SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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GROVICE PROPERTIES, LLC,

Plaintiff,

-against-

83-10 ASTORIA BOULEVARD LLC; JANE PERLOW, Individually and as Trustee of the SIDNEY ESIKOFF GRAT # 1; GRACE HAVASY, Individually and as Trustee of the SIDNEY ESIKOFF GRAT # 1; MARION STERNBERG, Individually and as Trustee of the SIDNEY ESIKOFF GRAT # 1; SIDNEY ESIKOFF, Individually and as Trustee of the SIDNEY ESIKOFF GRAT # 1; and RUSKIN MOSCOU FALTISCHEK, P.C., as Escrow Agent,

Defendants.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 600794-10
Motion Seq. Nos. 1 and 3
Submission Date: 2/16/11

Papers Read on these Motions:

Notice of Application, Affirmation in Support and Exhibits.....x
Notice of Cross Motion, Affirmation in Opposition/Support, Affidavit in Opposition/Support, Exhibits and Memorandum of Law.....x
Reply Affirmation in Support.....x
Correspondence dated February 16 and February 21, 2011.....x

This matter is before the court on 1) the motion by Plaintiff filed on or about December 13, 2010, [1] and 2) the cross motion filed by Defendants 83-10 Astoria Boulevard LLC, Jane Perlow, Grace Havasy and Marion Sternberg (collectively "Moving Defendants") on February 8, 2011, both of which were submitted February 16, 2011. For the reasons set forth

[1] Plaintiff filed its motion electronically and provided the Court with courtesy copies of its motion papers.

below, the Court 1) denies Plaintiff's motion; and 2) grants the cross motion, directs Plaintiff to accept the Amended Verified Answer previously served and deems the Verified Answer and Amended Verified Answer properly verified and served as to all Moving Defendants.

BACKGROUND

A. Relief Sought

Plaintiff Grovick Properties, LLC ("Grovick" or "Plaintiff") moves, pursuant to CPLR § 3215, for an Order granting Plaintiff judgment against Defendants 83-10 Astoria Boulevard LLC ("Astoria LLC"), Grace Havasy ("Havasy") and Marion Sternberg ("Sternberg"), in an amount to be determined by an assessment, account, proof or reference, but in any event not less than the principal amount of $534,292, plus interest, costs and disbursements.

Moving Defendants cross move, pursuant to CPLR §§ 2001, 2004 and 3012(d), for an Order 1) as to Defendants Astoria LLC and Sternberg, a) permitting them to correct irregularities in the verifications of the Verified Answer and Amended Verified Answer; and b) granting them an extension of time to serve a verified answer or, alternatively, compelling Plaintiff to accept the Amended Verified Answer previously served and to deem the Answer and Amended Answer properly verified and served; and 2) as to Defendant Havasy, a) vacating her default in answering the Verified Complaint ("Complaint"); and b) extending her time to answer the Complaint to the extent that her previously served Verified Answer and Verified Amended Answer be deemed to be timely served.

B. The Parties' History

The Complaint (Ex. 1 to Brooks Aff. in Supp.) alleges as follows:

Grovick, described as an "innocent purchaser of real property contaminated by petroleum" (Compl. at ¶ 1), seeks to recover from the real property's prior owners and their operators costs incurred in removing contamination and restoring the real property ("Premises") to levels that are satisfactory to the New York State Department of Environmental Conservation ("DEC"). Prior to commencing this action, 83-10 Astoria objected to Grovick's attempt to recover these costs from a designated escrow account, and refused to compensate Grovick.

In April of 2004, Grovick purchased the Premises ("Purchase"), located at 83-10 Astoria Boulevard, East Elmhurst, New York, from Astoria LLC pursuant to a Contract of Sale ("Contract") (Ex. 1 to Compl.). [2] Years before the Purchase, discharges of petroleum product

[2] Grovick is not the entity named as the purchaser in the Contract. The Contract was assigned to Grovick by the named purchaser, with the knowledge and approval of Astoria LLC (Compl. at n. 1).

contaminated the groundwater and soil at the Premises ("Contamination"). The believed source of the Contamination was discharges from an underground petroleum product and storage and dispensing system ("Petroleum System") once located at the Premises. After the Purchase, and as of July 30, 2010, Grovick incurred costs arising from or relating to the removal of the Contamination and remediation of the Premises ("Cleanup") in the amount of $534,292, and will continue to incur such costs until the DEC determines that the Cleanup is complete.

The Complaint contains seven (7) causes of action: 1) against Astoria LLC for breach of contract/indemnity pursuant to the Contract, 2) against Astoria LLC and Defendant Ruskin Moscou Faltischek, P.C. ("Ruskin Moscou") for declaratory judgment/escrow pursuant to the Escrow Agreement entered into in connection with the closing on the Premises, 3) against Perlow, the Managing Member of Astoria LLC, and Havasy and Sternberg, Members of Astoria LLC, for fraudulent conveyance in connection with the distribution of the proceeds of the Purchase, 4) against Astoria LLC pursuant to Article 12 of the Navigation Law, 5) against Perlow pursuant to Article 12 of the Navigation Law, 6) against Perlow, Havasy and Sternberg pursuant to Article 12 of the Navigation Law, and 7) against Sidney Esikoff ("Esikoff") pursuant to Article 12 of the Navigation Law.

The Complaint also alleges that the Sidney Esikoff Grantor Retained Annuity Trust ("GRAT") # 1 was and is a trust established on or before January 11, 1994 of which Esikoff, Perlow, Havasy and Sternberg are co-trustees.

In his Affirmation in Support, counsel for Plaintiff affirms as follows:

Plaintiff filed the Complaint on September 14, 2010, and served the Complaint on 1) Havasy on September 15, 2010, pursuant to CPLR § 308(1), as reflected by the affidavit of service provided (Ex. 2 to Brooks Aff. in Supp.), 2) Sternberg on September 15, 2010, pursuant to CPLR § 308(2), as reflected by the affidavit of service provided (*id.* at Ex. 3), and 3) on Astoria LLC on September 20, 2010, pursuant to Limited Liability Company Law § 303(a), as reflected by the affidavit of service provided (*id.* at Ex. 4). Plaintiff refers to these three defendants as the "Defaulting Defendants."

Between September 15 and October 13, 2010, none of the Defendants against whom Plaintiff seeks a default judgment contacted Plaintiff's counsel. On or about October 14, 2010, the attorney representing those Defendants ("Defendants' Counsel") contacted Plaintiff's counsel to advise him of that representation. Plaintiff's counsel advised those Defendants' Counsel that "at least one of his clients was in default and that he would have to seek relief from

the Court" (Brooks Aff. in Supp. at ¶ 8), which he did not do. On October 14, 2010, Defendants' Counsel served Plaintiff's counsel with a single pleading titled "Verified Answer" (Ex. 5 to Brooks Aff. in Supp.) which reflects that it is the Verified Answer of Defendants Astoria LLC, Havasy and Sternberg. Plaintiff submits that, because the Verified Answer was not timely as to Havasy, she is in default.

Plaintiff also objects to the fact that the Verified Answer was not verified by or for the Defendants against whom Plaintiff seeks a default judgment, and outlines the manner in which those verifications are inadequate. Plaintiff submits that, in light of those inadequacies, the Verified Answer is a "nullity" (Brooks Aff. in Supp. at ¶ 20) as to Sternberg and Astoria LLC and they are therefore in default.

In his Affirmation in Opposition, Defendants' Counsel affirms that on or about March 20, 2009, the State of New York ("New York") commenced an action ("State Action") against the Defendants, and other parties, to recover remediation costs ("Remediation Costs") related to the Premises. The State Action is pending in the Supreme Court of Albany County. All but two of the defendants in the State Action are Defendants in the matter *sub judice* ("Instant Action"). In the complaint in the State Action ("State Complaint"), New York alleges that it has incurred approximately $650,000.00 in Remediation Costs. Plaintiff in the Instant Action seeks $534,292.00 in Remediation Costs.

On or about February 17, 2010, Plaintiff's Counsel made a demand to Ruskin Moscou, the Escrow Agent, for the release of certain escrow funds ("Escrow Funds") held pursuant to the Escrow Agreement (*see* letter, Ex. B to Weil Aff. in Opp./Supp.). Defendants' Counsel, by letter dated February 23, 2010 (*id.* at Ex. C), and New York, by letter dated February 19, 2010 (*id.* at Ex. D), objected to the release of the Escrow Funds. Plaintiff initiated the Instant Action on or about September 14, 2010.

Defendants' Counsel affirms that, following the service of the Verified Answer, the Defendants served an Amended Verified Answer ("Amended Verified Answer") (Ex. F to Weil Aff. in Opp./Supp.) on November 3, 2010. By letter dated December 9, 2010 (*id.* at Ex. G), Plaintiff's counsel rejected the Verified Answer and Amended Verified Answer on the same grounds on which Plaintiff's motion is based. Defendants' Counsel submits that Plaintiff's counsel did not provide him with the required notice pursuant to CPLR § 3022 with due diligence, but nonetheless annexes corrected verifications for the Verified Answer and Amended Verified Answer (*id.* at Ex. H).

In her Affidavit, Havasy affirms that she was not a party to the Contract or the deed evidencing the transfer of title to the Premises to Plaintiff. She also was not a party to the Escrow Agreement, never owned operated or participated in the operation of a business at the Premises, and never caused or participated in any Contamination at the Premises. Havasy submits that these provide her with defenses, in addition to the Affirmative Defenses set forth in the Verified Answer and Amended Verified Answer.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment because the allegations in the Complaint set forth a *prima facie* case, and because the Defendants against whom Plaintiff seeks a default judgment have filed and served an untimely and inadequately verified Verified Answer.

Moving Defendants submit, *inter alia*, that 1) in light of Plaintiff's failure to provide the additional notice required by CPLR § 3215(g)(3)(i), the Court must deny Plaintiff's motion; 2) service of the Verified Answer was timely; 3) the Amended Verified Answer remedies any defects in the certification of the Verified Answer; 4) Plaintiff may not treat the allegedly improper certification in the Verified Answer as a nullity in light of his failure to provide Defendants' Counsel with the required notice of the alleged impropriety; and 5) any default by Defendant Havasy was excusable, and Havasy has demonstrated a meritorious defense given that she was not a party to the Contract or Escrow Agreement, or otherwise responsible for the Contamination.

In reply, Plaintiff submits, *inter alia*, that 1) Defendants' cross motion is "little more than a lawyer's lengthy *mea culpa* that admits each of the fatal defects" alleged in Plaintiff's application (Brooks Reply Aff. at ¶ 3); 2) the cross motion itself is procedurally flawed; 3) the fact that Havasy was not a party to the Contract or Escrow Agreement does not provide a meritorious defense, as Plaintiff's allegations against her do not rely on those documents, but rather on her role as a trustee of the GRAT # 1 and Member of Astoria LLC; and 4) the additional notice provisions of CPLR § 3215(g)(3)(i) are inapplicable to the Instant Action.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount

due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007). Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

B. Verification

CPLR § 3022, titled "Remedy for defective verification," provides:

> A defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.

An attorney may verify a pleading if the party to the action is not in the county where the attorney has his office. CPLR § 3020(d)(1); *see also Drake v. Touba Harou Cayor Transportation, Inc.*, 19 Misc. 3d 1102A (Brx. Cty. 2008), citing *Tenneriello v. Board of Elections of the City of New York*, 63 N.Y.2d 700 (1984) and *Goldman v. City of New York*, 287 A.D.2d 482 (2d Dept. 2001). An attorney may verify his client's pleading upon an assertion that his client does not reside in the county where the attorney has his office. *Id.*, citing, *inter alia*, *Suto v. Folkes Heating, Cooling & Burner, Service, Inc.*, 15 A.D.3d 469, 470 (2d Dept. 2005). Moreover, as the Second Department stated in *Goldman*, "[A]n answer verified by counsel is sufficient to demonstrate a meritorious defense in the context of a motion for leave to serve a late answer pursuant to CPLR [§] 2004." *Goldman*, 287 A.D.2d at 483.

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion for a default judgment in light of 1) the public policy favoring the resolution of cases on the merits, and 2) the *de minimus* delay, if any, of Defendants' service of their Answer and Amended Answer. The Court's conclusion is amplified by the factual disputes regarding Plaintiff's compliance with CPLR § 3022, and the apparent validity, pursuant to CPLR § 3020, of the verification in the Amended Verified Answer, given that the Defendants reside or have their places of business in a different county from the county

in which the office of Defendants' Counsel is located.

In light of the foregoing, the Court grants Defendants' cross motion, directs Plaintiff to accept the Amended Verified Answer previously served and deems the Verified Answer and Amended Answer properly verified and served as to the Moving Defendants.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
April 11, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.