214 Lafayette House LLC v Akasa Holdings LLC
2019 NY Slip Op 31644(U)
June 5, 2019
Supreme Court, New York County
Docket Number: 153415/2018
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 153415/2018

214 LAFAYETTE HOUSE LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

AKASA HOLDINGS LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DEFAULT JUDGMENT.

In this action seeking declaratory relief, specifically the enforcement of certain easements, plaintiff 214 Lafayette House LLC ("Lafayette") moves, pursuant to CPLR 3215, for a default judgment against defendant Akasa Holdings LLC ("Akasa"). Akasa opposes the motion and cross-moves, pursuant to CPLR 3012(d), to compel Lafayette to accept its answer, as well as for the costs and legal fees it incurred in having to file the cross motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, Lafayette's motion is denied and Akasa's cross motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a protracted dispute between the parties concerning the existence and enforceability of an easement across Akasa's property located at 57 Crosby Streeet, New York, New York ("the 1981 easement"). Although a detailed recitation of the facts of the dispute are set forth in this Court's decision and order entered March 14, 2018 ("the March 2018

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order") in a related action styled *Akasa Holdings LLC v Lafayette House LLC*, New York County Index Number 155738/16 ("the 2016 action") (Ind. No. 155738, Doc. 138), a summary of the those facts, as well as additional pertinent facts, is set forth below.

In the 2016 action, Akasa sued Lafayette to quiet title pursuant to Article 15 of the Real Property Actions and Proceedings Law. An easement for emergency egress in favor of 214 Lafayette Street, a building owned by Lafayette, was filed in 1981 ("the 1981 easement"), burdening a strip of land at 57 Crosby Street. At the time of the filing of the 1981 easement, 57 Crosby Street and 214 Lafayette Street were part of the same lot. However, the lot was subdivided in 1984 and 57 Crosby Street became its own lot. When Akasa purchased 57 Crosby Street in 2011, the title search did not reveal the easement because the Register of the City of New York failed to include it in lot designation records pertaining to 57 Crosby Street.

Lafayette moved for summary judgment dismissing the complaint in the 2016 action and, in the March 2018 order, this Court granted the motion, holding that the ministerial failure by the register to update its records did not void the original recording of the easement. See Ind. No. 155738/16, Doc. 138. This Court reasoned that the 1981 easement was intended to protect emergency egress from 214 Lafayette Street, as well as to preserve the architectural quality of the neighborhood. Id.

On March 19, 2018, Akasa appealed the March 2018 order. See Ind. No. 155738/16, Doc. 140. The appeal, which was heard by the Appellate Division, First Department on April 17, 2019, is still pending.

Pursuant to a consent to change attorney filed April 5, 2018, David Slarskey, Esq. of Slarskey LLC became counsel for Akasa in the 2016 action. See Ind. No. 155738/16, Doc. 143.

Lafayette thereafter commenced the instant action by filing a summons and complaint on April 13, 2018. Doc. 1. As a first cause of action, Lafayette alleged that it was entitled to an injunction enforcing the 1981 easement. Doc. 1, at pars. 3-7. Specifically, Lafayette claimed that "[o]bstacles [placed or stored] on the 1981 [e]asement [s]trip [by Akasa were] obstructing [its] potential use of the 1981 [e]asement." Doc. 1 at par. 5.

As a second cause of action, Lafayette sought an injunction to enforce a 1999 easement ("the 1999 easement") granted by the former owner of 57 Crosby Street, which ran with the land, benefited 214 and 216 Lafayette Street, and burdened 57 Crosby Street. Doc. 1 at pars. 2, 9. Lafayette alleged that certain obstacles placed or stored by Akasa and located within the 1999 easement obstructed its potential use of the said easement. Doc. 1 at par. 12.

Lafayette served Akasa via the Secretary of State pursuant to Limited Liability Law § 303 on April 19, 2018. Doc. 2. On May 4, 2018, Lafayette filed an "Affidavit of Additional Mailing Pursuant to Default Requirements" which, it represented, was served in accordance with CPLR 3215(g)(4)(ii). Doc. 2. The affidavit was mailed to Akasa "c/o Legalinc Corporate Services Inc." at 1967 Wehrle Drive, Suite 1-086, Buffalo, New York 14221 ("the Buffalo address"). Doc. 2.

Lafayette now moves, pursuant to CPLR 3215, for a default judgment against Akasa. Doc. 4. In support of the motion, Lafayette submits, inter alia, the summons and complaint; the affidavit of service and the affidavit regarding the additional mailing of the summons and complaint; the attorney affirmation of Claudia G. Jaffe, Esq. of the firm of Butler, Fitzgerald, Fiveson & McCarthy, P.C. attesting, inter alia, to the fact that Akasa failed to answer the complaint; and the affidavit of Marcus Nispel, a member of Lafayette, who attests, inter alia, to the existence of the obstructions referenced in the complaint. On May 29, 2018, Lafayette

mailed the motion for default to Akasa at the Buffalo address. Doc. 24. On May 30, 2018, Lafayette filed an amended notice of motion which changed the return date. Doc. 25. The amended notice of motion was also mailed to Akasa at the Buffalo address. Doc. 26.

On September 25, 2018, Slarskey LLC filed a notice of appearance on behalf of Akasa in the captioned action. Doc. 28. The same day, Slarskey wrote to this Court to request a conference representing, inter alia, that Akasa "just became aware of [the captioned] action based on a routine review of the Court's docket." Doc. 29. Slarskey represented to this Court that service of the summons and complaint was deficient because Lafayette failed to comply with CPLR 3215(g)(4). Doc. 29. He further stated that, although he had spoken to Lafayette's attorney about this dispute only two weeks before the filing of the instant motion, Jaffe, who knew that Slarskey represented Akasa, neither mentioned that the complaint had been filed nor asked whether Slarskey would accept service on Akasa's behalf. Doc. 29. Slarskey insisted that a default judgment against Akasa was not warranted and that, if Lafayette did not accept Akasa's answer, it would seek permission to move to compel it to accept the same. Doc. 29.

At the request of Akasa's attorney, on or about September 26, 2018, this Court conducted a conference with counsel for both parties regarding whether Lafayette would accept Akasa's answer. Doc. 34 at 6. During the conference, this Court advised counsel for Lafayette that, if Akasa were forced to move to compel Lafayette to accept its answer, this Court would entertain as part of such an application a request for costs and attorneys' fees incurred in filing such motion. Doc. 34 at 6-7. However, Lafayette's attorney refused to accept Akasa's answer and Sklarskey stated his intention to cross-move to compel Lafayette to accept Akasa's answer.

On September 28, 2018, Lafayette filed an affidavit of service reflecting that the summons and complaint, as well as a notice reflecting service on the Secretary of State on April

19, 2018, were mailed to Akasa, at 40-55 Crosby Street, New York, New York 10012, and to Slarskey, the previous day. Doc. 30.

By notice of cross motion filed October 10, 2018, Akasa sought an order compelling Lafayette to accept its answer, as well as for any costs and legal fees it incurs in cross-moving for such relief. Doc. 33. In support of the cross motion Akasa submits, inter alia, the affidavit of its member Tony Krantz, as well as a proposed answer and counterclaim for adverse possession. Docs. 35, 40-41.

In his affidavit, Krantz states that, although he is friendly with Lafayette's principal, Nispel, Akasa did not learn about the captioned action until it attempted to retrieve from this Court's docket documents needed in connection with its appeal in the 2016 action. Doc. 35 at par. 7. He maintained that, within two weeks of learning about the captioned action, he retained Slarskey, Akasa's attorney in the 2016 action, to answer the complaint on the company's behalf. Doc. 35 at par. 7. He further maintained that, although Lafayette had "reached out" to Akasa in March 2018 to discuss the dispute giving rise to the captioned action, negotiations were unsuccessful and Lafayette filed the complaint herein. Doc. 35 at par. 9. Krantz insisted that he never received a copy of the summons and complaint from Lafayette or its counsel or from the Secretary of State. Doc. 35 at par. 9. He insisted that, if Akasa knew that the summons and complaint had been served, it would have appeared and defended the action, since

> [t]he existing structures belonging to Akasa, which encroach across the 1981 [e]asement, are extremely significant and important to Akasa. Without the [structures, a platform and an elevator], both of which block entry into 55 Crosby, Akasa would have no direct entrance into its residence at 55 Crosby, nor direct access from the residence at 55 Crosby into the adjoining yard/garden at 57 Crosby. Thus, Akasa has a strong motivation to defend this litigation on the merits, and to proceed with its counterclaim for adverse possession.

Doc. 35 at par. 11.

In a memorandum of law in opposition to Lafayette's motion and in support of its cross motion, Akasa argues that Lafayette is not entitled to a default judgment since it failed to properly serve the complaint. Doc. 34. Akasa further asserts that Lafayette must be compelled to accept its answer since its delay in answering was brief and did not prejudice Lafayette, it has a meritorious defense, and there is a strong public policy in resolving claims on their merits. Doc. 34.

Lafayette immediately responded to Akasa's cross motion, filing a "Notice of Rejection of Late Answer" on October 10, 2018. Doc. 42.

In a memorandum of law in further support of its motion and in opposition to the cross motion, Lafayette argues, inter alia, that it has established the criteria necessary for the granting of a default judgment against Akasa and that Akasa failed to establish a reasonable excuse for its delay in answering. Doc. 55.

LEGAL CONCLUSIONS:

Lafayette's Motion for Default

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him." It is well settled that in order to establish its entitlement to a default judgment pursuant to CPLR 3215, a party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). This Court has broad discretion in determining

whether a plaintiff is entitled to a default judgment. *See Nutley v SkyDive the Ranch*, 65 AD3d 443, 444 (1st Dept 2009).

"Declaratory judgment can rarely, if ever, be granted solely on default, with no inquiry by the court as to the merits." *Tanenbaum v Allstate Ins. Co.*, 66 AD2d 683, 684 (1st Dept 1978). Here, although Nispel, in his affidavit, purports to set forth facts constituting the claim, many of the representations he makes are based not on his personal knowledge, as he initially states, but rather on information provided to him by Jaffe and/or on information he equivocally says he "understand[s]". Doc. 22 at pars. 3, 4, 5, 11, 12, and 18. He also sets forth conclusory legal opinions in lieu of facts. Doc. 22 at pars. 11-13. Therefore, this Court finds that he has failed to establish the facts constituting the claim.[1]

Additionally, Lafayette has failed to establish proper service of the summons and complaint. It is clear that Akasa was served via the Secretary of State on April 19, 2018. Doc. 2. However, as Akasa argues, Lafayette was also required to serve an affidavit attesting to the fact that "additional service of the summons by first class mail has been made upon defendant corporation at its last known address at least twenty days before the entry of judgment" (CPLR 3215[g][4][i]) but failed to do so. *See Crespo v A.D.A. Mgmt.*, 292 AD2d 5 (1st Dept 2002) (additional mailing requirement applied to limited liability corporation served via the Secretary of State pursuant to Limited Liability Company Law ["LLCL"] § 303); *see also Foster Constr. Mgmt., LLC v Tillackdharry Seerattan,* 2013 NY Slip Op 31609(U) (Sup Ct New York County 2013); *but see Tan v AB Capstone Dev., LLC*, 163 AD3d 937, 939 (2d Dept 2018) (Second Department held additional mailing requirement set forth in CPLR 3215[g][4] inapplicable where

[1] Although a complaint verified by plaintiff may be used to set forth the facts constituting a claim for the purpose of a default motion pursuant to CPLR 3215 (*see Beltre v Babu*, 32 AD3d 722, 724 (1st Dept 2006), here the complaint was unverified.

service effectuated pursuant to LLCL 303). Although Lafayette submits an affidavit representing that it served Akasa with an additional copy of the summons, the affidavit does not mention that an additional copy of the complaint was served as well. Doc. 3. Further, the affidavit, which was sent to the Buffalo address, is silent regarding whether that was Akasa's last-known address. Doc. 3. Indeed, Lafayette's own search of the New York State corporations data base reflects that the Buffalo address was not Akasa's last-known address but rather the address of Legalinc Corporate Services, its registered agent for service. Doc. 8.

In summary, since service was improper, Jaffe's representation that Akasa failed to answer the complaint (Doc. 5 at par. 11) is without merit and the motion for default must be denied. This result is also warranted because Lafayette failed to establish the facts constituting the claim.

Akasa's Cross Motion to Compel and for Costs and Legal Fees

The Appellate Division, First Department recently held that:

> Under CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading "upon such terms as may be just," provided that there is a showing of a reasonable excuse for the delay. In reviewing a discretionary determination, the proper inquiry is whether the court providently exercised its discretion.
>
> In *Artcorp Inc. v Citirich Realty Corp.* (140 AD3d 417, 30 NYS3d 872 [1st Dept 2016]), [the Appellate Division, First Department] adopted the factors set forth in *Guzetti v City of New York* (32 AD3d 234, 238, 820 NYS2d 29 [1st Dept 2006, McGuire, J., concurring]) as those that "must . . . be considered and balanced" in determining whether a CPLR 3012 (d) ruling constitutes an abuse of discretion. Those factors include the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense (32 AD3d at 238).

Emigrant Bank v Rosabianca, 156 AD3d 468, 472-473 (1st Dept 2017).

In considering the foregoing factors, this Court, in its discretion, grants Akasa's motion to compel Lafayette to accept its answer.

Initially, any delay by Akasa was not unreasonable. The summons and complaint were filed on April 13, 2018 and thus its answer was due in May 2018. However, Akasa did not learn about the action until September 2018, at which time it retained Sklarskey as counsel, and he filed an answer and counterclaim on October 10, 2018. Doc. 41. There is no indication in the motion papers that Akasa's actions were in any way willful or that they prejudiced Lafayette.

Akasa proffers as a reasonable excuse for failing to answer that it was never served with the summons and complaint. Since Lafayette submits an affidavit of service reflecting that Akasa was served with process via the Secretary of State, service on it was presumptively valid. *Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 111 AD3d 800 (2d Dept 2013). Although Akasa's excuse for its delay is "less than compelling", such an excuse is acceptable on a CPLR 3012(d) motion given the "strong preference in our law that matters be decided on their merits in the absence of demonstrable prejudice." *Elemery Corp. v 773 Assoc.*, 168 AD2d 246, 247 (1st Dept 1990). Given this policy, as well as the fact that Akasa is represented by counsel and clearly wishes to participate in this litigation, its motion to compel Lafayette to accept its answer is granted. In light of this determination, this Court need not address the merits of Akasa's defense of adverse possession at this juncture.

With respect to Akasa's demand for costs and attorneys' fees, this Court notes that Jaffe does not deny that she initially refused to participate in a conference call with this Court to discuss the possible acceptance of Akasa's answer. Although Jaffe then agreed to participate in a conference call, during which she was advised by this Court that it was inclined to deny a motion

for default and to grant a motion compelling Lafayette to accept Akasa's answer, and that this Court would entertain a motion for costs and fees if Akasa were forced to move to compel Lafayette to accept its answer, she nevertheless moved for a default judgment. While this Court does not condone this type of sharp practice, it finds that Jaffe's actions did not rise to the level of frivolous conduct punishable pursuant to 22 NYCRR 130-1.1. Moreover, Slarskey fails to cite any case supporting Akasa's argument that such sanctions should be imposed. Nor does he submit any documentary evidence supporting Akasa's claim that it is entitled to over $8,000 in attorneys' fees in connection with Akasa's cross motion to compel. Rather, Slarskey merely speculates that he "expect[s] to incur" $8,290 in legal fees in connection with the default motion and the cross motion to compel.[2]

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff 214 Lafayette House LLC seeking a default judgment against defendant Akasa Holdings LLC is denied; and it is further

ORDERED that the cross motion by defendant Akasa Holdings LLC seeking to compel plaintiff to accept its answer is granted, and the answer filed by said defendant on October 10, 2018 (Doc. 40) is deemed served *nunc pro tunc*; and it is further

[2] This Court notes that, in its motion papers, Akasa only seeks costs and fees incurred in connection with its cross motion.

ORDERED that the parties are to appear for a preliminary conference in this matter on August 13, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

6/5/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE