

David J. Louie, Inc. v Centre Hester Realty LLC.

2011 NY Slip Op 31296(U)

May 12, 2011

Supreme Court, New York County

Docket Number: 109415/08

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

DAVID J. LOUIE, INC.,

INDEX NO. 109416/08

MOTION DATE 05-04-2011

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

CENTRE HESTER REALTY, LLC, AND METAL STONE
CONSTRUCTION, INC., NU-WAY PLUMBING CORP., AND
202 CENTRE CORP.,

The following papers, numbered 1 to 8 were read on this motion for summary judgment and default judgment and cross motion for leave to file late answer.

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

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4, 5, 6

Replying Affidavits _____

7, 8

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this Motion is decided in accordance with the memorandum decision filed herewith.

This constitutes the decision and order of this court.

Dated: May 12, 2011

Manuel J. Mendez
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

MAY 17 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

RECEIVED

MAY 16 2011

**MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL**

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

*Eshel
JMS*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 13

-----X
DAVID J. LOUIE, INC.,
Plaintiff,

-against-

CENTRE HESTER REALTY LLC., AND
METAL STONE CONSTRUCTION INC., NU-WAY
PLUMBING CORP., AND 201 CENTRE CORP.,

Defendant .

Index No.: 109415/08
DECISION AND JUDGMENT

FILED

MAY 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X

In this action for money damages plaintiff moves for summary judgment against defendant Centre Hester Realty LLC., on all claims asserted, and for partial summary judgment on the counterclaims of the remaining defendants. In the Alternative plaintiff moves for a default judgment against defendant Centre Hester Realty, LLC., for its failure to answer the Amended Verified Complaint.

The defendants oppose the Summary judgment and Partial Summary judgment motions as untimely. They claim that the motions are late because a Preliminary Conference Order was issued by the Hon. O. Peter Sherwood on April 1, 2009 requiring that all dispositive motions be made within 60 days from the filing of the Note of Issue. Plaintiff filed its Note of Issue on October 27, 2010 and filed this dispositive motion on February 8, 2011, a date more than 60 days from the filing of the Note of Issue.(See moving papers Exhibits M & N).

CPLR 3212(a) provides that a summary judgment motion may be made within 120 days after the filing of the note of issue, unless the court has shortened that deadline to a date no less than 30 days after the filing. In its preliminary conference order the court fixed as a date for dispositive motions "60 days from the filing of the note of issue absent good cause". Plaintiff has not shown that this item in the order has been amended by a superseding compliance order, therefore, "absent a showing of good cause" the motion for summary judgment is untimely (see Anzalone v. Pan-Am Equities, 271 A.D. 2d 307, 706 N.Y.S. 2d 409 [1st. Dept. 2000]; Group IX, Inc.,

v. Next Printing and Design, Inc., 77 A.D. 3d 530, 909 N.Y.S. 2d 434 [1st. Dept. 2010]; Brill v. City of New York, 2 N.Y. 3d 648, 781 N.Y.S. 2d 261 [2004]).

Plaintiff further claims that defendant Centre Hester Realty LLC, is in default for failing to serve and file an answer to the First Amended Verified Complaint. Following Joinder of Issue Defendant Centre Hester Realty filed a Third Party action naming defendant Metal Stone Construction, Inc., under index number 590286/09. Third Party defendant Metal Stone filed a Fourth Party action naming Fourth Party defendant Nu-Way Plumbing Corp., under index number 591135/09. After issue was joined on all actions the parties entered into a stipulation dated March 23, 2010, "interposing a First Amended Verified Complaint and Amending the caption in the First Party Action." Under this stipulation the parties agreed that "Plaintiff's First Amended Verified Complaint, attached as exhibit A shall be interposed and deemed served as of the date of the So-Ordering of this stipulation." The First Amended Verified Complaint is in essence the original complaint with the addition of the Third Party defendant, the Fourth Party defendant and a new entity 202 Centre Corp. As to defendant Centre Hester Realty, LLC., the factual allegations did not change, no new causes of action were added, in the First Amended Verified Complaint.

The first party action caption was amended, the third Party defendant, Fourth Party Plaintiff and Fourth Party defendant and the new defendant 202 Centre Corp., answered the First Amended Verified Complaint. Defendant Centre Hester Realty, LLC., did not interpose an answer. The parties completed all discovery and plaintiff filed its note of issue. Plaintiff now moves for a default judgment. Defendant Centre Hester opposes the motion and Cross moves for permission to serve its answer to plaintiff's Amended Verified Complaint.

This court has reviewed the pleadings, the original complaint against Centre Hester Realty LLC., and the First Amended Verified Complaint and finds that this Amended Complaint does not allege new causes of action or theories against defendant Centre Hester Realty, LLC., plaintiff has simply supplemented its complaint to assert direct causes of action against the other defendants. The Answer to this Amended Verified Complaint should be the same as the one interposed by this defendant to the Original Complaint, without adding anything new or different.

When an original answer gives a plaintiff notice of defenses in a proposed amended answer, and considering the informal procedure which plaintiff followed in serving the amended complaint, simple fairness dictates that the proposed answer to the amended complaint be similarly treated (*John T. Brady & Co., Inc., v. City of New York*, 104 Misc. 2d 773, 429 N.Y.S. 2d 530 [N.Y. Sup. Ct. 1980]).

Following the service of the First Amended Verified Complaint the parties continued with discovery, interchanging documents and conducting examinations before trial of the parties respective witnesses. In effect plaintiff treated defendant Centre Hester Realty, LLC, not as a party in default but as a party who had previously served an answer that was still in effect. Additionally the Amended Verified Complaint which does not add any new causes of action against defendant Centre Hester but only seeks to assert direct causes of action against the Third Party and Fourth Party defendants, may be considered a Supplemental Complaint. If the complaint is a supplemental complaint rather than an amended complaint, the original answer remains in effect. (*County of Nassau v. Cedric Construction Corp.*, 100 A.D. 2d 890, 474 N.Y.S. 2d 549 [2nd. Dept. 1984]).

A court may vacate a default where the defendant demonstrates both a reasonable excuse for the default and a meritorious defense. Defendant has demonstrated a reasonable excuse for the default in its allegation of law office failure. Following the signing of the stipulation and the deemed service of the Amended Verified Complaint, the parties continued with and completed discovery. Due to defense counsel's oversight the answer to this amended complaint was not interposed. Defendant has raised a meritorious defense as alleged in its Original Answer and its Proposed answer to the amended verified complaint. The Default is not wilful or deliberate and there is no evidence of prejudice to the plaintiff. Absent a showing of willful, deliberate and contumacious conduct on the part of the defendant a court may exercise its discretion and vacate the default (*Whitfield v. State*, 28 A.D. 3d 541, 814 N.Y.S. 2d 185 [2nd. Dept. 2006]).

Plaintiff's motion for summary judgment is untimely as it was not made within 60 days from the filing of the note of issue in accordance with Justice Sherwood's Preliminary conference order. The Amended Verified Complaint does not assert any new causes of action or theories against defendant Centre Hester Realty, LLC., in essence it merely seeks to add as direct defendants under the main action the Third Party and Fourth Party defendants. Defendant has alleged law office failure in the

nature of an oversight by defense counsel in not answering the amended verified complaint. The defendant has raised a meritorious defense in its answer which is essentially the same answer as the Original complaint. Following the service of the amended verified complaint the parties continued with discovery, in which defendant participated. In effect plaintiff treated defendant Centre Hester Realty, LLC., not as a party in default, but as a party who had submitted an answer.

Accordingly, it is hereby ORDERED, that the motion for summary judgment against defendant Centre Hester Realty LLC., is denied as untimely, and it is further

ORDERED, that the motion for partial summary judgment on the Counterclaims against defendants Nu-Way Plumbing Corp. And Metal Stone Construction, Inc., is denied as untimely, and it is further

ORDERED, that the motion for a default judgment against defendant Centre Hester Realty, LLC., is denied, and it is further

ORDERED, that defendant Centre Hester Realty LLC.'s default in answering is vacated, and it is further

ORDERED, that the cross-motion of defendant Centre Hester Realty LLC., permitting it to serve and file an answer to plaintiff's amended verified complaint is granted, and it is further

ORDERED, that the proposed answer annexed to the cross-moving papers as Exhibit F, is deemed served and filed Nun Pro Tunc.

This constitutes the decision and order of this court.

Dated: May 12, 2011

Manuel J. Mendez
J.S.C.