

Wonder Works Const. Corp. v Seery

2011 NY Slip Op 32659(U)

October 11, 2011

Supreme Court, New York County

Docket Number: 100096/2010

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

WONDER WORKS CONSTRUCTION CORP.,
Plaintiff,

-against-

JAMES SEERY a/k/a J. SEERY,
Defendant.

INDEX NO. 100096/2010

MOTION SEQ. NO. 003

The following papers, numbered 1-4, were considered on this motion for default judgment/discovery:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross Motion: Yes No

Upon the foregoing papers, in this fraudulent conveyance claim, the court ordered that this motion by plaintiff for a default judgment against defendant, or, in the alternative, to compel discovery of financial information, including tax returns, is denied, as detailed below.

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Motion for Default Judgment

It is well settled that New York courts favor resolution of actions on their merits rather than on default. *Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1st Dep't 1986); *Berardo v. Guillet*, 86 AD3d 459 (1st Dept 2011); *Yu v. Vantage Mgmt Services, LLC*, 85 AD3d 564 (1st Dept 2011); *Bobet v. Rockefeller Center, North, Inc.*, 78 AD3d 475 (1st Dept 2010). As such, there is a liberal policy towards "opening default judgments in furtherance of justice so that parties may have their day in court." *Picinic v Seatrain Lines, Inc.*, 117 AD2d at 508. Additionally, in accordance with CPLR §3012(d), courts have discretion to extend a parties' time to "plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just...upon a showing of [a] reasonable excuse for [the] delay or default".

Here, there are sufficient grounds to warrant a denial of plaintiff's motion for the entry of a default judgment against defendant and to compel the acceptance of defendant's answer, which was inadvertently served upon plaintiff, approximately three (3) months late. Significantly, it is clear that defendant never intended to default in this action, as defendant has vigorously contested the allegations

dismiss, which were both denied by this court. Further, defendant's counsel appeared at a preliminary discovery conference on September 24, 2010, prior to the expiration of the time to answer, as well as numerous subsequent discovery conferences, exchanged substantial discovery and even entered into a confidentiality agreement with respect to certain discovery, which has been supplied. Thus, plaintiff cannot be said to have suffered any prejudice, nor is any prejudice alleged, from the brief, three (3) month delay in plaintiff's receipt of defendant's answer. As such, in accordance with CPLR §3012(d), this court shall extend defendant's time to serve his answer, and deem the service of defendant's answer, timely served and filed, *nunc pro tunc*.

The court notes that generally, "disputes" regarding timeliness of filings are generally resolved amongst counsel. Reasonable time extensions are usually routine matters of simple courtesies extended between lawyers in which the court should not be involved. *See Bermudez v. City of New York*, 22 AD2d 865 (1st Dept 1964). Such, however, was regrettably not the case with respect to the within counsel.

The motion for default judgment is therefore denied. Defendant's answer dated January 10, 2010 (Exh. 17, Treybich Reply Affirmation) is deemed timely served and filed, *nunc pro tunc*, as "the court has the authority to, *sua sponte*, grant relief pursuant to CPLR 3012(d) [for an extension of time to appear or plead,] even in the absence of a cross motion seeking such relief." *Willis v. City of New York*, 154 AD2d 289, 290 (1st Dept 1989); *see also Shure v. Village of Westhampton Beach, Inc.*, 121 AD2d 887, 888 (1st Dept 1986).

Motion to Compel

This case was commenced by plaintiff based upon an alleged fraudulent conveyance by J. Seery Construction to defendant, prior to such corporation becoming defunct and rendering a default judgment obtained by plaintiff against J. Seery Construction, in another action, worthless.

Plaintiff has moved to compel defendant pursuant to CPLR §3124, to comply with plaintiff's discovery demands served on October 4, 2010. The majority of the documentary discovery that remains outstanding, and in dispute, pertains to defendant's personal, financial information, including a request for his tax returns. It is noted that, while defendant objects to such demands arguing that they are "burdensome, unnecessary and intimidating" [§9, Affirmation in Opposition], it is not disputed that defendant has already exchanged copies of checks issued from the operating account of J. Seery

Construction from December 1, 2006 through the end of June 2007, tax returns of J. Seery Construction for 2006, 2007, 2008 and 2009, as well as balance sheets, trial balances and general ledgers pertaining to J. Seery Construction, for the relevant time period.

While generally in New York there is a liberal discovery policy, case law recognizes that because of their confidential and private nature, disclosure of tax returns is generally disfavored. *See Nanbar Rlty. Corp. v. Pater Rlty., Co.*, 242 AD2d 208, 209 (1st Dept 1997). Thus, a party seeking disclosure of tax returns must demonstrate that the tax return information is both “indispensible” and otherwise “unavailable.” *Id.*; *see BRS & W Assocs. v. W.R. Grace & Co.*, 156 AD2d 249, 249 (1st Dept 1989) (denying discovery of tax returns because the information could be solicited through deposition testimony or at trial); *Penn York Const. Corp. v. State*, 92 AD2d 1086 (3rd Dept 1983)(denying disclosure of tax returns and financial statements as the strong showing to require their production was not made).

Here plaintiff has not met its *high* burden to warrant that this court require the production of defendant’s tax returns. *See Briand Parenteau v. Dean Witter Reynolds Inc.*, 267 AD2d at 577. In particular, plaintiff failed to establish that the information contained in defendant’s tax returns is not obtainable elsewhere, especially since, as of the filing of the within motion, depositions of the parties have yet to be completed. Moreover, in support of the within motion, plaintiff has failed to cite to any New York case law which provides for the disclosure of an individual’s tax returns, in conjunction with a fraudulent conveyance claim; in fact, plaintiff’s moving papers fail to cite to any case law in support, and merely seeks discovery based upon that plaintiff served demands upon defendant, without any assertion of a factual correlation between the requested documents and the asserted claims.

Additionally, plaintiff’s *broad* request for financial statements and bank account information of defendant dating back five (5) years is also denied. Similar to tax returns, bank account information is afforded special protection because of its confidential and private nature. *See ICC Chemical Corp. v. Klein*, 243 AD2d 402, 402 (1st Dept 1997). Generally, bank records need not be disclosed unless they have a direct bearing on an issue in a case. *See id.* Moreover, at this juncture, prior to the parties’ depositions, it has not been established that similar relevant information cannot be obtained through other means, including questioning defendant at his deposition.

Additionally, plaintiff failed to demonstrate in the moving papers, the relevance for much of the extensive and burdensome discovery sought (i.e. Plaintiff's demands include: all contracts entered into by defendant from January 2006 to present, all invoices sent or received from defendant from January 2006 to present, all loans taken by defendant from January 1, 2006 to present, all tax records of defendant from January 1, 2006 to present, all phone bills and records of defendant from January 1, 2006 to present etc). It has been held that "[a]n all inclusive demand for documents of any and every kind...is improper. Pruning is the job of counsel, not the court". *Brandon v. Chefetz*, 101 AD2d 786 (1st Dept 1984).

This decision, however, is *without prejudice* to plaintiff's right to seek additional documentary discovery if necessary, after the completion of party depositions, upon a proper foundation, in accordance with the with the above; specifically, plaintiff must show that the additional material and relevant information it seeks was not obtainable through other discovery mechanisms, including deposition questioning.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment and to compel is denied; it is further ORDERED that defendants' answer dated January 10, 2010 (Exh. 17, Treybich Reply Affirmation) is deemed timely served and filed, upon entry of this decision and order; it is further

ORDERED that any remaining depositions of the parties shall be completed by November 25, 2011; should the parties be unable to agree on deposition dates, depositions shall commence on November 17, 2011, and continue day to day until completed; it is further

ORDERED that the sanction language contained in page two (2) this court's order dated April 29, 2011, is incorporated into this order, and affirmations shall be supplied at the next discovery conference, if the within discovery is not completed as provided herein; it is further

ORDERED that, **as it is over one (1) year since the filing of a request for judicial intervention in this case, the failure to file a note of issue within 90-days of the date of this order, will result in the dismissal of this case; Note of Issue shall be filed on or before January 11, 2012;** and it is further

ORDERED that all parties shall appear for a discovery conference on December 9, 2011, at 10:00 a.m, room 428, 60 Centre Street, New York, NY, **unless a note of issue is filed prior to such**

date and no discovery issues remain; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve upon plaintiff, with notice of entry.

This constitutes the decision and order of this Court.

Dated: October 11, 2011



DORIS LING-COHAN, J.S.C.

Check one: **FINAL DISPOSITION**
Check if Appropriate: **DO NOT POST**

NON-FINAL DISPOSITION

J:\Default Judgments\wonder works construction seery. deny def jud allow untimely answer.wpd

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