

Wieder v Home Depot U.S.A.
2016 NY Slip Op 32980(U)
July 7, 2016
Supreme Court, Kings County
Docket Number: 8676/14
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of July, 2016.

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

-----X

HOWARD L. WIEDER,

Plaintiff,

Index No.: 8676/14

-against-

HOME DEPOT U.S.A., INC., JOHN MARRUGO,
ROSARIO BERG, and JORGE BERG,

Defendants.

-----X

THE FOLLOWING PAPERS NUMBERED 1 to 6 READ ON THIS MOTION

1	Papers Numbered
NOTICE OF MOTION FOR A DEFAULT JUDGMENT AFFIDAVIT(S) - AFFIRMATION(S)	1-2
ANSWERING AFFIDAVIT(S) - AFFIRMATION(S)	5
REPLY AFFIDAVIT(S) - AFFIRMATION(S)	6
Other - Memoranda of Law	

After oral argument and a review of the submissions herein, the Court finds as follows:

Plaintiff moves the Court for an Order pursuant to CPLR§3215 granting Plaintiff a default judgment on the grounds that both Defendants Berg were served with a copy of the Summons and Verified Complaint, and the time to answer has expired. Plaintiff also moves for an Order pursuant to CPLR §3215(d) directing the assessment of damages against Defendants' Berg be conducted at the time of trial or other disposition of the causes of action against the non defaulting Defendants.

Defendants Berg oppose Plaintiff's motion for a default judgment on the grounds that:

- (1) They were not personally served with the Summons and Verified Complaint;
- (2) Both Defendants have meritorious defenses in that Plaintiff's claims are barred by the doctrine of *Res Judicata*; and
- (3) Summary Judgment was granted to all Defendants by the Eastern District of Federal Court on April 29, 2013.

Discussion¹

Defendants' first argument that the Defendants were not personally served is without merit. Plaintiff has attached Affidavits of Service which demonstrate that the service upon both Defendants Berg conform in every way with CPLR §308 - Service upon natural persons. Service upon both Defendants occurred on October 23, 2013, and said affidavits were filed on October 28, 2013 in Queens County Supreme Court, the venue wherein both Defendants and Plaintiff reside. Pursuant to CPLR§308(4), each Defendant had 40 days to Answer or appear after the Affidavit of Service was filed. Defendants' last day to Answer was December 7, 2013. Neither Defendant appeared or answered as of December 7, 2013. Defendants have provided no affidavits in support of the allegation by their Counsel that they were not served in Queens County. Defendants' Counsel has provided no affidavit of someone with personal knowledge that supports Counsel's allegation that Defendants were not served in Queens County.

Defendants' second allegation is that Plaintiff's claims are barred by the doctrine of *Res Judicata*. Defendants are referring to the first action brought by Plaintiff in U.S. District Court, Eastern District of New York against the same Defendants. In Judge William Buntz's decision of April, 2013, wherein he dismisses the "federal action", he states clearly: "The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims against the City Defendants, Home Depot Defendants, and the Bergs. Therefore, Plaintiff's remaining state law claims are DISMISSED WITHOUT PREJUDICE." [capitols in the original].

Thus, Plaintiff's state law claims against all defendants remain alive and able to be prosecuted within the time frame permitted. CPLR 205 specifically permits and provides that within the six-month period of the federal court's dismissal of the state law claims without prejudice, the plaintiff may serve and file a verified complaint in the state Court. This is precisely what Plaintiff did and venued this Verified Complaint in Queens County Supreme Court as that is his County of residence. Because the Plaintiff is employed as a Law Clerk in Queens County Supreme Court, the venue was administratively changed to Kings County Supreme Court.

Defendants' Counsel maintains that Plaintiff waited until this action was administratively reassigned to Kings County to move for a default judgment. Plaintiff has presented credible

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It must be noted that Defendants' Counsel has styled his opposition motion as "Affirmation in Opposition to Motion for "Summary Judgment", not in opposition to Motion for a Default Judgment. After reviewing Defendants' opposition, the legal arguments put forth address the legal aspects of a Default Judgment. Thus, the Court accepted Defendants' misnamed opposition, as that of opposition to a Default Judgment.

evidence that the original motion for a default judgment was submitted to Queens County Supreme Court Justice Rudolph Greco, who requested the reassignment of the case. The Administrative Judge of Queens County, Hon. Jeremy S. Weinstein, forwarded the papers to Hon. Fern Fisher, Deputy Chief Administrative Judge for New York City Courts, for reassignment outside of Queens County, because of Plaintiff's employment by Queens County Supreme Court. Justice Fisher's Order of May 14, 2014, transferred the case from Queens to Kings County.

Plaintiff's motion for a default judgment was served on each of the Bergs on February 19, 2014, as demonstrated by the affidavits of service of that Motion which are attached to Plaintiff's reply affirmation in this action - some three months before this matter was reassigned from Queens County Supreme Court to Kings. Unfortunately, Queens County Supreme Court failed to send all of the papers in this action when the case was transferred to Kings County Supreme Court, and that fact was unknown to Plaintiff until Charles Small, the Clerk of Kings County Supreme Court advised Plaintiff of same. Mr. Charles instructed Plaintiff to reassemble the original motion and file same in the Kings County Clerk's Office. He did as instructed by Mr. Small and reserved the Defendants' Berg even though they had never Answered the after being served the Summons and Verified Complaint, or the Notice of Motion for a Default Judgment on February 19, 2014.

Defendants' Berg's counsel, Brian D. Solomon, submitted an affirmation in opposition to Plaintiff's Motion for a Default Judgment on or around May 26, 2015 - one and one-half years after Defendants' default in this matter. No affidavits from either of the Defendants' Berg accompany Counsel's opposition which set forth an excuse for the default along with an affidavit of merit. The Appellate Division, Second Department, has consistently ruled that both a reasonable excuse for he default and an affidavit of merit be provided. See, *Gray v. B. R. Trucking Co.*, 59 N.Y. 2d 649, 650 (1983); and *Hamilton Public Relations v. Scientivity LLC*—A.D. 3d—, 2015 WL 3875719 (2nd Dept. 2015). Quoting *Hamilton*, "The mere denial of receipt of the summons and complaint, without more, was insufficient to demonstrate a reasonable excuse for its default." Thus, the error by the Bergs in not submitting their affidavits explaining their default, providing a reasonable excuse therefor, and providing any affidavit of merits of their defense is fatal to their opposition.

Finally, Defendants contend that Hon. William f. Kuntz, II, United States District Judge in the Federal action commenced by Plaintiff, granted Defendants Berg summary judgment. It is quite clear from Judge Kuntz that he did NOT grand Defendants Berg summary judgment as he states in his opinion, because they did not move for same. "Because the Berg Defendants did not act 'under color of law', all federal claims against the Berg Defendants are dismissed with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims against the City Defendants, Home Depot Defendants, and the Bergs. Therefore, Plaintiff's remaining state law claims are DISMISSED WITHOUT PREJUDICE. The Clerk of Court is directed to enter judgment for the City and Home Depot Defendants and to close this case." [All capital letters supplied by the Judge Kuntz]

Conclusion

Accordingly, Plaintiff having proven by credible evidence that Defendants Berg were properly served both the Summons and Verified Complaint, and the Notice of Motion for a Default Judgment, and Defendants having fail to provide a reasonable excuse or any meritorious defense to Plaintiff's motion for a default judgment, Plaintiff's motion is hereby granted in its entirety. Plaintiff is hereby granted a default judgment against Defendants' Berg, and pursuant to CPLR §3215(d) an Order directing that the assessment of damages against the Defendants Berg be conducted at the time of or following the trial or other disposition of the causes of action against the non defaulting Defendants.

This constitutes the decision and order of the Court.

ENTER:


RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

JUL 07 2016

FILED

AUG . 2 2016

KINGS COUNTY CLERK'S OFFICE