Burke v Mulberry St. Bar, LLC
2016 NY Slip Op 30464(U)
March 16, 2016
Supreme Court, New York County
Docket Number: 159567/2014
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

PATRICK DILLON BURKE,

Plaintiff,

Index No. 159567/2014

-against-

DECISION/ORDER

MULBERRY STREET BAR, LLC d/b/a MULBERRY STREET BAR and HERMES MANAGEMENT LLC,

Defendants.

----------x

HERMES MANAGEMENT LLC,

Third-Party Plaintiff,

-against-

MULBERRY STREET BAR, INC. d/b/a MULBERRY STREET BAR,

Third-Party Defendant.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking damages arising from personal injuries he allegedly sustained when he slipped and fell on a public sidewalk that had been sprayed with water adjacent to premises known as 176 ½ Mulberry Street (a/k/a 385 Broome Street). Thereafter, plaintiff moved for an Order pursuant to CPLR § 3215 for a default judgment against Mulberry Street Bar, LLC d/b/a Mulberry Street Bar ("Mulberry") due to its failure to answer or appear in the action. In a decision dated April 13, 2015, this court granted plaintiff's motion for

a default judgment against Mulberry, misnamed "Mulberry Street Bar, Inc. d/b/a Mulberry Street Bar" in the decision, and directed an inquest on the issue of damages. Mulberry now moves for an Order (1) pursuant to CPLR § 5015(a) vacating the default judgment, and (2) pursuant to CPLR § 3012(d) granting Mulberry leave to late file and serve its proposed answer to plaintiff's complaint and its reply to defendant Hermes Management LLC's ("Hermes") cross-claims. For the reasons set forth below, Mulberry's motion is granted.

The relevant facts are as follows. Plaintiff commenced the instant action by filing a summons and complaint on or about September 29, 2014. On or about October 10, 2014, plaintiff served Mulberry with the summons and complaint via the Secretary of State. When Mulberry failed to answer or appear, on or about November 17, 2014, plaintiff served Mulberry with a notice of Mulberry's failure to answer or appear and a copy of the summons and complaint via first class mail. On or about January 14, 2015, plaintiff moved for default judgment. Mulberry failed to oppose the motion and default judgment was granted in favor of plaintiff and against it on or about April 13, 2015. On or about November 6, 2015, Hermes filed a third-party summons and complaint for indemnification and contribution against Mulberry Street Bar, Inc. d/b/a Mulberry Street Bar.

Mulberry now moves to vacate the default judgment and for leave to late file and serve its answer. Mulberry has submitted the affidavit of Vivian Catenaccio ("Catenaccio"), the Managing Member of Mulberry, who claims that Mulberry learned of the instant action when it received a copy of the summons and complaint, whereupon it immediately forwarded the summons and complaint to its insurance agent, Prime Time Insurance ("Prime Time"), to be delivered to Mulberry's insurance underwriter, Indemnity Insurance Corporation RBG ("Indemnity"), and defended by Indemnity's attorneys. Allegedly unbeknownst to Mulberry,

Indemnity had been placed in liquidation on April 10, 2014. Pursuant to the Liquidation Order, all claims had to be filed with the court-appointed receiver on or before January 16, 2015 to be defended. Catenaccio further claims that, although Mulberry was led to believe that Prime Time timely forwarded the documents to Indemnity, Prime Time did not, and defense counsel was never appointed. According to Catenaccio, Mulberry only learned that the action was still ongoing when it received a copy of Hermes' third-party summons and complaint on or about November 14, 2015, at which time it retained counsel.

It is well-settled that in order to vacate a default judgment pursuant to CPLR § 5015(a), the defaulting party must demonstrate a reasonable excuse and a meritorious defense to the action. *See Brown v. Suggs*, 38 A.D.3d 329 (1st Dept 2007). The failure of an insurance carrier to provide counsel may provide a reasonable excuse for default. *See Rodriguez v. Dixie N.Y.C., Inc.*, 26 A.D.3d 199, 200 (1st Dept 2006) (finding a reasonable excuse where an insurance carrier failed to assign counsel, despite the fact that the complaint was promptly forwarded to the carrier); *Barajas v. Toll Bros.*, 247 A.D.2d 242 (1st Dept 1998) (finding a reasonable excuse where an insurance carrier failed to forward summons and complaint to counsel). However, where a defendant's failure to offer a reasonable excuse for a delay in moving to vacate the default judgment after the defendant was served with the default judgment and notice of entry shows "persistent and willful inaction," the court should not vacate the default judgment. *See Pires v. Ortiz*, 18 A.D.3d 263, 264 (1st Dept 2005) (holding that a delay in moving to vacate a default judgment of over a year, from the time the defendants' insurance carrier had disclaimed coverage and a default judgment was entered, showed "persistent and willful inaction").

In the present case, Mulberry's motion to vacate the default judgment is granted as it has demonstrated a reasonable excuse and a meritorious defense to the action. Its claim that Prime

Time did not timely forward the documents to Indemnity or the court-appointed receiver for Indemnity, and therefore failed to procure it counsel, provides a reasonable excuse for its default. Moreover, Mulberry has meritorious defenses to the action as it has submitted the Catenaccio affidavit testifying that the sidewalk on which plaintiff allegedly fell was not sprayed with water on the alleged date of loss or on any other morning in December 2013, that Mulberry did not have actual or constructive notice of any defect and that the photographs plaintiff has submitted depicting floor mats on the sidewalk at the time of the accident could not have been taken on or near the date of the accident due to the lack of Christmas decorations in the photographs.

Plaintiff's argument that Mulberry has not shown a reasonable excuse as it has not provided an explanation for why it waited until December 2015 to move to vacate the default judgment when a notice informing plaintiff of its failure to answer or appear was served in November 17, 2015 and plaintiff's motion for a default judgment was granted in April 2015 is unavailing. Although approximately eight months passed between when plaintiff served the notice of entry of the default judgment on Mulberry and when Mulberry moved to vacate the default judgment, Mulberry has claimed that it did not realize that the action was ongoing and that defense counsel had never been assigned until November 2016, when it received Hermes' third-party summons and complaint. Thus, the court finds that Mulberry's delay in moving to vacate the default judgment did not show persistent and willful inaction.

Moreover, there is a "strong public policy...for resolving disputes on their merits, and toward that end a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that parties may have their day in court." *Picinic v. Seatrain Lines, Inc.*, 117 A.D.2d 504, 508 (1st Dept 1986).

Plaintiff's argument that it would be prejudiced if the default judgment were vacated

because some witnesses for Mulberry may be unavailable is without merit. The Catenaccio affidavit states that one of the witnesses who may testify regarding certain statements allegedly made by plaintiff, bearing on his credibility, is available, and does not state whether the other witness is or is not available. Thus, plaintiff has not demonstrated that it would be prejudiced if plaintiff's motion is granted based on his speculation that Mulberry's witnesses will be unavailable.

Mulberry's motion for an Order pursuant to CPLR § 3012(d) granting it leave to late file and serve its reply to defendant Hermes Management LLC's ("Hermes") cross-claims is granted without opposition.

Accordingly, it is hereby

ORDERED that the judgment entered against Mulberry based on the Mulberry's failure to timely answer or otherwise appear in the present action is hereby vacated; and it is further

ORDERED that Mulberry is to serve an answer or otherwise move with respect to plaintiff's complaint and Hermes' third-party complaint within twenty (20) days from the date of this order.

This constitutes the decision and order of the court.

Dated: 3/16/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.