Ryan v Village of Lindenhurst, Inc.
2015 NY Slip Op 31134(U)
July 1, 2015
Supreme Court, Suffolk County
Docket Number: 12-25054
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 12-25054

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 12-4-14
ADJ. DATE 1-6-15
Mot. Seq. # 003 - MG

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 MCCAFFERY, 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; DOUG MADLON, individually and in his official capacity as Deputy Village Clerk,

Defendants.

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 40 read on this motion for leave to reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33 - 38 ; Replying Affidavits and supporting papers 39 - 40 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for leave to reargue the prior motion (001) by plaintiffs for an order pursuant to CPLR 3215 permitting entry of a default judgment against defendants and the prior cross motion (002) by defendants for an order pursuant to CPLR 3012 (d) extending their time to serve a notice of appearance and demand for complaint, which motion was granted and cross motion was denied by order of this Court dated October 14, 2014, is considered under CPLR 2221, and is granted. The motion is granted so as to specifically address the proposed defenses by defendants of

consent and improper service of process resulting in a lack of personal jurisdiction so as to determine whether defendants have a potential meritorious defense warranting vacatur of their default. Upon granting leave to reargue, the Court vacates its prior order and substitutes this order in its stead; and it is further

ORDERED that this motion (001) by plaintiffs for an order pursuant to CPLR 3215 granting a default judgment against defendants for their failure to appear in this action is denied; and it is further

ORDERED that this cross motion (002) by defendants for an order pursuant to CPLR 3012 (d) and CPLR 2005 for an extension of time to serve a notice of appearance and demand for complaint is granted; and it is further

ORDERED that defendants shall serve and file their notice of appearance and demand for complaint within twenty (20) days of service upon them of a copy of this order with notice of entry.

Plaintiffs reside at 105 North Kings Avenue, in Lindenhurst, New York. They claim that the Village of Lindenhurst ("Village") sent a letter in June 2008 informing residents of a two week project to repair a culvert that runs under the road between North Jefferson Avenue and North Kings Avenue on Albert Street in the Village of Lindenhurst. The letter allegedly warned that the road would be closed for two weeks. The project allegedly created several months of loud noise from heavy equipment and forced the closing of the road during said months. A large hole was dug in plaintiffs' property that reached into the streambed behind the property. Plaintiffs assert that as a result of the project, access to their home was limited, and the school bus stop was moved to the west side of the construction creating inconvenience and a potentially dangerous situation for children living on the east side of the construction. They claim that at the end of September 2008, the road was paved. Plaintiff Thomas J. Ryan ("Ryan") met with Doug Madlon in his capacity as project manager and with the contractor at the job site concerning the condition of plaintiffs' property. Plaintiff Ryan alleges that the parties at the meeting agreed that the property was to be back-filled and the property line restored and demarcated with a fence but that after the meeting, stakes were placed indicating the property line to be well inside the agreed property line. Plaintiffs assert that the staked area amounts to a taking of a triangle-shaped area on the left side of their back yard which is approximately six or seven feet by 30 feet by 31 feet totaling approximately 105 square feet of property. They also assert that defendants have exercised improper dominion and control over said property. By their notice of claim and summons with notice, plaintiffs are seeking to recover damages for, among other things, trespass, trespass to chattel, and the taking and loss of enjoyment of their property in violation of the fourth and fifth amendments of the United States Constitution and the New York State Constitution.

Plaintiffs served their notice of claim upon defendant Village[1] on August 16, 2011 by certified

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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*

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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 to "Gay Bodenschatz as clerk/aide" 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.

Plaintiffs now move, by motion dated December 27, 2013, pursuant to CPLR 3215 for an order granting a default judgment against defendants for their failure to appear in this action. In support of their motion, plaintiffs include their affidavits, copies of the notice of claim and summons with notice, and affidavits of service of same.

Defendants oppose the motion and cross-move pursuant to CPLR 3012 (d) and CPLR 2005 for an extension of time to serve a notice of appearance and demand for complaint. They contend that they have a justifiable excuse in the form of misunderstandings and poor communication between the Village Clerk and the Village Attorney. They also contend that the Village has meritorious defenses to the action inasmuch as service upon Gaye Bodenshatz was improper to constitute service on the Village as she is a village purchasing agent, the Village was incorrectly named in the summons, the individual defendants have qualified immunity, plaintiffs consented to the work, and the Village has an easement and right of way over the culvert and streambed. In support of their cross motion, defendants submit their 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. Defendants also include an affidavit from Shawn Cullinane, the Village Clerk and from Douglas Madlon, the Deputy Village Clerk.

CPLR 320 (a) provides that a defendant may appear in an action in one of three ways: (1) by serving an answer, (2) by serving a notice of appearance, or (3) by making a motion which has the effect of extending the time to answer (*see* CPLR 320 [a]; ***Tsionis v Eriora Corp.***, 123 AD3d 694, 998 NYS2d 117 [2d Dept 2014]). "[A] plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer" (***Todd v Green***, 122 AD3d 831, 832, 997 NYS2d 155 [2d Dept 2014]); *see* CPLR 3215[f]; ***DLJ Mortg. Capital, Inc. v United General Title Ins. Co.***, ___ AD3d ___, 2015 NY Slip Op 04087 [2d Dept 2015]).

A defendant seeking to vacate a default in answering or appearing upon the ground of excusable

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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.

default must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (*see* CPLR 5015 [a][1]; ***Bank of America Natl. Assn. v Patino***, ___ AD3d ___, 2015 NY Slip Op 04440 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Hampton***, 119 AD3d 856, 989 NYS2d 368 [2d Dept 2014]). The determination of what constitutes a reasonable excuse generally lies within the sound discretion of the trial court (*see* ***Madonna Mt. Servs., Inc. v R.S. Naghavi, M.D. PLLC***, 123 AD3d 986, 987, 999 NYS2d 858 [2d Dept 2014]; ***9 Bros. Bldg. Supply Corp. v Buonamicia***, 106 AD3d 968, 969, 965 NYS2d 380 [2d Dept 2013]; *see also* ***Golden v Romanowski***, ___ AD3d ___, 2015 NY Slip Op 04448 [2d Dept 2015]). In making that discretionary determination, the court should consider relevant factors such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*see* ***Lyubomirsky v Lubov Arulin, PLLC***, 125 AD3d 614, 614, 3 NYS3d 377 [2d Dept 2015]; ***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 60, 970 NYS2d 260 [2d Dept 2013]; *see also* ***Golden v Romanowski***, ___ AD3d ___, 2015 NY Slip Op 04448 [2d Dept 2015]).

CPLR 3012 (d) provides that, "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Upon an application for an extension of time under CPLR 3012 (d), the court may exercise "its discretion in the interests of justice to excuse delay or default resulting from law office failure" (CPLR 2005; *see* ***Neilson v 6D Farm Corp.***, 123 AD3d 676, 679, 998 NYS2d 397 [2d Dept 2014]; ***JP Morgan Chase Bank, Natl. Assn. v Russo***, 121 AD3d 1048, 1049, 996 NYS2d 68 [2d Dept 2014]). However, law office failure should not be excused where a default results not from an isolated, inadvertent mistake, but from repeated neglect (*see* ***GMAC Mortg. LLC v Guccione***, 127 AD3d 1136, ___ NYS3d ___ [2d Dep 2015]; ***Glukhman v Bay 49th St. Condominium, LLC***, 100 AD3d 594, 595, 953 NYS2d 304 [2d Dept 2012]).

Counsel for defendants, the Village Attorney, maintains by affirmation 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 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 for defendants asserts 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, avers 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 the subject project was meant to resolve a serious flooding issue by rebuilding the culvert and streambed, which are an integral part of the Village's drainage system, and that the Village has exercised dominion and control over said culvert and streambed for more than 50 years. He avers that he personally confirmed approval of the scope and nature of the project with plaintiffs prior to its commencement and that it was only after substantial completion of the work that plaintiffs complained of the Village's actions.

Here, 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. The Court, in its discretion, finds that defendants satisfied the first requirement for vacatur of their default in appearing or answering by showing that their excuse for their default was reasonable (*see* ***Allstate Ins. Co. v Grodzki***, 112 AD3d 919, 977 NYS2d 388 [2d Dept 2013]; ***Mason Builders of Orange County, Inc. v Lambert***, 19 AD3d 560, 796 NYS2d 535 [2d Dept 2005]).

Next, defendants must demonstrate, by submitting evidence in admissible form, the existence of a potentially meritorious defense (*see* ***Kirkland v Fayne***, 78 AD3d 660, 915 NYS2d 270 [2d Dept 2010]; ***HSBC Bank USA Natl. Assn. v Nuteh 72 Realty Corp.***, 70 AD3d 998, 895 NYS2d 497 [2d Dept 2010]). A proposed verified answer must set forth allegations sufficient to demonstrate the existence of a potentially meritorious defense (*see* ***Whitfield v State***, 28 AD3d 541, 814 NYS2d 185 [2d Dept 2006]; ***65 North 8 Street HDFC v Suarez***, 18 AD3d 732, 795 NYS2d 724 [2d Dept 2005]).

Here, defendants demonstrated a potentially meritorious substantive defense of consent with the affidavit of Douglas Madlon, the Deputy Village Clerk, in which he avers that plaintiffs' consent to the work was obtained prior to the start of the work and that he personally confirmed approval of the scope and nature of the work with the plaintiffs prior to its commencement (*compare* ***Hausman v Stern***, 235 AD2d 352, 653 NYS2d 8 [1st Dept 1997], *lv to appeal dismissed* 89 NY2d 1081, 659 NYS2d 853 [1997]). The fact that the potential defense was demonstrated by affidavit based on personal knowledge rather than another form of admissible evidence and that the affidavit is contradicted by the reply affidavit of plaintiff Ryan does not render the potential defense unmeritorious (*see* ***Smith v Smith***, 291 AD2d 828, 736 NYS2d 557 [4th Dept 2002]).

Defendants also claim a proposed procedural defense of improper service of process resulting in a lack of personal jurisdiction. CPLR 311 (6) provides that personal service upon a village shall be made by delivering the summons to the mayor, clerk or any trustee (*see* CPLR 311 [6]). Counsel for defendants avers personal knowledge that Gaye Bodenschatz is the Village's Purchasing Agent and not one authorized by statute to receive service of process on behalf of the Village. It has been held that "notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court" (***Feinstein v Bergner***, 48 NY2d 234, 241, 422 NYS2d 356 [1979]; ***Sutherland v Village of Suffern***, 139 AD2d 728, 728, 527 NYS2d 479 [2d Dept 1988]). Plaintiffs oppose contending that a personal affidavit from Ms. Bodenschatz is required as well as an explanation as to whether she was also a village clerk or deputy clerk or acting clerk at the time she was served with process. Contrary to plaintiffs' opposition, the affidavit of defendants' counsel, the Village Attorney,

based on personal knowledge and asserting that Ms. Bodenschatz was not authorized to receive service of process is sufficient for the purpose of raising a potential defense (*see generally* ***Primeau v Town of Amherst***, 303 AD2d 1035, 757 NYS2d 201 [4th Dept 2003]; ***Incorporated Village of New Hyde Park by Bd. of Trustees v Nuzzi***, 143 AD2d 396, 532 NYS2d 566 [2d Dept 1988]). In addition, defendants have not waived said defense (*see* ***Cadlerock Joint Venture, L.P. v Kierstedt***, 119 AD3d 627, 628, 990 NYS2d 522 [2d Dept 2014]). Thus, defendants have a potentially meritorious procedural defense of improper service of process resulting in a lack of personal jurisdiction (*see* ***Falvo v Cerra***, 127 AD3d 919, 6 NYS3d 643 [2d Dept 2015]; *see also* ***Schaeffer v Village of Ossining***, 58 F3d 48 [2d Cir 1995]; ***Matter of Reese v Village of Great Neck Plaza***, 154 AD2d 683, 546 NYS2d 889 [2d Dept 1989]). Inasmuch as defendants have demonstrated one potentially meritorious substantive defense, it is not necessary to review the merits of the other proposed defenses at this juncture.

Here, defendants established a reasonable excuse and demonstrated a potentially meritorious substantive defense of consent. Plaintiff Ryan asserts in his reply affidavit that he has been prejudiced in his ability to prosecute his case as memories of witnesses fade or witnesses become unavailable, evidence is lost or damaged, and the condition of the land changes with the passage of time. Plaintiffs have not shown, other than by generalized statements, that they have been prejudiced by the default (*see* ***Toll Brothers, Inc. v Dorsch***, 91 AD3d 755, 936 NYS2d 576 [2d Dept 2012]). Moreover, there has been no showing that the default by defendants was willful, and public policy favors the resolution of cases on their merits (*see id.*). Based on the foregoing, the Court denies plaintiffs' motion for leave to enter a default judgment and grants defendants' cross motion to vacate their default in appearing in the action, to extend their time to serve a notice of appearance and demand for complaint, and to compel the plaintiffs to accept their late notice of appearance (*see* CPLR 3012 [d]; ***New York Hosp. Med. Ctr. of Queens v Nationwide Mut. Ins. Co.***, 120 AD3d 1322, 992 NYS2d 361 [2d Dept 2014]; *see also* ***Golden v Romanowski***, ___ AD3d ___, 2015 NY Slip Op 04448 [2d Dept 2015]).

Accordingly, plaintiffs' motion (001) for a default judgment against defendants is denied and defendants' cross motion (002) for an extension of time to serve a notice of appearance and demand for complaint is granted.

Dated: July 1, 2015

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION   __X__ NON-FINAL DISPOSITION