

Tuchman v Deam Props. (U.S.), LLC

2010 NY Slip Op 33252(U)

November 12, 2010

Supreme Court, New York County

Docket Number: 101056/10

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

MAURICE TUCHMAN
- v -
DEAN PROPERTIES

INDEX NO. 101056/10
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion seq #'s 2, 3 & 4 are consolidated for depo. (2)
The request set for today is vacated & depending on the
outcome of these motions will be rescheduled. (2)
The ~~summary~~ requirement to file of NOI is also
extended to 12/30/10 (2)

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

FILED

NOV 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

NOV 12 2010

Dated: _____

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

-----X
MAURICE TUCHMAN and ADLIN DE
DOMINGO,

Plaintiffs,

-against-

DEAM PROPERTIES (U.S.), LLC and
EVEREST REALTY HOLDINGS, INC. d/b/a
ERH CONTRACTING,

Defendants.
-----X

Decision/Order

Index No.: 101056/10
Seq. No. : 002, 003, 004

Present:

Hon. Judith J. Gische
J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Def Everest OSC (§5015) w/BJW affirm, AR affid, exhs	1
Def Deam OSC (§5015) w/SMU affirm, TC affid, exhs	2
Def Everest n/m (§5015) w/BJW affirm, AR affid, exhs	3
Plff opp w/JS affirm, MT affid, exhs	4
Def Everest reply w/CAD affirm	5
Def Deam reply w/SMU affirm	6

Upon the foregoing papers, the decision and order of the court is as follows:

In connection with a prior motion by plaintiff for entry of a default judgment against the defendants, this court ordered that an Inquest be held on the issue of liability and damages (Order, Gische J., 7/18/10) ("default order"). The inquest was scheduled for September 2, 2010 before this court.

Everest has now moved to vacate the default entered against it. Deam has also moved for the same relief. Pending the court's decision on these motions, the court stayed the Inquest. Plaintiff opposes the motions, arguing that neither defendant has shown excusable default or a meritorious defense.

Arguments

This is a property damages action. The Tuchmans own unit 17-B at the Trump Palace Condominium whereas Deam is the owner of unit 18-B, directly above the Tuchmans. Everest is a general contractor that Deam hired to perform renovation work in Deam's unit.

The court entered a default against each defendant because they failed to answer the complaint or appear. Each defendant claims it was improperly served. Service was made through the Secretary of State at old addresses that they had on file and never updated.

In terms of a meritorious defense, Everest contends it had completed the job for Deam before the second incursion of water occurred. Deam, on the other hand, states that Everest was responsible for the renovation work and Deam, itself, was not negligent.

Defendants also argue the court should not have entered judgment on an unverified complaint and a motion supported only by an attorney's affirmation.

Discussion

Pursuant to CPLR 317 a defendant does not have to come forward with a reasonable excuse for his or her default if it demonstrates that it did not personally receive notice of the pending lawsuit (Pena by Pena v. Mittleman, 179 A.D.2d 607 [1st Dept 1992]). Here, however, each defendant was obligated to keep the information on file with the Secretary of State current, including its address. Thus, an incorrect address for service of process on file with the Secretary of State, under the circumstances of this case, is not a reasonable excuse for the defendant's delay in appearing or answering the complaint (Levine v Forgotson's Cent. Auto & Elec., Inc., 41 AD3d 576 [1st Dept. 2007]).

Defendants' argument, however, that the court should not have entered a default against them on a motion that was only supported by an attorney's affirmation, is persuasive and consistent with the prevailing law on this issue (Joosten v. Gale, 129 A.D.2d 531 [1st Dept

1987]; Mullins v. DiLorenzo, 199 A.D.2d 218 [1st Dept 1993]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim (Hazim v. Winter, 234 A.D.2d 422 [2nd Dept. 1996]; CPLR § 105 [u]). Thus, the court should not have granted the prior motion for that reason.

Although plaintiff argues that the dispute between defendants about who is responsible for plaintiff's damages is not a meritorious defense, the court disagrees. This is different than where a defendant has claims against a non-party or third party (see, Stone Conveyor Co. v. Nickerson, 38 Misc.2d 181[Sup Ct. Ontario 1962]). Here, Deam sets forth statements that frame a potentially meritorious defense against its independent contractor, sufficient to entitle it to vacatur of default judgment (Hernance v. Daddy-O's Restaurant Corp., 159 A.D.2d 924 [3rd Dept 1990]). The contractor's claim, that it did not have exclusive control of the Deam apartment and had finished its work before the second incursion of water occurred, is also a potentially meritorious defense.

Finally, the court also considers that there is strong public policy in favor of deciding disputes on their merits [J.R. Stevenson Corp. v. Dormitory Authority of State of N.Y., 112 A.D.2d 113 (1st Dept. 1985)].

For each of the reasons stated, each motion to vacate the default entered against Deam and Everest is granted. Plaintiffs shall accept defendants' answers which shall be served no later than ten days after notice of entry.

The motions for sanctions, costs, etc., are denied.

The court schedules the preliminary conference in this case for January 6, 2011 at

9:30 a.m. in Part 10, Room 232.

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that the motion by Everest to vacate the default entered against it (sequence number 004) is granted; and it is further

ORDERED that the motion by Deem to vacate the default entered against it (sequence number 003) is granted; and it is further

ORDERED that the motion by Everest for an order denying plaintiff's motion for entry of a default judgment against Everest is denied as moot; and it is further

ORDERED that plaintiffs shall accept defendants' answers which shall be served by them no later than ten days after notice of entry; and it is further

ORDERED that the motions for sanctions, costs, etc., are denied; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that the preliminary conference in this case is scheduled for January 6, 2011 at 9:30 a.m. in Part 10, Room 232; and it is further

ORDERED that this constitutes the decision and order of the court

Dated: New York, New York
November 12, 2010

So Ordered:



Hon. Judith J. Gische, JSC

FILED

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