

AEG Restoration Corp. v Henderson

2011 NY Slip Op 32394(U)

August 29, 2011

Sup Ct, Nassau County

Docket Number: 12319110

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

AEG RESTORATION CORP.,

Plaintiff,

- against -

VALERIE HENDERSON,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 12319/10
Motion Seq. No.: 02
Motion Date: 06/14/11
XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Order to Show Cause, Affirmation, Affidavit and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves for an order vacating the Decision and Order of this Court dated March 30, 2011 which was granted upon default and by which the plaintiff herein was granted summary judgment with respect to its breach of contract claim; for an order vacating and annulling in its entirety any judgment which may have been entered by the Clerk of the Court based upon this Court's prior Order of March 30, 2011; for an order restoring said matter to the Court calendar for further proceedings with respect to plaintiff's motion for summary judgment; and for the Court to accept defendant's present motion papers, with supporting Affirmation, Affidavit and exhibits in opposition to plaintiff's motion, which seeks an order granting plaintiff

summary judgment, or in the alternative, for partial summary judgment on the issue of liability. Plaintiff opposes defendant's motion.

Although no statutory section is cited by defendant in her motion, the Court will deem defendant's motion as having been made pursuant to CPLR § 5015(a).

On March 30, 2011, this Court issued a Decision and Order granting plaintiff's motion for summary judgment. Defendant had failed to submit any opposition to plaintiff's summary judgment motion.

Defendant's counsel now contends that, "[a]fter being served with Plaintiff's motion for Summary Judgment, Defendant asked Bhavjot Singh if he would agree to submit an Affidavit on her behalf to attest to the Evaluation and estimate which he provided pertaining to the construction work performed by the Plaintiff at the subject property, and prior to his being retained to complete the necessary construction work. After your Affirmant spoke to Mr. Singh (*sic*) and he agreed to execute such Affidavit, I promptly prepared same and forwarded it to him for his further review and signature....Although your Affirmant wished to submit Mr. Singh's Affidavit as part of the opposition papers to Plaintiff's motion for summary judgment, Mr. Singh was unreachable for an extended period of time and ultimately informed the Defendant that he decided not to execute same for fear of being involved with any lawsuit. Unfortunately, by the time Mr. Singh finally responded, no further adjournment of Plaintiff's motion would be agreed to by Plaintiff's counsel and as such, Plaintiff's motion was submitted without any opposition."

Defendant submits that it was never her intent not to oppose plaintiff's motion but, unfortunately, her opposition could not be done on a timely basis due to the time that it took her

to accumulate all pertinent contracts and payment records and because of the delay associated with trying to obtain an Affidavit from her present contractor, Mr. Singh, which would have further corroborated the extent of plaintiff's services, the value associated with same and the necessary work and costs involved in the completion of the construction.

Defendant argues that she has demonstrated a reasonable excuse for not timely opposing plaintiff's motion and a meritorious defense in her Verified Answer to plaintiff's Complaint and her Affidavit in Support of the instant motion.

In opposition to defendant's motion, plaintiff's counsel states, "[o]n or about January 5, 2011, plaintiff propounded a motion for summary judgment....Plaintiff argued that there existed a written, clear contract executed by the parties complete with a liquidated damages clause; a documented amount due representing a sum certain; a written letter by defendant terminating plaintiff without excuse or explanation; and thus no question of fact for this Court to decide." Plaintiff's counsel argues, "[f]irst, defense counsel concocts a tale of being unable to obtain an affidavit from a purported expert in time to oppose plaintiff's summary judgment motion - an affidavit he was apparently unable to obtain anytime thereafter either.... Then, defense counsel has decided to assert that by the time his 'expert' told him that he was not going to execute an affidavit at all, that 'no further adjournment of the summary judgment motion would be agreed to by plaintiff's counsel.'... Unfortunately, this is an untruth. On or about February 3d defense counsel requested and received from your affirmant consent to adjourn the subject summary judgment motion. Your affirmant drafted and executed a stipulation and faxed it to defense counsel, as is proven beyond dispute by Exhibit F. Defendant a) never executed the stipulation, b) never filed it with the Court, c) never called your affirmant with respect to the stipulation

drafted, d) never filed any opposition to the motion, and e) never returned any of your affirrant's subsequent phone calls or correspondence. Thus, defendant has no excuse at all for its (*sic*) failure to oppose plaintiff's motion - notwithstanding the false statement of counsel filed with this Court - and the Courts are unforgiving of a party who seeks such vacatur without a reasonable excuse, even when the time period is short."

Plaintiff further argues that defendant has also not articulated a meritorious defense. Plaintiff argues that defendant disingenuously claims that she retained plaintiff only for "debris removal," despite her signature on a concise and clear contract indicating that plaintiff was being retained to repair her fire damaged home. Plaintiff states that defendant admits that she failed to "review" the contract at plaintiff's suggestions, claiming in her Verified Answer that this represents a defense to the contract. Plaintiff argues that "[d]efendant also apparently failed to 'review' the detailed invoices submitted by plaintiff as to the work done...and was also apparently blissfully unaware of the reconstruction AEG had conducted at her specific request....Having failed to read the subject contract, Henderson's outrageous and entirely conclusory assertion that AEG's president somehow *urged her* not to do so, and that he ostensibly implied she was signing a contract for debris removal, does not constitute a defense of any kind."

Plaintiff adds that defendant submits an unsigned statement by her contractor suggesting that there was only \$10,000.00 of work done to defendant's residence, but this "documentation" does absolutely nothing to establish any semblance of reasonable excuse, a meritorious defense, or anything at all capable of presenting this Court with a factual issue that might have defeated plaintiff's motion for summary judgment in the first instance.

Relief under CPLR § 5015(a) is available where the defendant can demonstrate a

reasonable excuse for the default *and* a showing of a meritorious defense (emphasis added). See *Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986); *Szilaski v. Aphrodite Const. Co., Inc.*, 247 A.D.2d 532, 669 N.Y.S.2d 297 (2d Dept. 1998). The requirements are not alternative requirements and both requirements must be met in order to vacate the default judgment.

The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. See *Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harczark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

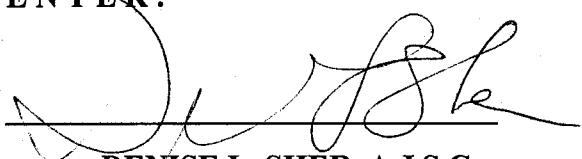
When viewing the moving papers in their best light, the Court finds that defendant has failed to demonstrate a reasonable excuse for her default in submitting opposition papers to plaintiff's motion for summary judgment. The fact that defendant's opposition allegedly could not be done on a timely basis due to the time that it took her to accumulate all pertinent contracts and payment records and because of the delay associated with trying to obtain an Affidavit from her present contractor does not constitute a reasonable excuse. Furthermore, plaintiff's counsel has demonstrated that he had agreed to stipulate to adjourn the summary judgment motion and provide defendant with additional time to respond to said motion. See Plaintiff's Affirmation in Opposition Exhibit F. This evidence of the stipulation, provided by plaintiff in its opposing papers, disproves defendant's counsel's statement that "no further adjournment of Plaintiff's motion would be agreed to by Plaintiff's counsel and as such Plaintiff's motion was submitted without any opposition." Defendant's failure to submit any opposition to plaintiff's summary judgment motion because she simply could not do so in time

(even when plaintiff was agreeing to provide her more than the time allotted for in the summary judgment motion) does not, in the Court's opinion, constitute a meritorious defense.

Accordingly, in the sound discretion of the Court, defendant's motion is hereby **DENIED** in its entirety.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
August 29, 2011

ENTERED
AUG 31 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE