

**Aquatic Pool & Spa Servs., Inc. v WN Weaver St.,  
LLC**

2012 NY Slip Op 33810(U)

September 25, 2012

Supreme Court, Westchester County

Docket Number: 59075/12

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

FILED & ENTERED

9/25/12

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH Supreme Court Justice

-----X AQUATIC POOL & SPA SERVICES, INC.,

Plaintiff,

MOTION DATE: 9/14/12 INDEX NO.: 59075/12

-against-

WN WEAVER STREET, LLC,

Defendant.

-----X

The following papers numbered 1 to 5 were read on this motion by defendant for an Order pursuant to CPLR 3211, subdivision (a), paragraph 2, dismissing this action for lack of subject matter jurisdiction, etc.

Papers Numbered

Notice of Motion - Affirmation (Furman) - Exh. .... 1-3
Answering Affirmation (Corrigan) ..... 4
Replying Affirmation (Furman) ..... 5

Upon the foregoing papers, it is Ordered that defendant's motion for an Order dismissing this action pursuant to CPLR 3211, subdivision (a), paragraph 2, based upon an asserted lack of subject matter jurisdiction based solely upon the fact that the

amount in controversy is less than \$25,000 is denied. Supreme Court is a Court of original general jurisdiction in both law and equity, N.Y. State Const., Article 6, §7, and thus it necessarily has jurisdiction over this action.

To the extent that defendant alternatively seeks an Order pursuant to CPLR 325, subdivision (d), transferring this action to County Court, such relief is denied. Firstly, as defense counsel herself concedes, she mistakenly had argued in her moving papers that this action be transferred to New Rochelle City Court, which relief plaintiff had opposed based upon City Court's jurisdictional limitation being \$15,000.00 and removal would prejudice plaintiff which seeks damages of \$24,457.00, plus attorney's fees. Because this correction appears in a foot note in defense counsel's replying affirmation, plaintiff's counsel has not been afforded the opportunity to address the issue of whether a transfer to County Court is appropriate.

In any event, transfer to County Court is not appropriate in this action since County Court, in Westchester County, is not used for civil matters but rather exclusively for criminal proceedings and related matters.<sup>1</sup>

Finally, the Court addresses defendant's motion seeking an

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<sup>1</sup>Pursuant to administrative edict, for the past several years, County Court has also been assigned non-hybrid Article 78 proceedings.

Order extending its time to answer the complaint pursuant to CPLR 3211, subdivision (f)<sup>2</sup>. It appears that defendant is of the position that it timely had filed and served the instant motion prior to the time for its appearing and/or answering having expired, whereas plaintiff contends that defendant presently is in default of pleading, it having noted that defendant had been served and service had been completed, on June 29, 2012. Notably absent from any party's submission at bar however is a copy of the affidavit of service establishing the date that service upon defendant had been effected. Nevertheless, given that plaintiff has not corrected the record regarding plaintiff's asserted service date, it necessarily appears that, at the time that defendant had filed and served the instant motion pursuant to CPLR 3211, on August 16, 2012, defendant's time to appear or answer already had lapsed and defendant was in default.

Given that defendant offers herein no reasonable excuse for its delay in timely appearing, moving for relief, or answering the complaint, and it proffers no meritorious defense nor any copy of a verified proposed answer, this Court necessarily finds on this record that it would be an improvident exercise of discretion to grant defendant's request for relief pursuant to CPLR 3211,

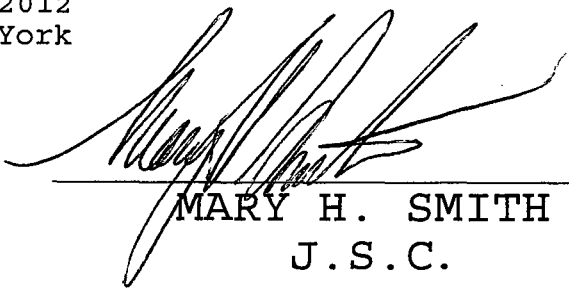
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<sup>2</sup>At different times in defendant's various papers it improperly references subdivision (d) of CPLR 3211 as the basis for the requested relief.

subdivision (f). Accordingly, said relief is denied without prejudice to defendant's right to move upon proper papers for an Order compelling plaintiff's acceptance of defendant's late answer. See Ryan v. Breezy Point Cooperative, Inc., 76 A.D.3d 523, 524 (2<sup>nd</sup> Dept. 2010).

The parties shall appear in the Preliminary Conference Part, at 9:30 a.m., on October 22, 2012.

Dated: September 25, 2012  
White Plains, New York

  
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MARY H. SMITH  
J.S.C.

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Preliminary Conference Part, Janet Jackson