

**Alexander v Weiner**

2011 NY Slip Op 33173(U)

November 29, 2011

Supreme Court, Nassau County

Docket Number: 010574/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**  
**Justice.**

**TRIAL/IAS PART 7**

\_\_\_\_\_  
LILLIAN ALEXANDER,

Plaintiff,

- against -

INDEX NO.: 010574/2009  
MOTION DATE: 9/22/2011  
SEQUENCE NO.: 003,004, 005,  
006

CYNTHIA J. WEINER,

Defendant.

\_\_\_\_\_  
CYNTHIA J. WEINER,

Third-party Plaintiff

- against -

NEIL J. ALEXANDER,

Third-party Defendant.

The following documents were read on this Motion:

- Motion Seq. 003 for Default Judgment ..... 1.
- Motion Seq. 004 for Order Dismissing Complaint ..... 2.
- Affirmation of Joseph Capobianco in Opposition to Motion ..... 3.
- Motion Seq. 005 for Eric I. Prusan, Esq. to withdraw as counsel ..... 4.
- Affirmation of Anne Rosenbach, Esq. in Partial Opposition to Withdrawal ..... 5.
- Motion Sequence #6 - Cross-motion to Motion #3 to Compel
- Acceptance of Third-party Answer ..... 6.
- Affirmation of Anne Rosenbach, Esq. in Opposition to Motion to Compel ..... 7.
- Reply Affirmation in Further Support of Cross-motion to Compel ..... 8.

## BACKGROUND

This is the third action brought against Cynthia J. Weiner. The first was brought by Neil Alexander in Florida, and was dismissed. The second was brought by Neil Alexander in Nassau County. It was dismissed by Hon. Leonard B. Austin, with leave to pursue the matter in Florida. This action, by the mother of Cynthia and Neil, is the third.

The complaint in the action alleges that defendant purchased a condominium in Florida with funds provided by her mother and now-deceased father. The parties agreed that the home was to be purchased in defendant's name, but held for the benefit of her parents. She was to make payments on account of the mortgage and for real estate taxes, and to be reimbursed by her brother.

According to the complaint, defendant re-financed the mortgage on the premises, kept the mortgage proceeds, and failed to make required payments, resulting in the home being lost in foreclosure, thereby depriving her mother of her retirement home.

There are three motions before the Court. The first is on behalf of defendant Cynthia Weiner to dismiss the complaint. The basis for the motion is that on April 5, 2011, plaintiff produced Neil Alexander for a deposition on the premise that he had power of attorney to testify on behalf of Lillian Alexander, his mother. Subsequent to the deposition defendant Weiner demanded discovery and inspection of documents, including the power of attorney, proof of payments made by Neil Alexander and a copy of the posted \$250 bond. The Court conducted a Compliance Conference on April 13, 2011, and directed plaintiff to produce the requested documents. A further Compliance Conference was scheduled for July 13, 2011, but only counsel for defendant appeared.

Plaintiff Lillian Alexander opposes the motion as premature and inappropriate. Counsel submits that the requested documents have been provided, except those which are not in her possession, including a copy of the deed to the foreclosed premises. The

attorney who was representing the plaintiff at the missed appearance allegedly did so inadvertently, and has now moved to be relieved.

Motion Sequence 005, brought by Order to Show Cause, seeks an order relieving Eric I. Prusan, Esq. as counsel for plaintiff; a stay of all proceedings for a reasonable time within which plaintiff is to obtain new counsel; and leave to submit a supplemental affidavit in the event the motion is opposed.

Defendant does not oppose the motion for leave to be discharged as counsel for Lillian Alexander, but objects to any representation by counsel that he has also been counsel for Neil Alexander. The claim is that a motion for default judgment on the third-party action has been submitted without opposition, and that counsel should not now claim for the first time that they have been representing both the plaintiff and the third-party defendant.

In fact, despite defendant's claims that the representation of the plaintiff and the third-party defendant constitutes a conflict of interest, it is in this precise capacity, as counsel for both of them, that the incoming attorney cross-moves to compel third-party plaintiff to accept the answer to the third-party complaint. The answer is dated April 11, 2011, and counsel claims that the third-party defendant has a meritorious defense and a justifiable excuse, and that the default in answering was inadvertent.

Cross-moving counsel points out that at an August 31, 2011 conference, the Court adjourned the motion for default against third-party defendant to September 22, 2011, in light of the fact that third-party defendant is now represented by counsel, and is moving forward in the defense of the third-party action.

#### DISCUSSION

Defendant's motion to dismiss the complaint is denied. The basis for the motion is the failure of plaintiff to provide demanded documentation and the failure to appear for a scheduled conference. As a practical matter, a motion addressed to the simple failure to produce documents would be responded to with a conditional order of preclusion,

directing production within a specified period of time and granting default in the event of non-compliance. (*Wei Hong Hu v. Sadiqi*, 83 A.D.3d 820, 821 [2d Dept. 2011]). In this case counsel for the defaulting party asserts full compliance, and movant has not replied to the contrary. The failure of counsel to appear for a single conference is hardly grounds for a dismissal of the complaint. The action would be even less appropriate under the circumstances in this case, where counsel for plaintiff was in the process of seeking to be relieved, and current counsel had not yet begun representation.

The motion by Eric I. Prusan, Esq. to be relieved as counsel for plaintiff Lillian Alexander is granted. There is no reason for a stay within which the plaintiff is to retain new counsel, since she already has replacement counsel. To the extent Mr. Prusan seeks relief from representation of the third-party defendant, the application is denied, since he has not appeared on behalf of Neil Alexander, witness the motion for default presently pending based upon the failure to answer the third-party complaint.

Motion Sequence 003 was for a default judgment against third-party defendant based upon his failure to appear in the action. Counsel for Neil Alexander cross-moves in Sequence No. 6 to compel the third-party plaintiff to accept the submitted third-party answer. Counsel for defendant and third-party plaintiff opposes the motion on the ground that there is no meritorious defense or justifiable excuse.

Cross-movant claims that the failure to answer the third-party complaint was not the fault of the third-party defendant, since he was under the impression that prior counsel was interposing an answer on his behalf. With respect to a claimed meritorious defense, he claims that the agreement called for him to reimburse third-party plaintiff for payments made on the mortgage covering their parents' condominium. He contends that Weiner made no mortgage or tax payments, and therefore the obligation for reimbursement never arose.

The granting of a motion to extend the time within which to plead is subject to the discretion of the Court. (*Cirillo v. Macy's*, 61 A.D.3d 538, 540 [1<sup>st</sup> Dept. 2009]). In this

case the third-party defendant plausibly expected that he was being represented by his former attorney, who was representing him in connection with a matrimonial proceeding. Only when third-party plaintiff moved for a default did he become aware that an answer had not been interposed on his behalf, sought new counsel, and now moves to compel acceptance of a September 15, 2011 answer to an April 11, 2011 complaint, which was served upon him on April 30, 2011. The delay is substantial, but there is no evidence that third-party plaintiff has materially changed her position as a result of the delay.

As a practical matter, the Court prematurely decided the motion for default on September 13, 2011, it having been adjourned on consent to September 22, 2011, and vacated that decision by Order dated September 22, 2011. In *Goldman v. City of New York*, 287 A.D.2d 482, 483 [2d Dept. 2001]), the Court denied a motion for a default judgment and granted a cross-motion to extend the time to answer some four months after the due date. Citing the strong public policy in favor of the resolution of cases on the merits, courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced. (Internal citations omitted). The relief was granted even though the verification was by counsel. In this case, the proposed verified answer is verified by Neil Alexander.

The Court hereby revisits the motion for default under Motion Sequence No. 3, and denies the relief requested. Third-party defendant's motion (#6) to Compel Third-party plaintiff to accept the answer is granted. Third-party is granted leave to serve and file a verified answer in conformity with Exh. "C" to the Cross-motion.

This constitutes the Decision and Order of the Court.

Dated: November 29, 2011

  
J.S.C.

**ENTERED**  
DEC 05 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE