

**400 W. 148th St. Hous. Dev. Fund Corp. v Argyle
Dev., LLC**

2010 NY Slip Op 33713(U)

December 27, 2010

Supreme Court, New York County

Docket Number: 108624/10

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

400 WEST 148th STREET HOUSING
DEVELOPMENT FUND CORPORATION
Plaintiff,

- v -

ARGYLE DEVELOPMENT, LLC, MARSTAN
DEVELOPMENT CORPORATION AND BIERZO
CONSTRUCTION CORPORATION,
Defendants.

INDEX NO. 108624/10
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

FILED
JAN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 2 were read on this motion by Order to Show Cause by defendant Argyle Development, LLC. to vacate a default judgment .

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

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

This is an action for a declaratory judgment, permanent injunction and damages for alleged negligent excavation brought by plaintiff 400 West 148th Street Housing Development Fund Corporation. Pursuant to CPLR § 5015 and CPLR § 2005, defendant Argyle Development, LLC ("Argyle") moves by Order to Show Cause to vacate the default judgment entered against it by an Order dated August 11, 2010.

Background

Argyle and Marstan Development Corp ("Marstan") were involved in a construction project which began in January 2008 to develop a building located at 753 St. Nicholas Avenue,

New York, NY ("Construction Site").¹ On April 8, 2008, the owner of the premises immediately next door to the Construction Site brought an action for damages against Argyle and Marstan for negligent excavation and construction, under the Index #:104973/08 ("2008 Action"). In the 2008 Action, both Argyle and Marstan were represented by counsel retained by Argyle's insurer, Mutual Marine Office Inc. ("MMO"). Marstan and Argyle continued to be represented by counsel retained by MMO until May 6, 2008, when Marstan's insurance carrier, Northland Insurance Co. ("Northland"), accepted the insurance tenders by MMO to provide a defense for Argyle and Marstan. From that point forward, Argyle and Marstan were represented by counsel retained by Northland.

In October 2008, 400 W. 148th St. Housing Development Fund Corporation ("plaintiff"), the owner of the building immediately next door, on the other side of the Construction Site, informally reported to Argyle that its building was damaged as a result of the excavation work performed at the Construction Site. Argyle reported plaintiff's claim to Northland for handling, since it arose out of the same excavation and construction work as the 2008 Action. Northland subsequently settled the 2008 Case, and made partial payment toward remediation of plaintiff's building. Thereafter Northland ceased tendering checks to plaintiff, without the knowledge of Argyle (Argyle exhibit B).

Subsequently, plaintiff moved by an Order to Show Cause ("plaintiff's OSC"), dated July 8, 2010, seeking judicial relief directing the defendants named herein to remediate all damages caused to its building as the result of Argyle's alleged negligent excavation. Argyle received plaintiff's OSC on July 9, 2010 and forwarded it by email that same day to MMO, who in turn directed Argyle to forward same to Northland. Although Northland disclaimed coverage to

¹Argyle is the owner of the lot located at 753 St. Nicholas Avenue, New York, NY, and Marstan is a contractor that was retained by Argyle for the construction of residential condominium units on Argyle's lot (Argyle exhibit A).

defend Argyle regarding plaintiff's OSC, MMO reiterated its position that Northland had a duty to provide counsel or oppose plaintiff's application. On August 11, 2010, the return date of plaintiff's OSC, plaintiff was granted a default judgment against Argyle for failure to appear or respond. Argyle received a copy of the default judgment on August 15, 2010, and now moves by Order to Show Cause dated August 20, 2010, to vacate said default.

In support of its motion Argyle submits, *inter alia*, a copy of this Court's order dated August 11, 2010 which granted a default judgment against Argyle; plaintiff's OSC, Affirmation in Support, and Exhibits thereto; an affidavit of Ryan Alexander ("Alexander"), a founder and managing member of Argyle; email correspondence between Alexander, MMO, and Northland regarding insurance coverage for the defense of Argyle in plaintiff's OSC; an affidavit of David B. Peraza, P.E. ("Peraza"), a structural engineer hired by Argyle to report and assess of the damages caused to plaintiff's building as a result of Argyle's excavation; an affidavit of Charles Lu, loss adjuster employed by MMO; email correspondence between Northland and Alexander regarding Northland's authorization and coverage of the remediation of plaintiff's building; and a copy of Summons with Notice for the herein action. Plaintiff submits an affirmation in opposition.

In support of its motion, Argyle argues that it promptly forwarded copies of plaintiff's OSC to MMO and Northland, and that the default judgment was a result of Northland's failure to timely procure counsel. Additionally, Argyle claims that it has a meritorious defense, as evidenced by the Peraza affidavit. The findings in Peraza's affidavit and report conflict with the report and assessment performed by plaintiff's independent engineer, Dr. Magued Iskander, P.E., regarding the extent of damages to plaintiff's building as a result of Argyle's excavation (Argyle exhibits A, G).

In opposition, plaintiff contends that Argyle lacks a reasonable excuse for vacating the default judgment because Northland disclaimed coverage a day before the return date of

plaintiff's OSC, yet Argyle failed to come to court requesting an extension of time. In addition, plaintiff contends that it is prejudiced by Argyle's delay in vacating the default judgment and that Argyle lacks a meritorious defense.

Standard

Under CPLR § 5015(a)(1) "a party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense" (see *Benson Park Assoc., LLC. v Herman*, 73 A.D.3d 464, 465 [1st Dept 2010]; see also *Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *Goldman v Cotter*, 781 NYS2d 28 [1st Dept 2004]). The determination of the sufficiency of the offered excuse rests within the sound discretion of the court (see *Goldman v Cotter*, 10 A.D.3d 289, 291 [1st Dept 2004]). An insurance carrier's failure to assign counsel for a defendant may constitute a reasonable excuse for vacating a default judgment (see *Rodriguez v Dixie N.Y.C., Inc.*, 26 A.D.3d 199 [1st Dept 2006]). Where a defendant's excuse for delay is not strictly law office failure (see CPLR § 2005), rather it's insurance company failed to assign counsel despite timely receipt of plaintiff's complaint, the Court will analyze it in a similar manner (see *Barajas v Toll Bros., Inc.*, 247 A.D.2d 242 [1st Dept 1998]).

Furthermore, where a defendant's default was not intentional and the delay in moving to vacate the default was not inordinate (cf *Chochla v Oak Beach Inn Corp.*, 115 A.D.2d 584 [2nd Dept 1985] [defendants had an unexplained four and one-half month delay in answering]), nor was the plaintiff prejudiced by such delay, vacating the default judgment may be proper (see *Kennedy v Cassmon Realty Co.*, 139 A.D.2d 629 [2nd Dept 1988]).

Discussion

There was a legitimate dispute as to insurance coverage regarding Argyle's defense in plaintiff's OSC. Argyle and MMO's reliance on Northland to provide counsel was not

unreasonable based upon its previous representation of Argyle in the 2008 Action, and its tendering of partial payment to the plaintiff in the herein action. The facts strongly suggest that Argyle had no intention of abandoning its defense as Argyle promptly forwarded all pertinent court documents to both MMO and Northland. Taking into account the short time periods involved, the Court finds that Argyle's excuse is reasonable in the context of vacating a default judgment, as it did not intentionally default nor has Argyle acted in a dilatory manner (*see Rodriguez v Dixie N.Y.C., Inc.*, 26 A.D.3d 199 [1st Dept 2006]; *cf Pirez v Ortiz*, 18 A.D.3d 263 [1st Dept 2005] [defendants motion to vacate default judgment denied due to "persistent and willful inaction" where defendants: knew their insurance carrier was in liquidation; failed to respond to a notice of inquest and notice of entry of judgment; and waited fourteen months to vacate default judgment]). Argyle moved to vacate the default judgment five days after receiving notice of same, and no undue prejudice would accrue to the plaintiff as a result of the delay (Argyle exhibit B; *cf 300 W. 46th St. Corp. v Clinton Hous. W. 46th St. Partners, L.P.*, 19 A.D.3d 136 [1st Dept 2005] [plaintiff was prejudiced by the delay where defendants acknowledged receipt of court documents and significance of same, yet failed to explain their prolonged failure to respond]).

Finally, in this case for alleged negligent excavation, Argyle made a sufficient prima facie showing of a meritorious defense by submitting the Peraza affidavit. Peraza concludes in his report and affidavit, "to a reasonable degree of engineering certainty, that the structural stability of [plaintiff's] building was not compromised by the adjacent construction, and that the building is readily reparable" (Argyle exhibit G). Peraza's findings regarding the extent of damage caused to plaintiff's building by Argyle's excavation conflicts with the findings and report of plaintiff's structural engineer, Dr. Iskander (*see Iskander affidavit*).

Under the above circumstances, and "in view of the strong public policy favoring resolution of cases on their merits" the default judgment should be vacated (*Arrington v Bronx Jean Co., Inc.*, 76 A.D.3d 461, 462 [1st Dept 2010]; *see also Bell v Toothsavers, Inc.*, 213

A.D.2d 199 [1st Dept 1995]).

Upon the foregoing, it is

ORDERED that plaintiff is to accept defendant Argyle Development LLC's notice of appearance; and it is further,

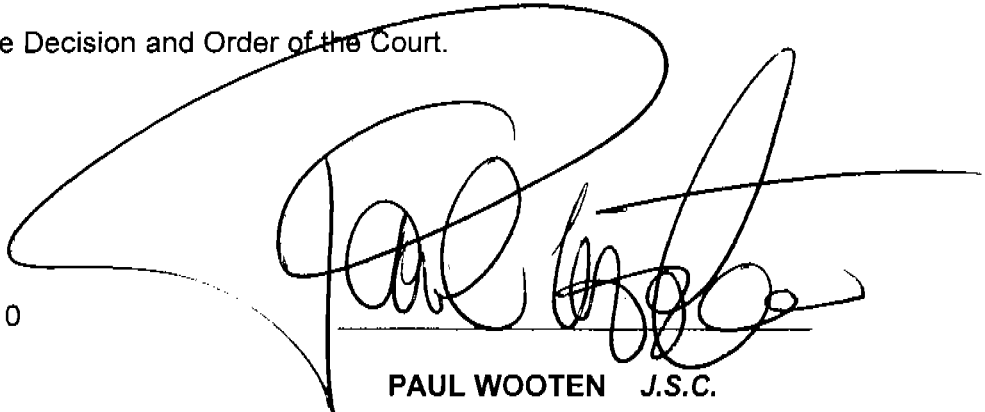
ORDERED that this motion to vacate the default judgment, dated August 11, 2010, against Argyle Development LLC, is hereby granted; and it is further,

ORDERED that defendant Argyle Development LLC is directed to serve and file an answer to plaintiff's summons and complaint, within 60 days of this order; and it is further,

ORDERED that all parties are directed to appear for a preliminary conference on March 16, 2011, at 11:00 a.m., in Part 7, at 80 Centre Street; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: December 27, 2010

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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