Tri-County Refrig., Inc. v Ballston Two, LLC
2018 NY Slip Op 31219(U)
June 14, 2018
Supreme Court, Tioga County
Docket Number: 47648
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 20th day of April, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

TRI-COUNTY REFRIGERATION, INC.

Plaintiff,

-vs-

DECISION AND ORDER

Index No. 47648
RJI No.: 2018-0077-M

BALLSTON TWO, LLC, and SARATOGA CENTER FOR REHABILITATION AND SKILLED NURSING CARE, LLC, a.k.a. SARATOGA CENTER FOR CARE, LLC a.k.a., SARATOGA CENTER FOR REHAB AND SKILLED NURSING CARE,

Defendants.

APPEARANCES:

COUNSEL FOR PLAINTIFFS: LEVENE, GOULDIN & THOMPSON, LLP
450 Plaza Drive
Vestal, NY 13850

COUNSEL FOR DEFENDANT BALLSTON TWO, LLC: MCGRAIL & BENSINGER, LLP
888-C 8th Avenue, #107
New York, NY 10019

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a motion filed by Ballston Two, LLC ("Ballston Two") seeking an order vacating a Default Judgment entered November 14, 2017. Tri -County Refrigeration ("Tri-County") opposes the *vacatur* of the default judgment against Ballston Two.

Plaintiff brought this action in July, 2017, alleging that it entered into a service agreement with Saratoga Center for Rehabilitation and Skilled Nursing Center ("Saratoga") to provide refrigeration and cooling equipment. Tri-County alleges non payment on the agreement and seeks damages of $83, 309.

Ballston Two and Saratoga have a landlord tenant agreement, with Ballston Two being the landlord, and Saratoga being the tenant. Saratoga runs a nursing home at the location. According to Plaintiff's allegations, when entering into the service contract, Saratoga was required to obtain, and did obtain, the consent of the landlord, Ballston Two. Plaintiff contends that the work it performed provided directly benefitted Saratoga, and also to the property, and thereby the landlord. Plaintiff characterizes Ballston Two as a third party beneficiary of the contract.

When Saratoga stopped making payments, Plaintiff brought a suit against Saratoga and Ballston Two to recover damages. Saratoga answered the complaint, but Ballston Two did not. Thererafter, Plaintiff made application to the County Clerk to enter default judgment against Ballston Two. The County Clerk did sign, and enter, judgment on November 14, 2017. When Plaintiff sought to enforce the judgment some months later, Ballston Two retained counsel and made the instant motion to vacate the default judgment.

To vacate a default judgment, the movant must show a reasonable excuse for the default and a meritorious defense. *See Inwald Enterprises, LLC v. Aloha Energy*, 153 AD3d 1008 (3rd Dept. 2017); *Passeri v. Tomlins*, 141 AD3d 816 (3rd Dept. 2016).

With respect to the reasonable excuse, the court must make a determination "based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." *Puchner v. Nastke,* 91 AD3d 1261, 1262 (3rd Dept. 2012). In this case, Ballston Two submitted an affirmation of Barry Goldberg, an attorney who stated that he is *de facto* general counsel for Ballston Two, and he explained that he received the complaint and then emailed it to the individuals who are responsible for operating the nursing home, as well as their attorney. He stated that he followed up by email and was told they were working on it, and also spoke with the attorney who told him that she would respond to the complaint. Goldberg was under the impression that the attorney would respond to the complaint on behalf of Ballston Two as well, and would attempt to resolve the litigation. In actuality, Saratoga only answered on their own behalf. Ballston Two argues that it was under the impression that Saratoga, as the actual party to the contract with Plaintiff, was handling this matter, and that it was reasonable to assume that.

Plaintiff contends that Goldberg's statements are inadmissible hearsay, and that Ballston Two should have taken further steps to insure it was being represented, or submit its own notice of appearance. Plaintiff claims that Ballston Two failed to exercise any diligence and thus, its excuse is not reasonable. Plaintiff also contends that it would be prejudiced by the grant of the motion because its own litigation strategy has been based on the existence of the default judgment against Ballston Two.

Although Goldberg's reliance on Saratoga to serve an answer and protect Ballston's Two's interests may have been imprudent, it does provide a factual and credible explanation that may be attributable to excusable law office failure. *See Inwald, supra; Cerrone v. Fasulo*, 245 AD2d 793, 794 (3rd Dept. 1997). In *Cerrone*, the Court found law office failure cold exist, even though the party was pro se, and the movants thought their mortgage company was going to serve and answer on their behalf. Similarly, in *Bellcourt v. Bellcourt*, 169 AD2d 855 (3rd Dept. 1991), the Third Department also found law office failure could apply to a pro se litigant, and constitute

a reasonable excuse.

Here, there is no evidence that Ballston Two intended to default, or demonstrated any wilfulness in not responding. Rather, Goldberg and Ballston Two reasonably believed that the co-defendant was defending both their interests[1]. Upon learning of the default in March, 2018, Ballston Two immediately sought to vacate the default. Although Plaintiff argues it will be prejudiced by vacating the default, the Court finds that argument to be without merit. Plaintiff moved quickly to obtain the default in the first instance, and part of its litigation strategy should have involved consideration that this very motion to vacate the judgment might be brought. If the Court grants Ballston Two's motion, Plaintiff can still pursue its claims against both defendants. And, if the Court grants the motion, the public policy in favor of resolving cases on their merits will be advanced. Accordingly, the Court finds that Ballston Two has demonstrated a reasonable excuse for the default.

The movant must also demonstrate the existence of a meritorious defense. The proof needed to vacate the default is less than that required when opposing a summary judgment motion. *Inwald Enterprises v. Aloha Energy, supar; Passeri v. Tomlins, supra.*

Ballston Two was the landlord, and not a party to the services contract. Thus, its liability would be as third party beneficiary. To be a third party beneficiary, Ballston Two would have to be an intended, and not just an incidental, beneficiary. The contracting parties' intent to benefit Ballston Two must be apparent from the face of the contract. *See, Zelber v. Lewoc*, 6 AD3d 1043 (3rd Dept. 2004). The services contract at issue here does not reference Ballston Two, and there is no evidence that Ballston Two derived any benefit. At the very least, on this limited evidence and before discovery has even started, the Court finds that Ballston Two has shown a meritorious defense.

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[1]Tri-County objects to Goldberg's affidavit arguing that it is hearsay and inadmissable. However, Goldberg's conversation with Saratoga is not being offered for the truth of the matter asserted but rather for its impact on Goldberg and his decision not to serve a verified answer.

Based upon all these factors, Ballston Two's motion to vacate the Default Judgment is **GRANTED**.

Counsel for Ballston Two is to provide the Court with a Proposed Order, on notice to the other parties, within 20 days.

IT IS SO ORDERED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: June 14, 2018
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice