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SHORT FORM ORDER

INDEX No. 09-45759

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/7/13
ADJ. DATES 7/19/13
Mot. Seq. # 003 - MD
Mot. Seq. # 004 - XMG;
Case Disp: NO
P.C. Scheduled: 11/12/13

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In the Matter of the Application of ALLAN GRECCO,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules compelling a determination to provide a legal defense,

-against-

ROBERT J. CIMINO, former County Attorney of the County of Suffolk, CHRISTINE MALAFI, as County Attorney of the County of Suffolk and the COUNTY OF SUFFOLK,

Respondents.

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BRACKEN, MARGOLIN, & BESUNDER, P.C., Atty. for Petitioner
1601 Veterans Hwy.
Islandia, NY 11749

DENNIS BROWN, ESQ.
Suffolk County Atty.
By: John Petrowski, Esq.
Atty. for Respondents.
P.O. Box 6100
Hauppauge, NY 11788

Upon the following papers numbered 1 to 18 read on this motion by the plaintiff/petitioner for a default judgment and inquest and cross motion by the defendants/respondents for leave to serve answer; Notice of Petition and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers 4-6 ; Answering Affidavits and supporting papers 7-9; 10-11 ; Replying papers 12-13; 14-15 ; Other: 16-17 (memorandum); 18 (administrative return - 3 vols). ; and after hearing counsel in support of and in opposition to the motion) it is,

ORDERED that the motion (#003) by the plaintiff/petitioner for an order fixing the respondents' default in answering and an order directing judgment in his favor, together with an order setting this matter down for a hearing to determine amounts due the petitioner, is considered under CPLR 7804, 3001 and 3215 and is denied; an it is further

ORDERED that the cross motion (#004) of the defendants/respondents for an order compelling the plaintiff/petitioner to accept service of their answer is considered under CPLR 3211(f), 3215, 3012(d) and 7804(e) and is granted; and it is further

ORDERED that a preliminary conference with respect to the petitioner's plenary causes of action for declaratory relief shall be held on Tuesday, **November 12, 2013**, at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex Building of the courthouse at One Court Street. Riverhead, New York 11901.

The plaintiff/petitioner (hereinafter "petitioner") commenced this hybrid action for a judgment reversing and annulling determinations of the respondent County Attorneys to deny the petitioner a defense and indemnity in two lawsuits and other proceedings and a judgment declaring that the defendants/respondents (hereinafter the "County" or "County respondents") were required to provide such defense and are now liable to reimburse the petitioner for all legal fees, costs and disbursements incurred by him. At issue in those external actions and proceedings was the propriety of the actions of the petitioner in negotiating the County's purchase of the Chandler Estate during his tenure as Director and Director of the Suffolk County Division of Real Estate from 1997-2001.

In 2002, the petitioner filed a hybrid action like the instant one against the County and respondent Cimino, who was then the Suffolk County Attorney, after Cimino declined the petitioner's request that the County provide him with a defense to a "Tweed" action that had been commenced by the Attorney General in an action entitled ***State of New York v Grecco, et al.*** The petitioner also claimed that the County owed him a defense and reimbursement for legal services incurred in a prior, taxpayer action commenced against him, the County and others entitled ***Glass v Grecco, et al.*** The petitioner's demands for relief in the 2002 hybrid action were granted by the trial court in an order and decision dated July 22, 2002 (Lifson, J). However, the Appellate Division, Second Department reversed the trial court's determination in a decision dated December 6, 2004 (*see* ***Grecco v Cimino***, 13 AD3d 371, 786 NYS2d 204 [2d Dept 2004], hereinafter *"Grecco I"*). The Appellate Division nevertheless qualified its decision as follows: "However, our determination is without prejudice to Grecco seeking reimbursement for counsel fees and costs incurred in the actions entitled *Glass v Grecco* (Suffolk County Index No. 01-30336 and *State of New York v Grecco* (Suffolk County Index No. 02-09384 and in the proceedings and investigations (*see Matter of Salino v Cimino*, *supra* at 172, n.5, 770 NYS2d 702, 802 N.E. 1100), in the event that it is ultimately determined that Grecco's conduct concerning the purchase of the Chandler Estate was within the scope of his duties and public employment".

The taxpayer action entitled ***Glass v Grecco*** (Index No. 01-30336) was disposed by order dated May 6 , 2003 (Lifson, J.). The order referred to a stipulation of all parties in which "it was agreed that the action should be withdrawn". The State's claims against Grecco, in the action entitled ***State of New York v Grecco*** were resolved by a written "Stipulation of Settlement" dated June 17, 2009, executed by the plaintiff's counsel and Grecco which terminated the action with prejudice. In paragraph numbered 3, the parties stipulated as follows: "This stipulation does not constitute a finding that he [Grecco] acted outside the scope of his authority nor finding that he acted within the scope of his authority".

On June 18, 2009, the County Attorney's office advised Grecco's counsel by e-mail that the County was not responsible for reimbursement of Grecco's counsel fees, costs and disbursements. Immediately following receipt of that e-mail, Grecco's counsel wrote, by letter dated June 19, 2009, to respondent Malafi, the Suffolk County Attorney. Therein, he detailed Greeco's position with respect to his claim for reimbursement of attorney's fees. Counsel asked Malafi to "consider our request for reimbursement as expeditiously as possible and let me know your position so that I might advise Allan of our next step." On August 20, 2009, Malafi advised petitioner's counsel, among other things, that "my position that Allan Grecco is not entitled to recover such costs and fees has not changed." It concluded with the following: "For all of these reasons, the County shall continue to abide by the decision of my predecessor [Cimino] and will not pay any of Mr. Grecco's litigation costs in these matters."

The petitioner then commenced this hybrid Article 78 proceeding and declaratory judgment action by filing on December 14, 2009. The petitioner demands reversal of respondent Cimino's July 22, 2002 denial of Grecco's request for indemnification and reimbursement of defense costs that and reversal of the August 20, 2009 confirmatory determination of respondent Malafi together with an order awarding such costs to him and those incurred in this hybrid proceeding. In lieu of answering, the respondents/defendants (hereinafter respondents) moved to dismiss the petition/complaint (#002) pursuant to CPLR 3211(a) and 7803, upon the grounds that the claims therein were legally insufficient and/or are barred by applicable statutes of limitations or principles of res judicata and/or collateral estoppel.

By order dated July, 9, 2010, this court granted the County's motion to dismiss upon a finding that none of the petitioner's claims were cognizable due to the unfulfillment of the condition imposed upon the reassertion of his claims set forth in the December 6, 2006 decision of the Appellate Division in *Greeco I*. The petitioner's claims for a reversal of the August 20, 2009 determination of County Attorney Malafi and those of her predecessor pursuant to CPLR 7803 and his claims for declaratory relief and a money judgment were thus dismissed pursuant to CPLR 3211(a)(7). A judgment dismissing the petition was subsequently signed by this court and entered on September 13, 2010.

An appeal from that judgment and the July 9, 2010 order dismissing the petition/complaint was filed by Grecco. By decision and order dated November 21, 2012, the Appellate Division, Second Department reversed (*see Grecco v Cimino*, 100 AD3d 892, 957 NYS2d 115 [2d Dept 2012] hereinafter "*Grecco II*"). Therein, the Appellate Division found that neither the statute of limitations nor the condition imposed in *Grecco I* upon Grecco's reassertion of his indemnity and reimbursement claims precluded Grecco's prosecution of such claims in this hybrid proceeding. The August 2009 correspondence by County Attorney Malafi was found to be a sufficiently final determination of Grecco's request for indemnity and reimbursement for statute of limitations purposes (*see Grecco II*, 100 AD3d 892, 895). It was further found to have satisfied the condition imposed in *Grecco I* upon reassertion of such claims because "Malafi, in her capacity as County Attorney, determined that Grecco was not an employee acting within the scope of his employment when the alleged wrongdoing occurred, and that he is, thus, not entitled to be indemnified or reimbursed for the attorney's fees and legal expenses he sought" (*id.*, at 897). The Court expressly noted that such determination was based upon Malafi's knowledge of events occurring well after the issuance of the first denial by respondent Cimino

in 2002 and the affirmance thereof in *Grecco I* (*see id.*). The Appellate Division ordered that the "petition/complaint be reinstated, the order modified accordingly and the matter remitted to the Supreme Court, Suffolk County for the service and filing of an answer and the administrative record, and for further proceedings on the petition/complaint" (*see id.*, at 892).

The petitioner served the County with a copy of the November 21, 2013 decision and order of the Appellate Division, with notice of its entry in the office of the Clerk of that court, on the very same day it was handed down (*see* Exhibit 7 attached to the moving papers). The petitioner alleges that the County failed to serve its answer within the time required for such service under CPLR 3211(f). That rule provides that "[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to a cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." According to the petitioner, CPLR 3211(f) controls service of the County's answer and that such service was due on or before December 6, 2012. Since, however, the County did not serve its answer until May 1, 2013, the date on which the instant motion for dismissal was interposed, the County respondents are alleged to be in default. The petitioner thus claims an entitlement to an order fixing such default, a reversal of all decisions denying of reimbursement together with a declaration of the County's liability and an inquest or hearing on the amount of the petitioner's reimbursement.

The County opposes the petitioner's motion and cross moves (#004) for leave to compel acceptance of its answer pursuant to CPLR 3012(d). In support thereof, the County claims that any technical default in answering is excusable and that it has various meritorious defenses to the claims for indemnity and reimbursement that underlie the petitioner's demands for relief. For the reasons stated below, the motion-in-chief is denied while the cross motion by the County respondents is granted.

To be entitled to the entry of a default judgment, the movant must establish proof of service of the summons and complaint, proof of facts constituting cognizable claims and proof of the defendant's default in answering or appearing (*see* CPLR 3215[f]; ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 70–71, 760 NYS2d 727 [2003]; ***C & H Import & Export, Inc. v MNA Global, Inc***., 79 AD3d 784, 912 NYS2d 428 [2d Dept 2010]). The failure to establish a default in answering or appearing due to improper service of process or otherwise warrants a denial of a motion to fix a default under CPLR 3215(f) (*see* ***Zareef v Lin Wong***, 61 AD3d 749, 877 NYS2d 182 [2d Dept 2009]; ***George v Yoma Dev. Group, Inc.***, 83 AD3d 776, 920 NYS2d 696 [2d Dept 2011]; ***Goonan v New York City Tr. Auth.***, 74 AD3d 747, 902 NYS2d 159 [2d Dept 2010]; *see* ***Friedman v Ostreicher***, 22 AD3d 798, 803 NYS2d 703 [2d Dept 2005]; ***Levi v Oberlander***, 144 AD2d 546, 535 NYS2d 958 [2d Dept 1988]).

Here, the petitioner failed to demonstrate a default in answering occurred on the part of the County respondents when they failed to serve an answer on or before December 6, 2012 in response to the petitioner's immediate service of a copy of the November 21, 2012 decision and order of the Appellate Division. The petitioner's reliance on the provisions of CPLR 3211(f) as the measure of the respondent's time to answer is misplaced since the November 21, 2012 decision and order of the Appellate Division does not constitute "the order" within the contemplation of Rule 3211(f). Rather, such order constitutes an order pursuant to CPLR 5712(c), as it reversed, on the law, this court's prior judgment dismissing the petition and it modified the order granting the plaintiff's motion to dismiss and

remitted the matter to this court for further proceedings. As such, it appears to be beyond the purview of the order referred to in CPLR 3211(f).

Even if the November 21, 2012 appellate court decision and order is within the contemplation of CPLR 3211(f), its entry and the remittitur directed therein are expressly governed by the provisions of CPLR 5524. Subdivision (a) of that statute provides that an order of an appeals court "shall be entered in the office of the clerk of that court". Under rules applicable in the Second Department, orders and judgments are drafted by that court and are deemed entered on the date upon which they were issued" (*see* 22 NYCRR 670.21). Where, as here, an order directs a remittitur, CPLR 5524(b) mandates that a copy of such order, and the record on appeal, "shall be remitted to the clerk of the court of original instance". It further provides that "*the entry of such copy shall be authority for any further proceedings*" [CPLR 5524(b); emphasis added]). Any proceedings undertaken in the court of first instance prior to entry of a copy of the appellate court's order with the clerk of the court of original instance are nullities since the appellate court retains jurisdiction until entry of its order is made in accordance with CPLR 5524(b) (*see* ***Fry v Village of Tarrytown***, 176 Misc2d 275, 671 NYS2d 633 [Sup. Ct, Westchester Ct. 1998]).

A review of the record here reveals that the November 21, 2012 Appellate Division decision and order and the record on appeal were not entered in the office of the Clerk of this court until December 10, 2012. Until such time, jurisdiction over the matters embraced by such decision and order remained in the Appellate Division, Second Department. Accordingly, the petitioner's same day service upon the County of the November 21, 2012 decision and order of the Appellate Division, with notice of its entry with the Clerk of that court (*see* Exhibit 7 attached to moving papers), did not start the running of the time within which the County's answer was due under CPLR 3211(f) or any other statute. The record is devoid of any evidence that notice of such entry in the office of the Clerk of this court was ever served upon the County respondents. Consequently, "authority for the further proceedings" embraced by the remittitur set forth in the November 21, 2012 decision and order of the Appellate Division never vested in this court (*see* CLR 5524(b)). Under these circumstance, this court finds that the petitioner is not entitled to a default judgment on the grounds advanced or any others as he failed to demonstrate that the County defendants defaulted in timely serving their answer. A denial of the petitioner's motion to fix the default and the granting of the County's cross motion to compel acceptance of its answer is thus warranted (*see* ***Friedman v Ostreicher***, 22 AD3d 798, *supra*).

In any event, the court finds that the County respondents, even if considered to have defaulted, are entitled to an order excusing any such default and compelling the petitioner to accept service of their answering papers. Such relief is warranted by the lack of prejudice to the petitioner and the public policy which favors the adjudication of claims on their merits rather than by default (*see* ***Arias v First Presbyterian Church in Jamaica***, 97 AD3d 712, 948 NYS2d 665 [2d Dept 2012]). It is further warranted by the unique factual circumstances of this case. Among them are the County's timely appearance by the interposition of its pre-answer motion to dismiss and its vigorous, albeit, unsuccessful defense of the order granting such motion during the appeal process which culminated in the November 21, 2012 decision and order of the Appellate Division. They also include the conduct of the petitioner's counsel following the issuance of the November 21, 2012 Appellate Division order, including his several

invitations to resolve this matter, by settlement, without any notification that a default in answering had allegedly occurred (*see* Exhibit F& G attached to the County's opposing affirmation). Indeed, counsel engaged this court in this regard by his March 1, 2013 letter advising of the Appellate Division's decision and its remittitur of the matter "*for further proceedings on the merits* of the petition/complaint" and his request for a conference "in order that the parties *be permitted to proceed* toward a judicial determination of the matter" (*see* Letter dated March 1, 2013 [emphasis added] by petitioner's counsel attached as Exhibit H to the County's cross moving papers). These circumstances interdict any notion that a default in answering had occurred as they unequivocally reflect that the parties were engaged in a post-remittitur focus upon a settlement of the matters at issue until March of 2013 when the petitioner sought the court's participation and/or its permission to proceed with the litigation.

Moreover, the governance of this hybrid Article 78 proceeding/declaratory judgment action by the provisions of CPLR 7804(e), at least in part, also warrant the granting of relief from any default to the County respondents. Pursuant to CPLR 7804(e), this Court is authorized to relieve a body or officer from a default by directing the service of an answer even in the absence of a motion therefor and without any showing of the usual elements attendant with the granting of such relief. The Article 78 proceeding aspects of this hybrid proceeding, which predominate the others,[1] are no doubt within the ambit of this statute and thus within the court's authority to eradicate any default in answering by the respondents. These circumstances further add to the distinctions between this case and most others in which relief from a purported default in answering is sought. They thus provide a further predicate for the granting of relief from any default on the part of the County respondents.

In addition, the court finds that the County respondents have demonstrated an entitlement to an order extending their time to serve their answer and administrative return pursuant to CPLR 3012(d). A party moving for relief under that statute is required to demonstrate a reasonable excuse for their default and the existence of a potentially meritorious defense (*see* CPLR 5015[a][1]; ***Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.***, 67 NY2d 138, 141, 501 NYS2d 8 [1986]; ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 941 NYS2d 679 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Noterile***, 88 AD3d 654, 930 NYS2d 260 [2d Dept. 2011]; ***C & H Import & Export, Inc. v MNA Global, Inc.***, 79 AD3d 784, *supra*). The determination of that which constitutes a reasonable excuse lies within the discretion of the Supreme Court (*see* ***Morales v Perfect Dental, P.C.,*** 73 AD3d 877, 899 NYS2d 883 [2d Dept. 2010]; ***Star Indus. Inc. v Innovative Beverages, Inc.***, 55 AD3d 903, 904, 866 NYS2d 357 [2d Dept 2008]). Whether a proffered excuse is "reasonable" is a "sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the

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[1] Although the petitioner denominated his pleading as a complaint/petition, styled the parties as plaintiffs/petitioners and demanded relief under CPLR 3001, the initiatory process employed by the petitioner was a notice of petition without a summons and he advanced, on prior motion practice, demands for a summary determination of all of his claims for relief, as if they were all advanced under CPLR Article 78. It thus appears that the plenary, procedural aspects of this proceeding have been considered secondary to the summary procedural aspects of an Article 78 proceeding .

merits" (***Fried v Jacob Holding, Inc.***, ___ AD3d ____, 970 NYS2d 260 [2d Dept 2013]; *quoting* ***Harcztark v Drive Variety, Inc.***, 21 AD3d 876, 876–877, 800 NYS2d 613 [2d Dept 2005]).

The County respondents met the forgoing standard by demonstrating a reasonable excuse for the delay in answering due to the circumstances outlined above and the conduct of the parties thereunder. Moreover, they demonstrated their possession of challenges to the merits of the petitioner's claims for relief under CPLR Article 78 and 3001. These merit based challenges are potentially meritorious and thus provide "defenses" to the petitioner's demands for relief within the contemplation of the above cited case authorities. While the statute of limitations defense asserted in the answer of the County respondents appears to be lacking in merit because it was raised and rejected by the Appellate Division in *Grecco II*, other defenses such as the County's merit based defenses have not been similarly determined. The issue of which side will prevail on the merits remains for another day, as such issue is not before the court on these motions.

In view of the foregoing, the petitioner's motion for entry of default judgment is denied while the cross motion by the County respondents is granted. The County's answer and answering papers to the petition/complaint and the administrative return attached to the moving papers shall be deemed served fifteen (15) days following the date of this order. Due to the intertwinement of the summary and plenary demands for relief, the court temporarily stays, pending further order, the petitioner's service of a notice of the type contemplated by CPLR 7804(f), advising of a "re-noticing" the Article 78 portions of this hybrid pleading.

A preliminary conference with respect to the petitioner's plenary causes of action for declaratory judgment shall be held on Tuesday **November 12, 2013** at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex Building of the courthouse at One Court Street. Riverhead, New York 11901. Counsel are directed to appear ready for the conference as to these matters and all others relevant to the other aspects of this hybrid proceeding.

DATED: 9/27/13

THOMAS F. WHELAN, J.S.C.