Moreno v MSMC Residential Realty LLC
2014 NY Slip Op 31160(U)
April 28, 2014
Sup Ct, New York County
Docket Number: 158886/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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WILLIAM MORENO, JR., INDEX NO. 158886/12

Plaintiff,

-against-

MSMC RESIDENTIAL REALTY LLC and ROSE ASSOCIATES, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, plaintiff moves for a default judgment against defendant Rose Associates, Inc. ("Rose"), the property manager for the premises known at 72 East 97th Street, New York, New York. Plaintiff alleges he was injured on March 4, 2012, when he was "traversing a staircase into the basement" at the premises, and as he "was going down the stairs broke," and he was "caused to fall" and "be violently precipitated to the ground." Defendant Rose is now appearing by counsel in opposition to the motion, and on August 5, 2013, filed an answer. Plaintiff previously discontinued the action as against co-defendant MSMC Residential Realty, LLC ("MSMC"), the owner of the premises.

Defendant Rose submits an affidavit from its general manager, Jay Schofield, admitting that pursuant to a contract with the owner of the premises, defendant Rose was in charge of "directing all employees working at the subject premises in the performance of their duties," and that plaintiff, as the superintendent, was one of those employees. Schofield states that at the time of plaintiff's alleged injury, plaintiff "was acting withing the scope of his employment as superintendent." As a potentially meritorious defense, Schofield asserts that "at no point did

anyone employed by MSMC, including plaintiff, give Rose Associates notice of the allege unsafe conditions." As its excuse for not answering, defendant Rose submits an affidavit from its chief financial officer, John Gacinski, explaining that he is "responsible for receiving lawsuits filed against Rose," and that "employees of Rose are to forward to my office all summons and complaints filed against Rose Associates that they receive." He states he "did not receive notice of this action until sometime in February 2013, when Rose Associates received plaintiff's first motion for a default judgment" and that he "has searched through Rose Associates' files and not found any record that Rose Associates received notice of this action prior to February 2013." Gacinski further states that "Rose Associates subsequently misplaced the plaintiff's motion," and that he "did not receive notice that this action remained pending until late July 2013, when Rose received plaintiff's amended motion for a default judgment. Rose Associates subsequently forwarded plaintiff's motion to its attorneys."

As a general rule, a defendant opposing a motion for a default judgment must demonstrate a reasonable excuse for not answering and a meritorious defense to the action. See Zwicker v. Emigrant Mortgage Co, Inc, 91 AD3d 443 (1st Dept 2012); Morrison Cohen LLP v. Fink, 81 AD3d 467 (1st Dept 2011); Singh v. Gladys Towncars, Inc, 42 AD3d 313 (1st Dept 2007); ICBC Broadcast Holdings-NY, Inc v. Prime Time Advertising, Inc, 26 AD3d 239 (1st Dept 2006). Public policy, however, favors the resolution of cases on the merits, and courts have broad discretion to grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful and the opposing party is not prejudiced. See Pagan v. Four Thirty Realty LLC, 50 AD3d 265 (1st Dept 2008); Heskel's West 38th Street Corp v. Gotham Construction Co, LLC, 14 AD3d 306 (1st Dept 2005).

In determining a request for leave to serve a late answer pursuant to CPLR 3012(d), the court considers a number of factors including the length of defendant's delay, the excuse offered for the delay, the absence or presence of willfulness, the possibility of prejudice to plaintiff, the potential merits of the defenses, and the public policy favoring the resolution of disputes on their merits. See Cirillo v. Macy's, Inc, 61 AD3d 538 (1st Dept 2009); Jones v. 414 Equities LLC, 57 AD3d 65 (1st Dept 2008); Pagan v. Four Thirty Realty LLC, supra. Where as here, no default order or judgment has been entered, a showing of the potentially meritorious nature of the defenses is not an essential component of CPLR 3012(d) relief. See Empire Healthchoice Assurance, Inc. v. Lester, 81 AD3d 570 (1st Dept 2011); Jones v. 414 Equities LLC, supra; DeMarco v. Wyndham International, Inc., 299 AD2d 209 (1st Dept 2002).

Even though defendant Rose has not formally cross-moved for leave to serve a late answer, it is clear that in opposing plaintiff's motion for a default judgment and in filing an untimely answer, defendant is in effect seeking leave to serve a late answer and to compel plaintiff to accept an untimely answer, pursuant to CPLR 3012(d). See Fried v. Jacob Holding, Inc, 110 AD3d 56 (2nd Dept 2013). Under these circumstances, the court, in the exercise of discretion, will consider defendant's application, even in the absence of formal cross-motion. See id; Blake v. United States, 109 AD3d 504 (2nd Dept 2013).

Applying the foregoing standards for determining a request to serve a late answer pursuant to CPLR 3012(d), the court concludes that defendant Rose should be permitted to answer, so this matter can be resolved on the merits. Even if defendant Rose has not provided a compelling excuse, the record neither shows nor suggests that the delay willful, and plaintiff has not demonstrated any prejudice as a result of the delay. Moreover, based on the sworn

statements from its general manager, defendant Rose has demonstrated the existence of a potentially meritorious defense.

Thus, under the circumstances presented, where plaintiff has not been prejudiced by the delay and the delay was not willful, and in view of the public policy favoring the resolution of cases on the merits, the court in its discretion finds that defendant Rose is entitled to serve a late answer, and the answer filed on August 5, 2013 shall be deemed timely served and filed.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment against defendant Rose Associates, Inc., is denied; and it is further

ORDERED that the default by defendant Rose Associates, Inc., in serving a timely answer is vacated, and the answer filed by defendant Rose Associates, Inc., on August 5, 2013, is hereby deemed timely served and filed; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on June 5, 2014 , at 11:00 am, Part 11, Room 351, 60 Centre Street.

DATED: April 28 , 2014

ENTER:

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