Dr. William O. Benenson Rehabilitation Pavilion v Feldman
2012 NY Slip Op 33532(U)
January 9, 2012
Supreme Court, Queens County
Docket Number: 310/12
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

- x

DR. WILLIAM O. BENENSON REHABILITATION PAVILION and FLUSHING MANOR GERIATRIC CENTER, INC.,

Plaintiffs,

- against -

JANET FELDMAN and WENDY HARRIS,

Defendants.

- x

BY: McDONALD, J.

Index No. 310/12

Motion Date: 11/04/13

Motion Cal. No.:45

Motion Seq. No.: 2

The following papers numbered 1 to 13 were read on this motion by defendant, Wendy Harris, for an order vacating a default judgment and order for an inquest and for an order allowing the defendant to file a late answer:

	Papers Numbered
Order to Show Cause-Affirmations-Service-Exhibits	1 - 5
Affirmation in Opposition-Affidavit-Exhibits	6 - 10
Reply Affirmation	11 - 13

In this action to recover a judgment for services rendered by plaintiff, Dr. William O. Benenson Rehabilitation Pavilion and Flushing Manor Geriatric Center, Inc., to defendant Janet Feldman for inpatient rehabilitation and nursing services, defendant Wendy Harris, moves by order to show cause dated September 19, 2013, for an order pursuant to CPLR 5015(a)(1) vacating a default judgment dated August 7, 2013 and entered by this Court on August 20, 2013 and for leave to serve a late answer on the ground of excusable default.

The plaintiff commenced the within action for breach of contract, quantum meruit, account stated and misappropriation of funds by filing a summons and complaint on January 6, 2012. An affidavit of personal service was filed on February 6, 2012 indicating that the defendant was personally served with a copy of the summons and complaint at her residence on January 23,

2012. According to the plaintiff's complaint, defendant Janet Feldman entered the plaintiff's rehabilitation facility on September 17, 2003. Plaintiff alleges that Janet Feldman entered into an "Admission Agreement" pursuant to which Janet Feldman guaranteed full compensation and her daughter, Wendy Harris agreed to function as a "Responsible Party" whereby Ms. Harris, as an individual with access to Janet Feldman's funds, would ensure that Janet Feldman provided plaintiffs with the proper compensation for their services as per the Admission Agreement. The Agreement states that Ms. Feldman would pay plaintiff the sum of $180.00 per month which was her net available income, as well as her monthly social security. The complaint alleges, however, that during the time Janet Feldman was a resident of plaintiff's facility there were accrued charges of $27,359.28 that were not paid by Janet Feldman and Ms. Harris has not ensured that plaintiff was compensated according to the agreement.

Plaintiff asserts that statements of account have been sent to both Janet Feldman and Wendy Harris and that no payments have been made on the account in over one year. The complaint also alleges that Wendy Harris is jointly and severally liable for the account as she is the responsible party with power of Janet Feldman's funds and has mishandled and misappropriated and failed to pay Feldman's outstanding net available income as required under the Admission Agreement. The defendants failed to answer the complaint.

On March 12, 2013 plaintiff's counsel informed the defendants that there was still an outstanding balance on the account and that plaintiffs would move for a default judgment unless they served an answer to the complaint by March 27, 2013. Defendants failed to respond and the plaintiff moved for a default judgment in July 2013 seeking a money judgment in the amount of $25,100.90. The defendants did not oppose the motion. By decision and order dated August 7, 2013 this Court granted the motion for a default judgment without opposition and set the matter down for an inquest on damages to be held on September 25, 2013.

By order to show cause dated September 19, 2013, defendant Wendy Harris, pro se, moves for an order pursuant to CPLR 5015(a)(1) vacating the default judgment and for leave to serve a late answer on the ground of excusable default. In her affidavit in support of the motion, Ms. Harris states that upon receiving the summons and complaint she contacted the plaintiff directly and spoke with the administrators at the nursing home. She requested forbearance as she had recently suffered a financial setback. She states that the nursing home agreed to suspend legal

action, a default judgment was not immediately pursued, and they entered into settlement negotiations. However the parties were not able to reach an agreement. Ms. Harris states that the she never received the motion for a default judgment in the mail. She also states that the amount sought by the plaintiff is excessive based upon certain accounting anomalies.

In opposition to the motion, the plaintiffs contend that the motion should be denied as the defendant has failed to submit a reasonable excuse for failing to answer the summons and complaint and has failed to offer a meritorious defense. In addition, plaintiff contends that the defendant has failed to submit a proposed answer with the moving papers. Counsel states that although a default judgment was not sought while negotiations were pursued, when a settlement was not reached the defendant was given until March 27, 2013 to submit an answer before a motion for a default judgment was filed but failed to do so. Counsel states that at no time did the plaintiff advise that it was forbearing litigation and at no time did the plaintiff waive its right to pursue litigation. Counsel asserts that the defendant has not offered a meritorious defense and that as Harris had access to her mother's accounts, including her social security, she has the ability to make the payments from her mother's resources as required by her agreement.

Plaintiff also submits an affidavit from Louis Rosenfeld, an administrator at the Dr. William O. Benenson Rehabilitation Pavilion and Flushing Manor Geriatric Center, Inc. In which he states that pursuant to the agreement signed by Wendy Harris, Ms. Harris was a responsible party who was responsible for helping her mother Janet Feldman fulfill her financial obligation to compensate the nursing home for goods and services received. Once her mother was approved for Medicaid. Ms. Harris was responsible for arranging that her mother's pension and social security be turned over directly to the plaintiff. As of June 2007, Ms. Harris was required to turn over to the nursing home, her mother's pension of $180.00 per month and her mother's social security of $1,073.48 per month. Under the agreement Ms. Harris was obligated to ensure that those payments were directed to the plaintiff. Although Mr. Rosenfeld states that the defendant has made lump sum payments on the account and directed her mother's social security payments to the plaintiff, the defendant did not pay her mothers pension amount of $180 per month until June 2012, and was still in arrears in the amount of $25,100.90 as of December 2012.

In reply, the defendant states that although she has made payments to the nursing home, she does not agree to the correctness of the amount claimed by the plaintiff to be due.

Upon review of the papers submitted herein, this court finds that the defendant's motion to vacate the default judgment and to serve a late answer is denied.

Pursuant to CPLR 3012(d): "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

The Courts have held that as a general rule, a defendant seeking to vacate a default judgment entered upon his failure to answer or appear, must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (see CPLR 5015[a][1]; 3012 [d]; U.S. Bank Nat. Assn. v Slavinski, 78 AD3d 1167 [2d Dept. 2010]; also see Maspeth Federal Savings and Loan Association v McGown, 77 AD3d 890 [2d Dept. 2010]; Taddeo-Amendola v 970 Assets, LLC, 72 AD3d 677 [2d Dept. 2010]; Perfect Care, Inc. v Ultracare Supplies, Inc., 71 AD3d 752 [2d Dept. 2010]; Zarzuela v Castanos, 71 AD3d 880 [2d Dept. 2010]; Baldwin v Mateogarcia, 57 AD3d 594 [2d Dept. 2008]; Bank of N.Y. v Sequi, 42 AD3d 555 [2d Dept. 2007]; Bekker v Fleischman, 35 AD3d 334 [2d Dept 2006]).

Here, the defendant has not denied that she was served with the summons and complaint. In fact she states that upon receiving same she began negotiations with the plaintiff with a view to settling the account. Although plaintiffs' counsel concedes that the plaintiff did not pursue a default judgment while negotiations were ongoing, once a settlement was not reached the defendant was granted leave by the plaintiffs to serve a late answer. However, the defendant failed to do so and failed to offer any excuse for failing to serve an answer.

Moreover, although the defendant claims not to have received the motion for a default judgment, a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action in moving to extend the time to answer or to compel the acceptance of an untimely answer" Moriano v Provident N.Y. Bancorp, 71 AD3d 747 [2d Dept. 2010]; Baldwin v Mateogarcia, 57 AD3d 594 [2d Dept. 2008]; CPLR 5015[a][1]). Here, the defaulting defendant failed to provide a reasonable excuse for the default failed to submit a proposed answer and failed to demonstrate that she has a meritorious defense to the action.

Accordingly, the defendant's motion for an order pursuant to CPLR 50015(a)(1) to vacate the default judgment as to liability and pursuant to CPLR 3012(d) for an order extending the time to answer is denied.

This matter shall remain on the Trial Scheduling Part for an inquest on damages for February 10, 2014. The defendant may participate at the inquest, should she be so advised, at which time a determination as to the proper amount of arrears shall be determined by the Court (see Rokina Opt. Co. v Camera King, 63 NY2d 728[1984]; Rawlings v Gillert, 104 AD3d 929 [2d Dept. 2013]; Otto v Otto, 150 AD2d 57 [2d Dept. 1989]; Napolitano v Branks, 128 AD2d 686 [2d Dept. 1987][where entry of a default judgment against a defendant is made after an application to the court, the defendant is entitled to a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages]).

Dated: Long Island City, N.Y.
January 9, 2012

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ROBERT J. McDONALD
J.S.C.