

Baruch v Nassau County
2014 NY Slip Op 33706(U)
April 21, 2014
Supreme Court, Nassau County
Docket Number: 10006/12
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ZAKAY BARUCH,

Plaintiff,

- against -

NASSAU COUNTY, NASSAU COUNTY PUBLIC WORKS,
VILLAGE OF GREAT NECK, TOWN OF NORTH
HEMPSTEAD and CAMPBELL FOUNDRY COMPANY,

Defendants.

TRIAL/IAS PART 34
NASSAU COUNTY

Index No.: 10006/12
Motion Seq. Nos.: 01, 02
Motion Dates: 01/24/14
01/24/14

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 01), Affirmation and Exhibits</u>	1
<u>Notice of Cross-Motion (Seq. No. 02), Affirmation, Affidavit and Exhibits</u>	2
<u>Affirmation in Opposition to Cross-Motion Seq. No. 02 and in Reply to Motion Seq. No. 01 and Exhibits</u>	3
<u>Reply Affirmation in Support of Cross-Motion Seq. No. 02</u>	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 01), pursuant to CPLR § 3215, for an order granting a default judgment against defendant Village of Great Neck ("Great Neck") on the issue of liability and setting the matter down for an Inquest as to damages.

Defendant Great Neck opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3215(c), for an order dismissing the above captioned action as against it on the grounds that the time for plaintiff to move for a default has expired. Plaintiff opposes the cross-motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on May 21, 2011, when he fell into a manhole located at or near the south side of Vista Hill Road, west of East Shore Road, along the side of the premises known as 241 East Shore Road, Great Neck, County of Nassau, State of New York.

Plaintiff proves jurisdiction by annexing a copy of the Affidavit of Service of the Summons and Verified Complaint upon defendant Great Neck. *See* Plaintiff's Affirmation in Support Exhibit B. The Court notes plaintiff's compliance with additional service of the Summons and Verified Complaint upon defendant Great Neck pursuant to CPLR § 3215(f). *See* Plaintiff's Affirmation in Support Exhibit H.

Plaintiff proves defendant Great Neck's default in the Affirmation of Counsel. Plaintiff proves his claims in the supporting exhibits. *See* CPLR § 3215(f); *Joosten v. Gale*, 129 A.D.2d 531, 514 N.Y.S.2d 729 (1st Dept. 1987).

In opposition to plaintiff's motion (Seq. No. 01) and in support of defendant Great Neck's cross-motion (Seq. No. 02), defendant Great Neck's counsel argues "[o]ur office was retained to represent the VILLAGE on or about December 6, 2013. Upon retention in this matter, I reviewed the contents of the file provided by the VILLAGE. The contents of the file provided by the VILLAGE includes two letters sent from Sacco & Filas (*sic*), LLP, attorneys at law (*sic*) plaintiff's attorneys in this action. The first letter is dated October 31, 2012 to the VILLAGE at 61 Baker Hill Road, Great Neck, New York 11023, advising VILLAGE that it was served with a Summons and Complaint on August 20, 2012. The letter goes on to state that service was completed on August 20, 2012. Copies of the Summons and Complaint were provided along with that letter,.... The Village next received a letter from Sacco & Filas (*sic*), LLP dated October

15, 2013 advising that it was in default in answering the Summons and Complaint served upon it on August 13, 2012, and that service was completed on August 20, 2012, copies of the summons and complaint were attached to that letter.... Since the plaintiff did not then move for a default it was reasonable for the VILLAGE to believe that the action against it was abandoned. The VILLAGE would be prejudiced if the action was not dismissed.” See Defendant Great Neck’s Affirmation in Support/Opposition Exhibits A and B.

Counsel for defendant Great Neck further submits that “[t]he time in which the Plaintiff must file a motion for default pursuant to CPLR §3215 is one year from the date of the default. Based on the date of completion of service of the Summons and Complaint, the VILLAGE’s default in answering the Complaint occurred on September 10 (*sic*), twenty days from the service of the Complaint. The plaintiff failed to move for a default within the statutory time period. When a plaintiff fails to seek leave to enter a default judgment within one year after the default has occurred, the action is deemed abandoned. [citations omitted]. To avoid dismissal of the complaint as abandoned under such circumstances, a plaintiff must offer a reasonable excuse for the delay in moving for a (*sic*) leave to enter a default judgment and must demonstrate that the complaint is meritorious. [citation omitted]. Here, the Plaintiff has offered no reasonable excuse for failing to enter a judgment against the VILLAGE within one year of its default as required by CPLR §3215(c). [citations omitted].” See Defendant Great Neck’s Affirmation in Support/Opposition Exhibit C.

In opposition to defendant Great Neck’s cross-motion (Seq. No. 02), counsel for plaintiff argues “[t]he defendant, Village, has not offered any excuse as to why they remained silent through the proceedings until service of plaintiff’s default motion. As can be seen by plaintiff’s

moving papers, they have been well aware of the proceedings in this case and remained silent and only move to dismiss the case after served with a default motion. If the Village thought the plaintiff did not have a valid case against them and there was no cause of action due to notice as per the Affidavit of Ms. King then why did they wait so long?"

Counsel for plaintiff further contends that "[t]he plaintiff never abandoned his case against the Village and there is no prejudice to the Village."

Counsel for plaintiff asserts that the Second Department has held in matters where plaintiff failed to move for a default against one co-defendants within the statutory time frame, but was actively pursuing the matter against the other co-defendants, that the matter was not deemed abandoned against the defaulting defendant. Counsel for plaintiff states that "plaintiff has been actively prosecuting his case in the form of responding to discovery demands, serving discovery demands, appearing at court conferences and appearing for his deposition. Further, the delay in filing the motion for default was only approximately a four month delay."

Counsel for plaintiff adds, "[f]urther, due to law office failure, the handling paralegal never diaried any items for a default motion. It was not until after this office recently reviewed the file after the November 26, 2013 conference before Judge Sher that it was discovered that the one year deadline has passed."

In reply to plaintiff's opposition, counsel for Great Neck contends, "[t]he Plaintiff sent a 'default' letter to the VILLAGE dated October 15, 2013. The letter sets out that the VILLAGE was in default, it sets out the date service was completed, and the Plaintiff recites that the last date to answer was September 2, 2012. This letter was sent to the Defendant VILLAGE after the statutory time period had expired to move for a default. The Plaintiff cannot claim law office failure where its own letter shows that it was aware of the default and that the time period for the

default had elapsed. The letter threatens a Motion for Default be made after the time provided by statute. The Plaintiff failed to make a timely motion for more than 15 months after the alleged default by the Defendant VILLAGE.”

CPLR § 3215(c) reads, “**Default not entered within one year.** If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion made by the defendant under this subdivision does not constitute an appearance in the action.”

In the instant matter, it is alleged that service upon defendant Great Neck was completed on or about August 13, 2012. Accordingly, defendant Great Neck had until September 10, 2012 to serve their Answer to plaintiff’s Summons and Verified Complaint. Having not served an Answer at that time, defendant Great Neck was in default. Pursuant to CPLR § 3215(c), plaintiff then had until September 10, 2013 to “take proceedings for the entry of judgment.” Plaintiff did not move for a default judgment until December 31, 2013, said date being four hundred seventy-seven (477) days (one (1) year, three (3) months and twenty-seven (27) days) from the date of defendant Great Neck’s default and three (3) months and twenty-seven (27) days past the deadline set forth in CPLR § 3215(c).

The Court does not find merit in plaintiff’s counsel’s argument with respect to the “reasonable excuse” for not moving for default judgment in the time frame set forth in the statute. Plaintiff’s counsel knew defendant Great Neck was in default, as evidenced in the letter sent to defendant Great Neck’s counsel on October 31, 2012 (*see* Defendant Great Neck’s Affirmation in Support/Opposition Exhibit A), but did not to file for a default judgment against

defendant Great Neck until well over a year after said letter.

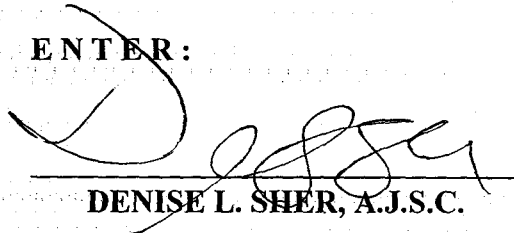
Accordingly, plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3215, for an order granting a default judgment against defendant Great Neck on the issue of liability and setting the matter down for an Inquest as to damages is hereby **DENIED**.

Defendant Great Neck's cross-motion (Seq. No. 02), pursuant to CPLR § 3215(c), for an order dismissing the above captioned action as against it on the grounds that the time for plaintiff to move for a default has expired is hereby **GRANTED**.

The remaining parties shall appear for a Certification Conference in IAS Part 34, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on May 6, 2014, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 21, 2014

ENTERED

APR 22 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE