

Stapleton v 493 Rest. Inc.

2014 NY Slip Op 32609(U)

October 6, 2014

Sup Ct, New York County

Docket Number: 150344/2014

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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LIAM STAPLETON,

Plaintiff,

- against -

493 REST. INC., d/b/a MERCURY BAR EAST,

Defendant.
-----x

Index Number: 150344/2014

Sequence Numbers: 003, 004

Decision and Order

Arthur F. Engoron, Justice

Motions sequence numbers 003 and 004 are consolidated for disposition and disposed of as follows:

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on defendant's motion to vacate its default (Motion Sequence 003) and defendant's motion to vacate the Note of Issue (Motion Sequence 004):

Papers Numbered:

Moving Papers (003): Order to Show Cause dated June 13, 2014 - Affirmation - Exhibits	1
Affirmation in Opposition - Exhibits	2
Moving Papers (004): Notice of Motion - Affirmations - Exhibits	3
Affirmation in Opposition - Exhibits	4

Brief Background

On January 14, 2014, plaintiff e-filed a summons and complaint alleging negligence and seeking to recover damages he allegedly sustained in a slip and fall accident at defendant's premises on January 5, 2013.

Simultaneously with filing the summons and complaint, plaintiff e-filed an order to show cause, signed by this Court on January 16, 2014, for an order directing defendant to, inter alia, preserve and allow an inspection of the premises. Plaintiff was, for all that appears, properly served with the summons and complaint and the order to show cause on January 17, 2014.

By Order dated February 5, 2014, this Court granted plaintiff's motion to preserve and to inspect the premises. Plaintiff provided a copy of the February 5, 2014 Order to defendant under cover of letters dated February 7, 11 and 19, 2014.

Defendant did not respond to plaintiff's attorney's letters requesting an inspection of the premises and did not in fact allow a timely inspection. Nor did defendant appear in the action or answer the complaint.

By notice of motion dated February 28, 2014, and returnable on March 20, 2014, plaintiff moved, pursuant to CPLR 3215(a), for entry of a default judgment against defendant.

On March 18, 2014, defendant retained its current attorneys and provided them with a copy of the January 16, 2014 order to show cause (Motion Seq. 003, Affirmation in Opposition, Exhibit 1). At that time, defendant's counsel could (and should) have ascertained the status of this matter via the NYSCEF system, which would have revealed the pending motion for a default judgment.

In any event, defendant's counsel admits that on April 2, 2014 she knew about and had possession of plaintiff's default motion papers (Motion Seq. 003, Affirmation in Opposition, Exhibit 1). Nevertheless, defendant failed to oppose the motion and instead, on April 2, 2014, without first obtaining plaintiff's consent to withdraw the motion and accept an answer, served and e-filed an answer to the complaint.

Defendant's counsel admits (Motion Seq. 003, Affirmation in Opposition, Exhibit 1) that as of April 8, 2014 "no agreement to withdraw the motion for default could be reached" with plaintiff's counsel, and that the default motion had not yet been decided by the Court as of that date. By letter dated April 22, 2014, plaintiff's attorney reminded defendant's counsel of the pending default motion (Motion Seq. 003, Affirmation in Opposition, Exhibit 8).

Inexplicably, despite several opportunities to oppose the motion for a default judgment, defendant failed to do so. Instead, on April 23, 2014, defendant e-filed an amended answer, conveniently ignoring, if not flouting, the pending motion for a default. The amended answer asserted, inter alia, the affirmative defense of lack of personal jurisdiction.

By e-mail dated April 28, 2014 (Motion Seq. 003, Affirmation in Opposition, Exhibit 9), this Court, noting that an answer and an amended answer had been filed, requested that the parties contact the Court regarding the pending default motion. By e-mail dated May 5, 2014, on which defendant's attorney was "cc'd," plaintiff's attorney advised the Court that he had spoken to defendant's attorney and asked the Court to decide the motion "on the papers submitted."

By Decision and Order dated May 15, 2014, upon plaintiff's proper showing on his motion for a default judgment, and in the absence of any opposition by defendant, this Court granted the motion and directed that the matter proceed to an inquest on damages.

On June 2, 2014, pursuant to this Court's May 15, 2014 Decision and Order, plaintiff filed a note of issue scheduling an inquest on damages.

On that same day, defendant e-filed a proposed order to show cause to vacate the May 15, 2014

default order and restore the case to the pre-trial calendar (Motion Seq. 003). However, defendant did not present the order to show cause to this Court for signature until June 13, 2014.

Five days later, on June 18, 2014, defendant moved to vacate the note of issue, upon the ground that discovery had not been completed (Motion Seq. 004).

Discussion

A party may not be relieved of its default pursuant to CPLR 5015(a)(1) or otherwise in the absence of showing a reasonable excuse for its default and a meritorious defense. See, Singh-Mehta v Dyrlewski, 107 AD3d 478, 478 (1st Dept 2013) (motion to vacate default properly denied in absence of reasonable excuse and meritorious claim).

Although, as is often said, courts prefer to dispose of cases on their merits, courts also are loathe to tolerate deliberate indifference to obligations that the CPLR sets forth clearly.

Here, this Court considers defendant's failure to oppose plaintiff's motion for a default judgment to be deliberate and, therefore, not excusable. See, Brown v Suggs, 38 AD3d 329, 330 (1st Dept 2007) (deliberate default is not excusable); ADL Cons., LLC v Chandler, 78 AD3d 407, 407 (1st Dept 2010) (defendant's failure to respond to motion was "willful and calculated to cause delay"). On April 2, 2014, defendant knew that plaintiff had moved for a default judgment. Six days later, on April 8, 2014, defendant knew that the motion would not be withdrawn. Under these circumstances, this Court is hard pressed to find any reasonable basis which could excuse defendant's failure to oppose the default motion. To the contrary, in view of plaintiff's expressed intent to proceed with the motion, defendant was obligated to oppose it or suffer the consequence.

Notably, defendant does not argue, nor is there any proof in the record, that it was not given an opportunity to oppose the motion. Rather, by the end of April, defendant had ample opportunity to submit opposition – was in fact invited by the court to do so – yet deliberately chose to ignore the motion. Instead, defendant proceeded ostrich-like, as if its appearance was timely, first filing an answer on April 2, 2014, and then an amended answer on April 23, 2014. Such a course of conduct can only be described as deliberate. See, Brown v Suggs, supra; ADL Construction, LLC v Chandler, supra.

Defendant's argument that this Court lacks personal jurisdiction is belied by the January 17, 2014 Affidavit of Service. Note, too, that defendant failed to move pursuant to CPLR 3211(a)(8) within 60 days of April 23, 2014, the date of service of the amended answer, to dismiss the complaint for lack of personal jurisdiction. See, CPLR 3211(e); Wiebusch v Bethany Mem. Reform Church, 9 AD3d 315, 315 (1st Dept 2004) (motion to dismiss for lack of personal jurisdiction denied because defendant "did not make the motion within 60 days after serving its answer").

In the absence of a reasonable excuse for defendant's default on the motion, the Court need not address the issue of whether defendant demonstrated a meritorious defense. See, Silva v Honeydew Cab Corp., 116 AD3d 691, 692 (2d Dept 2014):

Here, the Supreme Court providently exercised its discretion in refusing to accept the plaintiff's explanation for failing to oppose the defendants' separate motions for summary judgment (see, Strunk v Revenge Cab Corp., 98 AD3d 1029, 1030 [2012]; cf. Simpson v Tommy Hilfiger U.S.A., Inc., 48 AD3d 389, 392 [2008]). Accordingly, we need not address whether the plaintiff demonstrated a potentially meritorious opposition to those motions.

Another ground of today's decision is defendant's manifest failure timely to allow an inspection of the premises, to which plaintiff was clearly entitled.

Accordingly, for the foregoing reasons, defendant's motion to vacate the May 16, 2014 default judgment and restoring this case to the trial calendar, is denied in its entirety. The case shall proceed to an inquest on damages as provided in the Note of Issue filed by plaintiff on June 2, 2014.

Defendant's motion to vacate the instant note of issue (Motion Sequence 004) is hereby denied without prejudice solely as moot.

Conclusion

Motions denied. Case to proceed to inquest.

Dated: October 6, 2014



Arthur F. Engoron, J.S.C.