Ryan v Village of Lindenhurst, Inc.
2014 NY Slip Op 33900(U)
October 14, 2014
Supreme Court, Suffolk County
Docket Number: 12-25054
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 12-25054

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-17-14 (#001)
MOTION DATE 2-11-14 (#002)
ADJ. DATE 7-1-14
Mot. Seq. # 001 - MG
002 - XMD

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THOMAS J. RYAN and BARBARA J. RYAN,

Plaintiffs,

- against -

VILLAGE OF LINDENHURST, INC., SHAWN CULLINANE, individually and in his official capacity as Village Clerk, THOMAS A. BRENNAN, individually and in his official capacity as Village Mayor, KEVIN MCCAFFREY, individually and in his official capacity as Village Trustee (Deputy Mayor), MARYANN WECKERLE, individually and in her official capacity as Village Trustee, JODI CARAVELLA, individually and in her official capacity as Village Trustee, MICHAEL A. LAVORATA, individually and in his official capacity as Village Trustee, and DOUG MADLON, individually and in his official capacity as Deputy Village Clerk,

Defendants.

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JUDITH N. BERGER, ESQ.
Attorney for Plaintiffs
28 East Main Street
Babylon, New York 11702

GLASS & GLASS, ESQS.
Attorney for Defendants
72 E. Main Street, Suite 3
Babylon, New York 11702

Upon the following papers numbered 1 to 22 read on these motions for a default judgment and to extend time to answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9 - 18; Answering Affidavits and supporting papers _; Replying Affidavits and supporting papers 19 - 22 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs for an order pursuant to CPLR 3215 permitting entry of a default judgment is granted in an amount to be determined after inquest on damages; and, it is further

ORDERED that the cross motion by defendants which seeks an order pursuant to CPLR 3012 (d) extending their time to submit a notice of appearance and demand for complaint is denied.

Plaintiffs served a notice of claim upon defendant Village of Lindenhurst, Inc.[1] ("the village") on August 16, 2011 by certified mail return receipt requested and the summons with notice upon the village on December 11, 2012 by personal delivery upon one "Gay Bodenschatz as clerk/aide" for the village. Additionally, plaintiffs served the summons with notice by delivery on December 11, 2012 and mailing on December 12, 2012 upon defendants Shawn Cullinane (individually and as Village Clerk), Thomas Brennan (individually and as Village Mayor), Kevin McCaffrey (individually and as Village Trustee and Deputy Mayor), Doug Madlon (individually and as Deputy Village Clerk), and Maryann Weckerly, Jodi Caravella, Michael A. Lavorata (individually and as Village Trustees). Proof of service was filed with the County Clerk on December 12, 2012, thus service was complete on December 22, 2012 (*see* CPLR 308 [2]). None of the defendants served a demand for complaint, notice of appearance, motion, or request for a 50-h hearing.

In a motion dated December 27, 2013 plaintiffs request an order granting entry of a default judgment against defendants for their failure to appear in this action. In support of their motion, plaintiffs include copies of the notice of claim, summons with notice, and affidavits of service of same. Additionally, affidavits of plaintiffs aver that they are seeking the recovery of damages they allegedly sustained as a result of "[d]efendants' [*sic*] hav[ing] taken dominion and control over [a triangular 6-7 feet by 30 feet by 31 feet portion of property owned by plaintiffs and known as 105 North Kings Avenue, Lindenhurst, New York] on the left side of the back yard without due process."

Defendants oppose the motion and cross-move, requesting an extension of time to submit a notice of appearance and demand for complaint. In support of their request, defendants submit an attorney's affirmation, a proposed notice of appearance and demand for complaint, a copy of a letter from their insurance carrier denying coverage on the claim, copies of certain e-mails, and correspondence between counsel. Additionally, defendants include an affidavit from Shawn Cullinane, the village clerk and from Douglas Madlon, the deputy village clerk.

Counsel for defendants maintains that upon learning of the service of the summons with notice by plaintiffs he forwarded the claim to the village's insurance carrier "to represent it in the defense of the

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Defendants maintain that the "Village of Lindenhurst, Inc." does not exist, as the proper name is the "Incorporated Village of Lindenhurst" and suggest that for this reason plaintiffs' motion should be denied. However, CPLR 305 (c) permits the court, "[a]t any time, in its discretion and upon such terms as may be just" to amend the summons and proof of service, if a substantial right of a party is not prejudiced (*see also* ***Sally v Keyspan Energy Corp.***, 106 AD3d 894, 966 NYS2d 133 [2d Dept 2013]; ***Ober v Rye Town Hilton***, 159 AD2d 16, 557 NYS2d 937 [2d Dept 1990]). Defendants have offered no evidence of prejudice and have admitted receipt of the notice of claim and summons with notice. Thus, the court amends the notice of claim and summons with notice, *nunc pro tunc* to reflect the proper name of the village.

action." In a letter dated December 19, 2012, with the notation "DELIVERY CONFIRMATION &EMAIL", addressed to "Mr. Doug Madlon, Deputy Village Clerk, The Incorporated Village of Lindenhurst, 430 S. Wellwood Avenue, Lindenhurst, New York 11757, volmayor@optonline.net", and cc'd to "Hon. Thomas A. Brennan, Mayor, Village of Lindenhurst volmayor@optonline.net, and Gerard Glass, Esq., Glass & Glass, glassandglasss@optonline.net", the insurance company disclaimed coverage. The letter stated in part "[b]ased upon the submissions to date, no coverage is afforded this matter under the MPO and CGL policies. Accordingly, at this time, NYMIR is unable to provide the Village with a defense or indemnification for this matter. **We ask the Village to provide us with a copy of the Complaint once it is received from the Plaintiff. NYMIR will then undertake a further review for coverage.**" Counsel now claims that his office has no record of ever having received the e-mail, that he "was under the impression that the matter was being handled" by the insurance carrier, and that his next recollection of any involvement in this matter was when he received the within motion. Shawn Cullinane, the village clerk, averred that "upon learning that the Summons with Notice had been served, [he] immediately submitted the claim to [the village's] insurance carrier . . . [that he] was under the impression that the matter was being handled by our attorneys . . . [and that he] never followed up because the [insurance carrier] disclaimer letter indicated in bold print [to provide a copy of the complaint] and [he] believed that nothing else needed to be done on behalf of the Village until a complaint was served." Douglas Madlon, the deputy village clerk, asserts in his affidavit that "[t]he Village has a meritorious defense to plaintiffs' default motion", that service upon Gaye Bodenshatz, was improper as service on the village as she is a village purchasing agent, that the village was incorrectly named in the summons, that the individual defendants have qualified immunity, and that two meritorious substantive defenses exist, *i.e.* that plaintiffs' consented to the work done and that the village has an easement to the property upon which it worked.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and complaint, (2) the facts constituting the claim, and (3) the defendant's default" (***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 59, 970 NYS2d 260 [2d Dept 2013]). "To successfully oppose a motion for leave to enter a default judgment based on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for its default and the existence of a potentially meritorious defense" (***Dela Cruz v Keter Residence, LLC***, 115 AD3d 700, 700, 701, 981 NYS2d 607 [2d Dept 2014]; ***Kolonkowski v Daily News, L.P.***, 94 AD3d 704, 941 NYS2d 663 [2d Dept 2012]). "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 a prejudice to the opposing party, whether there has been willfulness, and a strong public policy in favor of resolving cases on the merits" (***Fried v Jacob Holding, Inc.***, *supra* at 60, *citations omitted*).

Here, where defendants timely submitted the claim to their insurance carrier, but through office failures or inadvertencies failed to appear in the action for over a year, they may have provided a reasonable excuse for their failure to answer. However, there has been no evidence offered to show that they have a meritorious defense to the claims of plaintiffs. Bold allegations by the deputy village clerk that plaintiffs consented to the work done by the defendant village and that an easement exists for the property claimed to have been "taken" by the village without any evidence of same do not amount to meritorious defenses.

Accordingly, plaintiffs' motion for the entry of a default judgment is granted and an inquest on damages will be scheduled after the filing of a note of issue. Defendants' motion for an extension of time to appear and demand a complaint is denied.

Dated: Oct. 14, 2014

W. Gerard Asher
J.S.C.

_____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**