

Hollandale Apts. & Health Club LLC v Bonesteel

2015 NY Slip Op 32940(U)

February 18, 2015

Supreme Court, Saratoga County

Docket Number: 2014-1912

Judge: Robert J. Chauvin

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK COUNTY OF SARATOGA
SUPREME COURT

ORIGINAL

HOLLANDALE APARTMENTS & HEALTH CLUB LLC,

Plaintiff,

DECISION AND ORDER

-against-

**Index No: 2014-1912
RJI No: 45-1-2014-1143**

MICHAEL BONESTEEL,

Defendant

-and-

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant-Intervenor.

2015 FEB 23 PM 1:45
SARATOGA COUNTY
CLERK'S OFFICE
BALL ST. ALBANY, NY

FILED

Appearances:

Plaintiff: David H. Pentkowski, Esq.
Pentkowski, Pastore & Freestone
P.O. Box 445
Clifton Park, NY 12065

Defendant: Michael R. Bonesteel
Self-Represented Litigant

Andrew A. Stecker, Esq.
Disability Rights New York
725 Broadway, Suite 450
Albany, NY 12207

Intervenor/Defendant: Sandra Pullman, Esq., Assistant Attorney General
Office of the NYS Attorney General
120 Broadway
New York, NY 10271
(No appearance upon instant motion)

Before: Hon. Robert J. Chauvin, JSC

By notice of motion dated September 17, 2014, filed September 18, 2014, plaintiff seeks an order of default judgment as against the defendant herein. In support of such motion plaintiff submitted the affidavit of David H. Pentkowski, Esq. dated September 17, 2014, along with copies of an affidavit of service and the summons and complaint with annexed exhibits thereto.

Such motion was initially returnable September 25, 2014.

In opposition defendant submitted a self represented written answer and verification dated September 25, 2014, filed October 1, 2014.

In further opposition, defendant submitted a further affidavit dated November 21, 2014, received by the court November 25, 2014, along with annexed exhibits marked "A" through "C" consisting of various emails and correspondence. The defendant also submitted the affidavit of Andrew A. Stecker, Esq. and a memorandum of law both dated November 21, 2014.

By notice of motion dated December 9, 2014, filed December 11, 2014, the defendant seeks an order of the court permitting the interposition of an amended answer. In support of such motion defendant submitted the affidavit of Andrew Stecker, Esq. dated December 9, 2014 along with a proposed amended answer with exhibits annexed thereto. Such motion was returnable January 9, 2015.

As noted in a prior decision and order of this court dated October 29, 2014, the underlying action herein was commenced by the filing of a summons and complaint on June 24, 2014. Such complaint contained four causes of action all seeking relief by way of a declaratory judgment. In the first three causes of action the plaintiff has sought a determination by the court that the plaintiff's actions set forth therein are not illegal, discriminatory or violative of fair housing laws, that the plaintiff does not need to permit the plaintiff to have a dog in his apartment and/or that, at the very least, a hearing is required concerning same. In the fourth cause of action the plaintiff seeks a determination that the plaintiff is being denied a property right without due process.

Factually the underlying action concerns the denial of defendant's request to have an emotional support dog live in the apartment leased by defendant from plaintiff.

As pertinent to the pending motions the factual subject matter set forth in the complaint was the subject of a prior proceeding and investigation having been conducted by the New York State Attorney General's Office pursuant to Executive Law § 297. However prior to any stipulation of settlement or formal determination within such administrative proceeding, the plaintiff commenced the instant action. In that regard the plaintiff has submitted an affidavit of service reflecting that defendant was served with a copy of the summons and complaint on July

7, 2014.

Further, as pertinent to the pending motions, the court notes that the first responsive pleadings interposed by the individual defendant was the self represented written answer and verification dated September 25, 2014 and received by the court October 1, 2014. However the court does note that at time of the commencement of the action and until the appearance of counsel upon the papers submitted in November, 2014 the defendant was unrepresented. Having obtained counsel the defendant has submitted an affidavit establishing a potential meritorious defense and now seeks to interpose an amended answer.

It has clearly and repeatedly been held that, where the period of delay or default in interposing a responsive pleading is brief, there has been no showing of prejudice to the plaintiff and there has been a showing of a meritorious defense, that it is within the sound discretion of the trial court to deny a motion for entry of a default judgment and/or grant the vacating of a previously entered default judgment. Such a determination has been held to be required by the strong public policy in determining actions upon the merits. (*Giacopelli v Guiducci*, 36 AD3d 853, 854 [2d Dept. 2007]; *Giladi v City of New York*, 34 AD2d 733 [2d Dept. 2006]; *Jolkovsky v Legeman*, 32 AD3d 418, 419 [2d Dept. 2006]; *New York & Presbyt. Hosp. v Auto One Ins. Co.*, 28 AD3d 441 [2d Dept. 2006]; *Bunch v Dollar Budget, Inc.*, 12 AD3d 391 [2d Dept. 2004].)

In the present case the total period of delay has been at most four months. The defendant has submitted an affidavit of merits establishing a potentially meritorious defense and/or claim. The plaintiff was aware of the prior proceeding and has shown no prejudice in permitting the interposition of the now submitted amended answer. More importantly to permit the entry of a default judgment and deny the defendant's request to interpose the amended answer, would only serve to completely avoid a determination of the underlying action upon the merits.

As such, the plaintiff's motion for a default judgment is denied and the defendant's motion to interpose the proposed amended answer is granted. In that regard the defendant is directed to serve such amended answer upon plaintiff within twenty (20) days of the date of this order and decision.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: February 18, 2015
Ballston Spa, NY

ENTERED
Craig A. Hayner
Craig A. Hayner

[Signature]
HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

2015 FEB 23 PM 1:45
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Notice of Motion for Default Judgment dated September 17, 2014;
2. Affidavit of David H. Pentkowski, Esq. dated September 17, 2014;
3. Michael Bonesteel letter of September 25, 2014 with attachments;
4. Affidavit of Michael Bonesteel dated November 21, 2014 with attached exhibits "A" through "C";
5. Affidavit of Andrew A. Stecker, Esq. dated November 21, 2014;
6. Memorandum of Law dated November 21, 2014;
7. Notice of Motion dated December 9, 2014; and
8. Affidavit of Andrew Stecker, Esq. dated December 9, 2014.