

Goldstein v Sandhu
2019 NY Slip Op 32954(U)
October 4, 2019
Supreme Court, Kings County
Docket Number: 521016/18
Judge: Wavny Toussaint
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of October, 2019.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

-----X

GLORIA GOLDSTEIN,

Plaintiff,

- against -

CH MUHAMMAD I.A. SANDHU
and JAMIL A. ILAZ,

Defendants.

-----X

DECISION AND ORDER

Index No. 521016/18

Mot. Seq. No. 1

The following e-filed papers read herein:¹

NYSCEF No.:

Notice of Motion, Affirmation, and Exhibits Annexed _____
Affirmation in Opposition _____
Affirmation in Reply and Exhibits Annexed _____

8-10 _____
13 _____
20 _____

In this action to recover damages for personal injuries, defendant Jamil A. Ijaz, incorrectly sued herein as Jamil A. Ilaz (defendant), moves for an order, pursuant to CPLR 3012 (d), to compel plaintiff Gloria Goldstein (plaintiff) to accept defendant's late answer. Plaintiff opposes the application.

¹ The Court has not considered plaintiff's Affirmation in Reply to Defendant's Reply Affirmation, dated Apr. 30, 2019 (NYSCEF #20). It is an improper surreply.

Background

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a trip and fall in front of the premises known as 120 Foster Avenue, Brooklyn, New York, on October 19, 2015. The building is allegedly owned by the defendants. According to plaintiff's affirmation in opposition (at ¶ 4), defendant CH Muhammad I.A. Sandhu died before the inception of this action. This action against him is therefore dismissed, as a nullity.

Plaintiff commenced the instant action on October 18, 2018. Plaintiff commenced a prior action against the City of New York under index No. 500581/2017, arising from the same incident. The prior action, to date, has not advanced beyond the filing of an affidavit of service of process. On November 27, 2018, defendant was personally served with process at her residence at 420 Foster Avenue in Brooklyn, New York. Subsequently, defendant forwarded the summons and complaint to her insurance carrier, Liberty Mutual Insurance (LMI).

By letter, dated December 4, 2018, LMI advised defendant (with a copy to plaintiff's counsel) that it was investigating, in light of the service of process on defendant at an address that was different from that of the building (that is, at 420 Foster Avenue, rather than at 120 Foster Avenue), whether she in fact resided at the building at the time of the incident. By email to plaintiff's counsel, dated December 6, 2018, LMI requested an adjournment of defendant's time to answer until January 12, 2019. Plaintiff's counsel did not respond to LMI's request.

On Dec. 17, 2018, Defendant's time to answer expired on December 17, 2018. By letter dated January 4, 2019, LMI advised defendant (with a copy to plaintiff's counsel) that it was providing her with defense in this action, subject to the reservation of rights under the policy.

On January 9, 2019, defendant's counsel, as provided to her by LMI, filed an answer to the complaint (NYSCEF #5). On January 10, 2019, plaintiff's counsel rejected the answer, as untimely. Defendant thereafter, moved to compel plaintiff, to accept defendant's late answer.

Discussion

Pursuant to CPLR 3012 (d); "[u]pon the application of a party, the court may . . . compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." As the Second Judicial Department explained:

"In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (*see* CPLR 2004, 3012 [d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists."

(*Yongjie Xu v JJW Enters., Inc.*, 149 AD3d 1146, 1147 [2017]; *see also Klughaupt v Hi-Tower Contrs., Inc.*, 64 AD3d 545, 546 [2d Dept 2009]).

Here, defendant requested an extension of time from plaintiff's counsel to serve an answer *before* her time to do so expired. After plaintiff failed to respond and rejected defendant's answer as late, defendant promptly moved to vacate her default

(see *Himmelstoss v Parent's Aid Society*, 96 AD2d 576, 577 [2d Dept 1983]). Considering the lack of prejudice to plaintiff as a result of a relatively short 24-day delay in serving her answer, the lack of willfulness on defendant's part, the public policy favoring the resolution of cases on their merits, and a potentially meritorious defense, the Court, in the exercise of its discretion, excuses defendant's minimal delay in answering (see *Covaci v Whitestone Const. Corp.*, 78 AD3d 1108 [2d Dept 2010]; *Klughaupt*, 64 AD3d at 546).

Contrary to plaintiff's contention, defendant has demonstrated a potentially meritorious defense in her answering papers, since the recording information for the subject building describes it as a one-to-two family dwelling with an attached garage and/or vacant land.² The decisions cited by plaintiff in her opposition are easily distinguishable. In *Integon Natl. Ins. Co. v Noterile* (88 AD3d 654, 655 [2d Dept 2011]), the defendants' contention that their insurance company delayed in informing them that it would *not* defend them, was considered "insufficient." Here, however, LMI is representing defendant. Unlike *Leifer v Pilgreen Corp.* (62 AD3d 759 [2d Dept 2009]), which involved a ten-month delay in moving to vacate a default, the delay here was under one month. This case is a far cry from *Spitzer v Landau* (104 AD3d 936 [2d Dept 2013]), in which the defendant's unsubstantiated claims that his insurer was defending him were manifestly unreasonable, given that he had been served with the plaintiff's motion for leave to enter a default judgment.

² See Recording and Endorsement Cover Page, annexed as Exhibit F to defendant's opening affirmation (collectively filed with all other defense exhibits under NYSCEF #10).

In the instant case, LMI's December 6, 2018 email to plaintiff's counsel requesting an extension of time to answer the complaint was transmitted *before* defendant's time to answer expired on December 17, 2018.³ Plaintiff's counsel's mere denial of receipt of an email is insufficient to rebut a presumption that a party has received an email when it is delivered to the party's email address in accordance with regular office procedures (*see Thomas v Karen's Body Beautiful LLC*, 168 AD3d 500, 501 [1st Dept 2019]; *see also Lockette v Morgan Stanley*, 2018 WL 4778920, *4 [SD NY 2018]).

Conclusion

Based on the foregoing and after oral argument, it is **ORDERED** that defendant's motion in Seq. No. 1 is granted; and it is further **ORDERED** that defendant's answer, dated Jan. 7, 2019 (NYSCEF #5), is deemed served; and it is further

ORDERED that the action against defendant CH Muhammad I.A. Sandhu is dismissed. The action is severed and shall continue as against defendant Jamil A. Ilaz; and it is further

ORDERED that the caption is amended as follows:

³ The email is annexed to defendant's opening affirmation as Exhibit I.

Gloria Goldstein,

Plaintiff

Index # 521016/2018

-against-

Jamil A. Ilaz,

Defendant

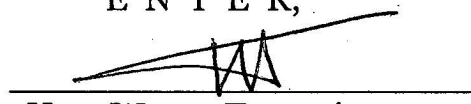
and it is further

ORDERED that this matter is set down for a preliminary conference on December 3, 2019, in the Intake Part; and it is further

ORDERED that defendant's counsel shall electronically serve a copy of this Decision and Order with notice of entry on plaintiff's counsel and shall electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

E N T E R,



Hon. Wavny Toussaint
J.S.C.

HON. WAVNY TOUSSAINT
J.S.C.