plaintiff Rutgers Casualty Insurance Company (Rutgers) moves, pursuant to CPLR 3215, for a default judgment as against defendant LGB Development, Inc. (LGB) for LGB's failure to appear for court-mandated conferences on May 12, 2009, September 8, 2009, and October 20, 2009, or, in the alternative, to strike LGB's answer, pursuant to CPLR 3126.

This case involves a claim by Rutgers for declaratory relief finding that the insurance policy issued by LGB is void ab initio.

On May 12, 2009, LGB failed to appear for a preliminary conference, and Rutgers asserts that it was granted leave to file for a default judgment as against LGB. However, the document provided by Rutgers in support of this aspect of its motion is entitled "Stipulation," and it does not have a judicial stamp affixed to it. Motion, Ex. C.

When LGB failed to respond to Rutgers' discovery demands, Rutgers allegedly moved to compel LGB to respond.¹ On August 6, 2009, the court issued the following order:

"Upon the foregoing papers, it is ordered that this motion is granted without opposition (no opposition papers submitted), to the extent that it is ORDERED that defendant L.G.B. Development shall reply to plaintiff Rutgers Casualty Insurance Company's Combined Discovery Demands and Notice for Discovery and Inspection, both dated May 27, 2009, within 20 days of service of a copy of this order."

Motion, Ex. F.

LGB again failed to appear for a compliance conference with the court on September 8, 2009, and Rutgers alleges that the court again granted it leave to file a default judgment as against LGB. However, although the motion refers to Ex. G for a copy of said order, Ex. G is empty, and the court records do not have a copy of the alleged order.

On October 20, 2009, LGB again failed to appear for a court-ordered compliance conference, and the court issued the following order:

"P shall move for default judgment as against D LGB on or before 11/10/09. P shall serve answer to interrogatories on or before 11/29/09.
Deposition to occur w/in 45 days of 11/30/09 [sic].
Note of issue to be filed on or before January 15, 2009 [sic]
Compliance conference to be held at 9:30 am on 12/22/09, 9:30 Am, FINAL
Proof of filing a Note of Issue with the Trial Support Office shall be filed with the Clerk of Part 23.
A penalty shall be imposed for any non-compliance, unless good cause is shown therefor."

Motion, Ex. H.

In opposition to the instant motion, Robert I. Meyers (Meyers), an attorney duly admitted to practice law before the Courts of the State of New York, who is an associate with Frenkel

¹Neither the motion nor the court records contain a copy of the alleged motion.

Lambert Weiss Weisman & Gordon, LLP, attorneys for defendants Amy Yen, 28 East 4th Street Housing Corp., and Carlo Frua, has submitted an affirmation. In his affirmation, Meyers avers that LGB's initial counsel, Bernstein & Bernstein, LLP, disbanded as the result of Marc A. Bernstein having been suspended from the practice of law, and that LGB has failed to appear because it has been without counsel (Meyers' firm does not represent LGB). The remainder of his affirmation concerns the underlying merits of the case, which are not presently before the court for resolution.

In reply, Rutgers only addresses that portion of the opposition dealing with the underlying litigation, and not with the issue presented by the instant motion seeking a default judgment as against LGB.

The court notes that the motion papers do not contain any evidence that Rutgers complied with the above-referenced court order to file a note of issue, nor do the court records indicate that a note of issue has been filed in this matter. Further, none of the papers evidences that any of the court directives appearing in the order of October 20, 2009 have been complied with, except for the timely filing of the instant motion. In addition, although the opposition papers fail to provide any documentation of LGB's former counsel being suspended from the practice of law, such suspension does appear on the official Office of Court Administration website.

DISCUSSION

CPLR 3215 allows a plaintiff to seek a default judgment against a defendant who has failed to appear, plead or proceed to trial. CPLR 3126 allows the court to strike the pleadings of any party who fails to obey an order for disclosure.

Granting a default judgment pursuant to CPLR 3215 lies within the sound discretion of the court. *Patterson v Greater N.Y. Corp. of Seventh Day Adventists*, 284 AD2d 382 (2d Dept 2001). Since there is evidence that LGB has failed to respond to discovery demands because it

is presently without counsel due to its counsel's suspension from the practice of law, and that there is no evidence that it has intended to abandon its defense, the court declines to grant that portion of Rutgers' motion seeking a default judgment. *Martin Iron & Construction Co. v Grace Industries, Inc.*, 285 AD2d 494 (2d Dept 2001). Further, since the other defendants have been diligently defending the action, Rutgers' conclusory assertion that it is prejudiced by LGB's failure to respond is found to be without merit.

Striking an answer is a drastic remedy that may only be granted if a defendant's failure to comply with a court order was the result of wilful, deliberate, and contumacious conduct or its equivalent. *Palmenta v Columbia University*, 266 AD2d 90 (1st Dept 1999).

The burden of establishing that the failure of a party to comply with a court order was the result of wilful, deliberate or contumacious conduct, so as to support the entry of a default judgment or the striking of an answer, rests with the movant seeking the order (see *Goodman, Rackower & Agiato v Lieberman*, 260 AD2d 599 [2d Dept 1999]), and then the burden shifts to the non-moving party to indicate a reasonable excuse. See *Furniture Fantasy v Cerrone*, 154 AD2d 506 (2d Dept 1989).

Rutgers has met its initial burden by establishing that LGB has failed, over a period of over six months to respond to any discovery demands or to attend court-ordered conferences. LGB, by means of the affirmation of its co-defendants' counsel, has attempted to provide evidence of a reasonable excuse for its non-compliance, i.e., lack of counsel due to its attorney's suspension from the practice of law. However, the court notes that LGB has been without counsel for an inordinate length of time, and no evidence has been presented that it is, or has been, attempting to retain new representation. The court cannot countenance LGB's continued non-compliance based on its lack of counsel.

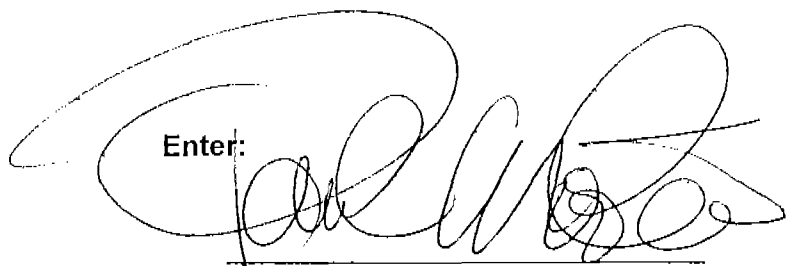
CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiff's motion is granted and the answer of defendant LGB Development, Inc. is stricken, unless within 60 days from service of a copy of this order with notice of entry, said defendant obtains legal representation and said counsel files an appropriate Notice of Appearance with the Clerk of the Court, and it is further,

ORDERED that all parties are directed to appear for a status/settlement conference on October 20, 2010, at Part 7, 9:30 a.m. (80 Centre Street, Room 320, New York, New York 10013).

Dated: September 29, 2010

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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