

**New York State Dept. of Env'tl. Conservation v  
Hickey's Carting, Inc.**

2015 NY Slip Op 30507(U)

April 2, 2015

Supreme Court, Suffolk County

Docket Number: 13080/2013

Judge: Jr., Andrew G. Tarantino

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At PART 50 of the Supreme Court in and for the County of Suffolk, at One Court Street, Annex Building, Riverhead, New York, on April 2, 2015. **COPY**

PRESENT  
HON. ANDREW G. TARANTINO, JR.  
A.J.S.C.

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**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and JOSEPH MARTENS, Commissioner of the New York State Department of Environmental Conservation**

Plaintiff(s)

-against-

**HICKEY'S CARTING, INC., DENNIS C. HICKEY, DENNIS E. HICKEY, MARIA HICKEY, and EPENAY, LLC.,**

Defendant(s).

Index No. **13080/2013**

Motion seq. **001: MD**  
Orig. Date: 10/31/2014  
Adj. Date: 1/6/2015

Motion seq. **002: XMotD**  
Orig. Date: 12/30/2014  
Adj. Date: 1/6/2015

**ORDER DENYING DEFAULT JUDGMENT AND DENYING MOTION TO DISMISS**

Upon consideration of the Notice of Motion for a default judgment in favor of the plaintiff Joseph Martens, Commissioner of the New York State Department of Environmental Conservation and the New York State Department of Environmental Conservation [collectively "the DEC"], the supporting affirmation, exhibits, and memorandum of law (motion sequence 001), the Notice of Cross Motion to dismiss the complaint and all cross claims asserted by the co-defendant Epenay LLC ["Epenay"], as abandoned or for leave to file a late Answer on behalf of the defendants Hickey Carting, Inc., Dennis C. Hickey, Dennis E. Hickey, and Maria Hickey [collectively "Hickey" or "the Hickey defendants"], the supporting affirmation, affidavit, and exhibits (motion sequence 002), the DEC's affirmation in opposition to the cross motion and in further support of its motion for a default judgment, and exhibits A and B, the DEC's memorandum of law in opposition to the cross motion, and Epenay's affirmation in opposition to the cross motion to dismiss its cross claims against Hickey, it is now

*ORDERED* that so much of the DEC's motion for a default judgment against Hickey is denied; and it is further

*ORDERED* that so much of Hickey's motion to dismiss the complaint is denied; and it is further

*ORDERED* that so much of Hickey's motion to dismiss Epenay's cross claims is denied; and it is further

*ORDERED* that so much of Hickey's motion for leave to Answer the complaint is granted on the condition that Hickey serves an Answer to the Verified Complaint on the DEC no later than **APRIL 30, 2015.**

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On June 4, 2007, after an administrative enforcement proceeding, Hickey entered into an administrative Order on Consent with the DEC ["the Consent Order"], to resolve alleged violations of the Environmental Conservation Law related to the operation of a solid waste landfill on Hickey's property located at 169 Sycamore Avenue in Central Islip ["the subject property"]. Hickey agreed to remove the solid waste and remediate the subject property pursuant to a remediation plan approved by the DEC and pay a \$100,000.00 penalty, half of which was suspended as long as Hickey complied with the Consent Order's requirements.

The DEC asserts, and Hickey admits, that Hickey only paid the first installment of the penalty in the amount of \$5000.00, leaving an outstanding agreed-upon penalty of \$95,000.00. Under the DEC approved remediation plan, Hickey agreed to remove construction and demolition debris ["C & D"] on the Sycamore Avenue property owned by Hickey's Carting and/or Dennis C. and Maria Hickey. The Consent Order included stipulated penalties for each day of violation. There is no dispute that the remediation work encompassed in the Consent Order was not performed by Hickey. The DEC brought the instant action to compel compliance with the terms of the Consent Order and obtain a judgment for the unpaid penalty as well as additional penalties and other relief.

Co-defendant Epenay is the owner of property immediately adjacent to the subject property ["the Epenay property"]. Pat Chicarelli, a non-party, is the owner of a 3 ½ acre parcel adjacent to the Epenay property and is a principal of Epenay. At one time, Hickey owned the Epenay property. Hickey alleges in an affidavit that Pat Chicarelli stripped his 3 ½ acre parcel and put all the C & D on to what is now the Epenay property, but was then owned by Hickey as mortgagor and Chicarelli as mortgagee. Ultimately, Chicarelli foreclosed on Hickey, reacquired the property, and transferred title to Epenay. Epenay's cross claims seek contribution and indemnification against Hickey with respect to remediation of the Epenay property.

The action was commenced by the DEC against Hickey and Epenay on May 15, 2013. Hickey's attorney on another matter involving Hickey and the DEC agreed to accept service of process in this action on behalf of the Hickey defendants on June 25, 2013. On July 2, 2013, Hickey's attorney, Epenay's attorney and the Assistant Attorney General prosecuting the action for the State ["the AAG"] entered into a joint stipulation extending the time to answer the complaint to September 2, 2013.

When the stipulation extending Hickey's time to answer was executed, Hickey was being sued in federal district court in an action filed by the State of New York in May of 2001 to recover costs paid by the State to remediate the Blydenburgh Landfill. AAG Medina was the Assistant Attorney General involved in the Blydenburgh litigation from 2002 until the case was settled in 2011. Pursuant to that settlement, Hickey agreed to pay the State \$650,000.00 with interest within two years. The State filed its judgment against one of the parcels on Sycamore Avenue that had to be remediated under the terms of the 2007 Consent Order as well as another parcel used in Hickey's sanitation business.

Hickey's attorney asserts that the State and the Hickey defendants engaged in attempts to reach a global settlement of both the federal Blydenburgh Landfill litigation and the 2007 Consent

Order. The attorney argues that Hickey's failure to answer the complaint should be excused and Hickey should be granted leave to file a late answer because with the knowledge and cooperation of the DEC, Hickey was trying to secure a buyer of the subject property that would be willing to sign a Consent Order with the DEC to carry out the directives of the remediation plan in the 2007 Consent Order. Dennis C. Hickey, who had spent over 7 years in prison between 1998 through May 27, 2006, claims he did not have the money to remediate the subject property himself in accordance with the 2007 Consent Order. The efforts to find a suitable purchaser of the subject property were ongoing when this action was commenced in May of 2013.

For reasons not relevant here, several potential deals with prospective buyers to purchase and remediate the subject property were not successful. Hickey's attorney asserts that he continually communicated with the AAG and explained that his goal was to bring about a deal between Hickey and one of the prospective purchasers that would assure that the 2007 Consent Order would be carried out, that the Hickey defendants did not have the assets to pay the attorney to litigate this action, and that the Hickey defendants' money was better spent on trying to facilitate a settlement rather than paying attorney bills to litigate. Hickey's attorney told the AAG in the summer of 2013 that if the DEC insisted on the Hickey defendants filing an Answer to the Complaint, in all likelihood the attorney would seek leave to withdraw as counsel as there were no funds available to pay the attorney for his continued representation of Hickey in the lawsuit. Although the AAG threatened to move for a default judgment in early September of 2013 if a comprehensive Remedial Plan was not submitted within two days to be accomplished by one of the prospective buyers of the subject property, the DEC did not move for a default judgment until one year later on September 30, 2014, twenty-eight days after the one-year anniversary date that Answers should have been served by Hickey and Epenay, respectively, according to the parties' stipulation.

The DEC acknowledges its cooperation with the Hickey defendants' plan to find an acceptable buyer for the subject premises between May of 2008 and the commencement of the action in May of 2013. Emails between the Attorney General's Office and Hickey's attorney suggest that this cooperation extended through the Fall of 2013 and the early winter of 2014. In early 2014, the Hickey defendants, through another attorney, began to communicate with still another prospective buyer which talks continued through September of 2014. Hickey's present attorney concedes that he could have been more forthcoming with the AAG about the latest prospective purchaser when he was last contacted for an update by the newly assigned AAG in January of 2014. In any event, on September 30, 2014, Hickey, not Hickey's attorney, received a letter from the Attorney General's Office advising that the DEC would be moving for a default judgment, the motion being returnable on October 31, 2014. All further efforts to secure a buyer of the subject property, although continuing, have proven unsuccessful.

The DEC's motion for a default judgment against the Hickey defendants is denied. A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer must show both a reasonable excuse for the default and the existence of a potentially meritorious defense ( *see* CPLR 2004; *Citimortgage, Inc. v. Stover*, 124 A.D.3d 575, 2 N.Y.S.3d 147 [2d Dept. 2015]).

In light of the foregoing facts, the Court concludes that there is a reasonable excuse for the Hickey defendants' default. It is apparent that for a long period of time the common goal of both the DEC and Hickey was to accomplish the terms of the Consent Order including the expensive tasks of testing and remediation of the subject property. Hickey maintains that after a lengthy prison term, the payment of substantial fines and penalties in connection with the Blydenburgh Landfill settlement, the 2007 economic downturn, and Dennis C. Hickey's ill health, finding a buyer acceptable to the DEC with the financial wherewithal to carry out the dictates of the Consent Order was Hickey's only option. At least for some months after Hickey's default, it would appear that the DEC acquiesced in Hickey's approach to resolving the Consent Order. Considering all the correspondence that was exchanged by the Office of the State Attorney General and Hickey's attorney between the summer of 2013 and January of 2014, one would have thought that the Attorney General would have contacted Hickey's attorney and told him that unless an Answer was forthcoming, the DEC would move for a default judgment. In all likelihood, had that contact been made, the motions that ensued might have been avoided. In any event, under all the circumstances the Court concludes that the Hickey defendants should be excused for their failure to file an Answer, the first requirement for vacatur of a default.

The second requirement for vacating a default is a demonstration of a potentially meritorious defense to the action. It is within the sound discretion of the Court to determine whether, inter alia, a movant's defense has sufficient merit (*Anamdi v. Anugo*, 229 A.D.2d 408, 644 N.Y.S.2d 804 [2d Dept. 1996]).

In addition to a monetary judgment, the complaint seeks a judgment ordering the Hickey defendants to 1) stop operating a solid waste management facility on the subject property without first obtaining a permit from the DEC, 2) remove all visible solid waste and C & D debris pursuant to a DEC-approved plan, 3) conduct a subsurface investigation of the subject property pursuant to a DEC-approved plan, 4) remove all unacceptable sub-surface material as determined by the DEC.

The Hickey defendants have demonstrated that they have several potentially meritorious defenses to the causes of action in the Complaint. These include the three year period of limitations for an action to recover upon a liability, penalty or forfeiture created or imposed by statute (*see* CPLR 214 [2]), the alleged failure of the DEC to comply with the ten day Notice to Cure requirement in the Consent Order in connection with the sought-after stipulated penalties, and Hickey's denial that any of the Hickey defendants dumped solid waste on to the subject property or the Epenay property, or operated a solid waste facility without DEC approval. In the exercise of the Court's discretion, the Court concludes that Hickey has demonstrated a potentially meritorious defense and that it should be given leave to file a late Answer so long as the Answer is served on the parties within thirty days of entry of the Order.

With respect to Hickey's cross motion to dismiss the DEC's Verified Complaint and Epenay's cross claims as abandoned, the cross motion is denied. The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to seek a default on an unanswered complaint or counterclaim within one year of the default may be excused if "sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]). The Second Department has interpreted this language as requiring both a reasonable excuse for the delay in

timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious (*Giglio v. NTIMP, Inc.*, 86 A.D.3d 301, 308, 926 N.Y.S.2d 546 [2d Dept. 2011]). The DEC has met both requirements (*Guarneri v. St. John*, 18 A.D.3d 813, 795 N.Y.S.2d 462 [2d Dept. 2005]). In light of the history of the Consent Order and the DEC's sustained efforts to obtain compliance, including the lack of any prejudice to Hickey caused by the DEC's 28-day delay in moving for a default judgment, it's abundantly clear that the DEC never intended to abandon the action ( *see LNV Corp. v. Forbes*, 122 A.D.3d 805, 996 N.Y.S.2d 696 [2d Dept. 2014]), and its delay should be excused.

The legislative history of CPLR 3215 reveals that it was also intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints ( *see* 5 N.Y. Adv. Comm. Rep. A-476 [Advance Draft 1961]; 7 Weinstein-Korn-Miller, Civ. Prac. § 3215.08; *Giglio v. NTIMP, Inc.*, 86 A.D.3d 301, 926 N.Y.S.2d 546 [2d Dept. 2011]). However, since Epenay's cross claims against Hickey are solely indemnification and contribution claims dependent upon the resolution of the DEC's action against Hickey, and Hickey concedes that the parties were working toward a resolution without further litigation, Hickey's motion to dismiss Epenay's cross claims as abandoned is likewise denied.

*ORDERED* that so much of the DEC's motion for a default judgment against Hickey is denied; and it is further

*ORDERED* that so much of Hickey's motion to dismiss the complaint against it is denied; and it is further

*ORDERED* that so much of Hickey's motion to dismiss Epenay's cross claims against it is denied; and it is further

*ORDERED* that so much of Hickey's motion for leave to Answer the complaint is granted on the condition that Hickey serves an Answer on the attorneys for the DEC and Epenay within thirty days of entry of the Order.

Dated: April 2 2015

  
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 ANDREW G. TARANTINO, JR., A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION