

Genesis Merchant Partners, LP v Gee

2013 NY Slip Op 32328(U)

September 17, 2013

Sup Ct, New York County

Docket Number: 651852/2013

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

GENESIS MERCHANT PARTNERS, L.P.

INDEX NO. 651852/13

- v -

JAMES D. GRIE, JR.

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 17, 2013

HON. JOAN A. MADDEN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
GENESIS MERCHANT PARTNERS, L.P., Index No. 651852/2013

Plaintiff,

-against-

JAMES D. GEE, JR.,
 Defendant.

-----X
JOAN A. MADDEN, J.

Defendant James D. Gee, Jr. moves, by order to show cause, for an order vacate his default and dismissing this action, and for costs.

As set forth below, the motion to vacate the default is granted as plaintiff concedes that it failed to comply with the time requirements of CPLR 3213. Specifically, plaintiff filed the summons, notice of motion for summary judgment in lieu of complaint and supporting papers on or about May 22, 2013. CPLR 3213 provides that the summons served with papers seeking summary judgment in lieu of complaint “shall require the defendants to submit answering papers within the time provided in the notice of motion.” CPLR 3213 further provides that “[t]he minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making a notice of appearance, depending on the method of service.” CPLR 320(a) requires an answer to be served within 30 days of completion of service. Here, service was made on defendant per CPLR 308(2) which provides that service is complete 10 days after the filing of proof of service.

According to the affidavits of service substituted service was made on defendant’s place of business in Tennessee on June 7, 2013, and the affidavit of service was filed with the court on June 17, 2013. Thus, service was complete on June 27, 2013, which is 10 days from

the filing of proof of service.

Under CPLR 3213, the minimum time for noticing summary judgment in lieu of complaint was 30 days from June 27, 2013. Since the motion was noticed to be heard on June 17, 2013, plaintiff failed to comply with the time requirements under CPLR 3213.

Defendant argues that the short service of a motion for summary judgment in lieu of complaint constitutes a jurisdictional defect and requires dismissal of the action. In support of his position, defendant point to Goldstein v. Saltzman, 13 Misc.3d 1023 (Sup Ct Nassau Co. 2006, Austin J.). On the other hand, plaintiff argues that short service is not jurisdictional and the remedy is to provide defendant with an opportunity to respond to the motion.

Trial courts have disagreed as to whether this defect is jurisdictional. While there is no appellate authority specifically on point, the First Department has held that a motion for summary judgment in lieu of complaint must be denied “for failure to provide sufficient time on the notice of motion for defendants to respond.” National Bank of Canada v. Skydell, 181 AD2d 645 (1st Dept 1992). Moreover, in Ross Bicycles v. Citibank, 149 AD2d 330 (1st Dept 1989), a case cited in Skydell, where a default judgment had been entered five days before the statutory minimum time had elapsed, the court held that the default judgment should be vacated and the defendant be given an opportunity to appear and contest the motion for summary judgment in lieu of complaint.

Here, defendant does not challenge the manner in which the service of the summons with notice of motion and supporting papers was made and does not deny receiving them. Defendant’s only challenge is the date the notice of motion was noticed to be heard.

Under these circumstances, I conclude that plaintiff’s failure to comply with CPLR 3213

time requirements for defendant's response to the motion is not jurisdictional but rather "circumscribes the defendant's available response time." Plaza 400 Owners Corp. v. Resnicoff, 168 Misc2d 837 (NY Civ. Ct. 1996, J. Stallman); Imbriano v. Seaman, 189 Misc2d 357 (Dist. Ct. Nassau Co. 2001, Gartner, J.).

Finally, defendant's motion to dismiss and for sanctions is denied.

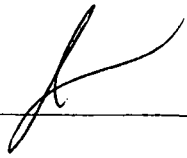
In view of the above it is

ORDERED that defendant's motion to vacate its default in answering is granted, and defendant shall e-file papers in response to the motion for summary judgment in lieu of complaint and provide working copies of papers to Part 11, room 351, 60 Centre Street, New York, NY on or before on or before October 21, 2013; and it is further

ORDERED that plaintiff shall e-file any reply and provide working copies to Part 11, room 351, 60 Centre Street, New York, NY, on or before October 30, 2013; and it is further

ORDERED that oral argument of the motion for summary judgment in lieu of complaint (motion seq. 001) shall be held in Part 11, room 351, 60 Centre Street, New York, NY, on November 7, 2013, at 9:30 am.

DATED: September 17, 2013



J.S.C.

HON. JOAN A. MADDEN
J.S.C.