Martin Assoc. Inc. v JT Magen & Co. Inc.
2020 NY Slip Op 30879(U)
March 27, 2020
Supreme Court, New York County
Docket Number: 154181/2019
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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MARTIN ASSOCIATES INC,

Plaintiff,

- v -

JT MAGEN & COMPANY INC, 140 WEST STREET (NY) LLC, MAGNUM REAL ESTATE GROUP LLC, LIBERTY MUTUAL INSURANCE COMPANY A/K/A LIBERTY MUTUAL INSURANCE COMPANY OF BOSTON, MASSACHUSETTS

Defendants.

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INDEX NO. 154181/2019

MOTION DATE 02/20/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for JUDGMENT - DEFAULT.

Motion by plaintiff Martin Associates Inc. ("Plaintiff"), pursuant to CPLR 3215 (a), for a default judgment on the First Cause of Action of the mechanics lien foreclosure against defendants J.T. Magen & Company. ("JTM"), 140 West Street (NY) LLC, Magnum Real Estate Group LLC ("the owner") and JTM's surety Liberty Mutual Insurance Company a/k/a Liberty Mutual Insurance Company of Boston, Massachusetts ("Liberty") (collectively "Defendants"), on the Second Cause of Action of the account stated against JTM, and on the Third Cause of Action of the breach of contract against JTM, and for the entry of judgment in favor of Plaintiff and against Defendants and Liberty jointly and severally in the amount of $218, 296.80 plus interest is denied for the reasons stated herein; and

Cross-motion by Defendants, pursuant to CPLR 3012 (d), compelling Plaintiff to accept the Verified Answer filed by Defendants in the action on November 21, 2019 is granted for the reasons stated herein.

BACKGROUND

On April 23, 2019, Plaintiff—a subcontractor who was hired by the general contractor JTM to perform work on the owner's 47 apartment units in the property located at 140 West Street, New York, New York ("the property")—commenced the instant action against JTM and its surety Liberty, and the owner, seeking a judgment in its favor for an allegedly remaining balance of $218, 296.80 for alleged services performed and materials furnished for the property. Specifically, Plaintiff asserts three causes of action:

- Under the **First Cause of Action**, Plaintiff alleges it is entitled to judgment on the basis of the foreclosure of its Mechanic's Lien[1] totaling $218, 296.80 against Defendants. (Affirm in Supp, Ex 4 ¶¶1-21 [NYSCEF No 43, originally No 1] [Summons and Verified Complaint].)
- Under the **Second Cause of Action**, Plaintiff alleges it is entitled to judgment against JTM on the basis of an account in the same sum of $ 218, 296.80 with interest. (*Id.* ¶¶ 22-26.)
- Under the **Third Cause of Action**, Plaintiff alleges it is entitled to judgment against JTM on the basis of a breach of contract in the same sum of $218, 296.80 with interest from the date to be proven at the trial. (*Id.* ¶¶ 28-32.)

Additionally, on April 24, 2019, Plaintiff filed a Notice of Pendency. (Affirm in Supp, Ex 5 [NYSCEF No 44, originally No 3] [Notice of Pendency].)

On May 29, 2019, Liberty was served with the Summons, Verified Complaint and Notice of Pendency. (Affirm in Supp, Ex 1 at 10 [NYSCEF No 40, originally NYSCEF No 8] [Liberty's Affidavit of Service].) On June 6, 2019, the remaining defendants were served with the Summons, Verified Complaint and Notice of Pendency. (Affirm in Supp, Ex 1 at 3, 5, 7 [NYSCEF No 40, originally Nos 5, 6, 7].)

On August 14, 2019, JTM and Liberty e-filed a motion to dismiss ("the Motion to Dismiss") seeking the dismissal of the First Cause of Action of the mechanics lien foreclosure against Defendants, or in the alternative, the dismissal of the action against the owner, and the canceling and vacating of the Notice of Pendency filed in the action. (Affirmation in Supp [Seq 001] at 2, NYSCEF 14.) In its Decision and Order, dated November 21, 2019 ("the Seq 001 Decision") this Court denied JTM and Liberty's Motion to Dismiss, reasoning that the motion was untimely and did not recite any section of the CPLR under which it was made. This Court further "denied as academic" an application "for time to be allowed to move for an extension of time to answer" pursuant CPLR 3012 (d). (Affirm in Supp, Ex 6 [Seq 001 Decision], NYSCEF No 45.)

Also, on November 21, 2019—the very same day that this Court issued the Seq 001 Decision—Defendants filed a Verified Answer. (Affirm in Supp, Ex 7, NYSCEF No 46 [Verified Answer].)

On November 22, 2019, and in response to the Verified Answer, Plaintiff sent a letter to Defendants rejecting the Verified Answer and argued that the Verified Answer was "in direct contravention" of the Seq 001 Decision. (Affirm in Supp, Ex 8, NYSCEF No 47 [Notice of Rejection and Rejection Letter].) Plaintiff's rejection letter argued that at the time of the filing of the Motion to Dismiss, Defendants were "in default" and "the court issued an order denying, among other things, the defendants [sic] application for an extension of time to answer the complaint." (Affirm in Supp, Ex 8, NYSCEF No 47 [Notice of Rejection and Rejection Letter].)

[1] Plaintiff filed a Mechanic's Lien on the property against the owner and JTM in the Office of the County Clerk of the County of New York on February 19, 2019 in the sum of $218, 296, allegedly for uncompensated work and materials furnished. (NYSCEF No 4 [Mechanic's Lien].)

In response to Plaintiff's rejection, Defendants sent a letter to Plaintiff arguing that the Verified Answer was not "in direct contravention" of the Seq 001 Decision. (Affirm in Supp, Ex 9 [December 3, 2019 Letter].) Defendants' letter stated that the decision did not amount to an entry of default judgment against Defendants—noting that the Seq 001 Decision did not mark the matter final—and instead regarded the Motion to Dismiss alone. (*Id.*) Defendants' letter further stated that "the State's policy of resolving disputes on the merits militate[d] in favor of permitting a defendant to answer where doing so does not prejudice plaintiff." (*Id.*, citing *Naber Elec. v Triton Structural Concrete, Inc.*, 160 AD3d 507 [1st Dept 2018].)

In response to Defendants' letter, Plaintiff sent a letter to Defendant reiterating its position that it was rejecting the Verified Answer. (Affirm in Supp, Ex 10 [December 13, 2019 Letter].) Plaintiff's letter stated that at the time of the filing of the Motion to Dismiss, Defendants were in default in answering the complaint. (*Id.*) The letter further stated that prior to filing the Motion to Dismiss, Defendants had not requested an extension of time to answer the complaint or to make a pre-answer motion addressing the complaint. (*Id.*) The letter argued that although Defendants asked in their motion for an extension of time to answer the Complaint, this request was denied by the Seq 001 Decision. (*Id.*)

Presently, Plaintiff moves this Court for an order pursuant to 3215 (a) granting a default judgment on the First Cause of Action of the mechanics lien foreclosure against Defendants and Liberty, on the Second Cause of Action of the account stated against JTM, and on the Third Cause of Action of the breach of contract against JTM, and for the entry of judgment in favor of Plaintiff and against Defendants and Liberty jointly and severally in the amount of $218,296.80 plus nine percent pre-judgment interest accruing from no later than September 27, 2018. (Affirm in Supp ¶ 2, NYSCEF No 37.)

In addition to opposing Plaintiff's motion for a default judgment, Defendants, in their cross-motion, ask the Court to compel Plaintiff to accept the Verified Answer, filed by Defendants in the action on November 21, 2019, pursuant to CPLR 3012 (d). (Affirm in Opp and in Supp of Cross-Motion ¶ 2 [NYSCEF 51].)

ARGUMENTS

Plaintiff argues that its motion for default judgment is timely made within one year of the commencement of the action. (Memo in Supp at 10 [NYSCEF 39].) Plaintiff further alleges that it has submitted proof of service of the summons and complaint by affidavits of service filed with this court, as well as proof of the facts submitted by affidavit of Plaintiff's President and the verified complaint constituting the causes of action. Plaintiff asserts that Defendants' default is confirmed by the Seq 001 Decision. (*Id.* at 9, 12.)

Plaintiff emphasizes that Defendants' Motion to Dismiss was served and filed on August 14, 2019, sixty-nine (69) days after defendants JTM, 140 LLC and Magnum LLC were served with the summons and complaint, and seventy-eight (78) days after defendant Liberty was served with the summons and complaint. (*Id.* at 10.) Plaintiff underscores that the Motion to Dismiss was untimely pursuant to CPLR 3211(e) as it was not made before service of their answer was required. (*Id.* at 11.)

In response, Defendants oppose Plaintiff's motion for a default judgment. (Memo in Opp at 2.) Defendants argue that their delay was excusable. (*Id.* at 9 n 6.) Defendants further argue that under CPLR 320 (a)—which provides 20 days to appear "by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer"—they had until June 26, 2019 to appear. Defendants assert that they eventually appeared on August 14, 2019 when they filed the Motion to Dismiss. Based on this, Defendants assert that only 49 days elapsed between when they should have appeared and when they actually appeared. Defendants argue that a 49-day delay in appearing is excusable. Defendants further argue that they have a reasonable excuse for this 49-day delay and a meritorious defense to the claims set out in the Complaint, and that Plaintiff was not prejudiced by the delay. (*Id.* at 3, 9.) Lastly, Defendants argue that this action should be litigated on the merits in the interests of justice. (*Id.* at 11.) As such, Defendants cross-move, pursuant to CPLR 3012 (d), to compel Plaintiff to accept their Verified Answer.

Regarding the delay, Defendants argue that the delay was caused by the failure of an associate, who is no longer employed by Defendants, to adhere to internal and external deadlines. (*Id.* at 3-4.) Defendants allege that as early as June 7, 2019, the day after service of the Complaint was made on all but one party in the instant action, Defendants' counsel determined that it would file a pre-answer motion to dismiss and tasked the aforementioned associate with preparing a draft thereof. (Affirm in Opp and in Supp of Cross-Motion, Ex G [NYSCEF 60].) Defendants allege that this draft was to be submitted on June 11, 2019. Defendants further assert that said draft, however, was actually submitted on June 18, 2019, roughly one week late. (*Id.* at 3.) Defendants assert that the draft was reviewed that same day and deemed insufficient. (*Id.*). Defendants assert that, with Defendants' counsel, intending to file the motion "before the 4th of July," said counsel continued to seek status updates in connection with the motion to dismiss; however, such efforts—also due in part to the fact that the firm's Construction Law group was inundated with work—did not result in the motion's timely filing. (*Id.* at 3-4.) Defendants state that this failure was not indicative of an abandonment of Defendants' defenses. (*Id.* at 4.)

Regarding the meritorious defense, Defendants argue that Plaintiff performed deficient work and thereafter abandoned the property and thereby breached the contract. (Memo in Opp and Supp of Cross-Motion at 5, *see also* Memo in Opp and Supp of Cross-Motion, Ex B [NYSCEF 55] [emails by Plaintiff]; Memo in Opp and Supp of Cross-Motion, Ex A at 5 ¶ 25 [Subcontract] ["Any dispute relating to or arising out or in connection with or as a result of or as a consequence of this Agreement or its termination, the performance of the work shall be resolved by litigation in a court of competent jurisdiction. Pending resolution of any such dispute, Subcontractor agrees to continue the performance of the work notwithstanding the existence of such dispute[.]")

Defendants further argue that even if Plaintiff had intended in good faith to fully perform under the contract, its recovery under the contract would not be $218,296.80. (Memo in Opp and Supp of Cross-Motion at 6-7 [NYSCEF 53].) Defendants also dispute Plaintiff's claims as to the validity of its mechanic's lien and argue that it is Plaintiff who owes JTM a sum of $185,795.13 (*Id.* at 7.) Defendants moreover argue that Plaintiff's lien is untimely. (*Id.* at 8.)

Defendants lastly assert that Plaintiff was not prejudiced because Defendants argue, Plaintiff is "in no rush to move this action along." (*Id.* at 11) To support their assertion, Defendants allege that Plaintiffs also delayed the action and did not file for a default judgment previously. (*Id.* at 10-11.)

In reply, Plaintiff argues that Defendants did not dispute that Plaintiff has satisfied the requirements for an entry of default against Defendants pursuant to CPLR 3215 (f). (Reply Memo in Supp at 7 [NYSCEF 64].) Plaintiff further argues that Defendants' application for an extension of time pursuant to CPLR 3012 (d) was denied by this Court's Seq 001 Decision. (*Id.* at 8.) Plaintiff further argues that Defendants had 30 days to serve a motion for leave to reargue the order denying the application seeking an extension of time to answer pursuant to CPLR 2221 (d). Plaintiff also argues that Defendants failed to establish excusable law office failure, a meritorious defense, and the granting of the cross-motion would prejudice Plaintiff. (*Id*. at 12-15.)

DISCUSSION

CPLR 3215 (a) provides, in relevant part, that "[w]hen a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default." On a motion for a default judgment under CPLR 3215, based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint, (2) proof of the facts constituting its claim, (3) proof of the defendant's default in answering or appearing, and (4) proof of the amount due by an affidavit made by the party. (*See* CPLR 3215 [f].) "Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and amount due." (*Id.*) On the other hand, it has been consistently held that "a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006] [internal citations omitted].)

Notwithstanding a party's default, a motion court may, in its discretion, refuse to enter default judgment against that party. (*Meyer v Rose*, 160 AD2d 565 [1st Dept 1990]; *Emigrant Bank v Rosabianca,* 156 AD3d 468, 472 [1st Dept 2017] ["Under CPLR 3012 (d), a trial court has the discretionary power to . . . compel acceptance of an untimely pleading . . ."].)

CPLR 3012 (d) provides, "Upon the application of a party, the court may extend the time to appear or plead, or 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."

The First Department has held that in considering applications under CPLR 3012 (d), for an extension of time to appear or plead in an action, a motion court must consider and balance five factors: (1) the length of the delay; (2) the excuse offered; (3) the extent to which the delay was willful; (4) the possibility of prejudice to adverse parties; and (5) the potential merits of any defense. (*Emigrant Bank,* 156 AD3d at 472; *see also Pichardo v 969 Amsterdam Holdings, LLC*,

176 AD3d 571, 571 [1st Dept 2019] ["Given that no default judgment had been entered, defendant was not required to demonstrate a meritorious defense."] [internal citations omitted]; *Naber Electric v Triton Structural Concrete, Inc.*, 160 AD3d 507, 508 [1st Dept 2018] ["[A]n affidavit of merit is not essential to the relief sought by defendants before entry of a default order or judgment[.]"] [internal quotation marks and citations omitted].)

The Court will first consider whether to grant Defendants' cross-motion to compel acceptance of the Verified Answer—as granting such will render Plaintiff's motion for a default judgment academic.

Regarding the first factor, the length of delay, other courts have held similar to or much longer than Defendants' 49-day delay to be excusable. (*See Hertz Vehicles, LLC v Mollo*, 171 AD3d 651, 651 [1st Dept 2019] [excusing a three month delay occasioned by law office failure]; *Nedeltcheva v MTE Transportation Corp.*, 157 AD3d 423, 423 [1st Dept 2018] [excusing a one-month delay in service of an answer]; *Junior v City of New York*, 85 AD2d 683, 684 [2d Dept 1981] ["The defendant's delay in answering was not substantial — only 33 days elapsed between the time when the defendant should have answered pursuant to statute . . . and the time when the answer was actually served."].)

Regarding the second factor, the excuse for the delay, Defendants' excuse based on law office failure, as supported by exhibits, "while not particularly compelling," is sufficient to show good cause for the delay. (*See Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]; *see also Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016] [excusing a failure to regularly check office mail as law office failure]; *Govt. Employees Ins. Co. v Ave. C Med., P.C.*, 166 AD3d 857, 859 [2d Dept 2018] [excusing miscommunication between former and present counsel as law office failure].)

Regarding the third factor, the absence or presence of willfulness, Defendants' delay did not result from willfulness, but rather resulted from the failure—or, perhaps, the poor management—of the former associate to which the drafting of the motion to dismiss was assigned. (*Compare Emigrant Bank*, 156 AD3d at 473 [knowingly causing delay considered willful], *with Govt. Employees Ins. Co.*, 166 AD3d at 859 [delay resulting from miscommunication among counsel considered not willful], *and Josovich v Ceylan*, 133 AD3d 570, 571 [2d Dept 2015] [delay resulting from law office failure considered not willful].)

Regarding the fourth factor, the possibility of prejudice to an adverse party, Plaintiff presents no evidence that it has been prejudiced by Defendants' 49-day delay in appearing. In contrast, granting a default judgment here would result in a windfall to Plaintiff and would violate this state's public policy of resolving cases on the merits. (*See Emigrant Bank*, 156 AD3d at 472; *see also BPS Mgt. Corp. v New York Tit. Ins. Co.*, 115 AD2d 921, 922 [3d Dept 1985] [finding that the motion court abused its discretion when it granted a default judgment despite a short delay, presence of a meritorious defense, absence of prejudice to the adverse party, and the public policy favoring the resolution of cases on the merits].)

Regarding the fifth factor, the absence or presence of a meritorious defense, Defendants provide Exhibits A-E which, at this early stage, are sufficient to set forth a potentially meritorious defense against the breach of contract, account payable, and lien foreclosure claims.

In sum, a consideration of all five factors supports granting Defendants' cross-motion. (*Emigrant Bank*, 156 AD3d at 472.) By granting Defendant's cross-motion to compel Plaintiff's acceptance of the Verified Answer, this Court also finds that Plaintiff is not entitled to a default judgment. Pursuant to this state's longstanding policy, this action will be litigated upon the merits. (*Pichardo, LLC*, 176 AD3d at 571.)

On Motion Seq 001, this Court denied the Motion to Dismiss because it was untimely, along with Defendants' failure to cite the CPLR provision under which it was made. When the Court "denied as academic" Defendants' request—in a footnote in the Defendants' reply memorandum on the Motion to Dismiss—seeking additional time to make another motion for further additional time to serve an answer, by no means did this Court indicate that Plaintiff was entitled to a default judgment. At the time that Seq 001 was issued, this Court did not have a motion pursuant to CPLR 3012 (d) to extend the time to serve the answer—only a request for more time to make such a motion—nor had Plaintiff yet rejected the answer. As such, "denied as academic" merely meant that Defendants were required to serve an answer within 10 days, (*see* CPLR 3211 [f]), of being served with notice of entry of the Seq 001 Decision—which they did on the same day the Seq 001 Decision was filed and before they were served with notice of entry. As Defendants noted in their December 3, 2019 letter to Plaintiff, this Court did not mark this matter as "final" in the Seq 001 Decision. The Court also did not direct the clerk to enter judgment in favor of Plaintiff. In Plaintiff's letter rejecting the Verified Answer, Plaintiff stated that "plaintiff Martin rejects the verified answer as defendants filing of said answer is in direct contravention of this court's order." (NYSCEF No 47.) Plaintiff argued that "[o]n November 21, 2019 the court issued an order denying, among other things, the defendants [sic] application for an extension of time to answer the complaint." (*Id*.) This is a misreading and misstatement of the Seq 001 Decision, which held that "an application for time to be allowed to move for an extension of time to answer" was "academic." (NYSCEF No 45 [emphasis added].) To brief a motion on such a misreading is an unnecessary burden on judicial resources.

Going forward, this Court expects better.

CONCLUSION

Accordingly, it is

ORDERED that the motion by plaintiff Martin Associates Inc. ("Plaintiff"), pursuant to CPLR 3215(a), for a default judgment on the First Cause of Action of the mechanics lien foreclosure against defendants J.T. Magen & Company. ("JTM"), 140 West Street (NY) LLC, Magnum Real Estate Group LLC ("the owner") and JTM's surety Liberty Mutual Insurance Company a/k/a Liberty Mutual Insurance Company of Boston, Massachusetts ("Liberty") (collectively "Defendants"), on the Second Cause of Action of the account stated against JTM, and on the Third Cause of Action of the breach of contract against JTM, and for the entry of judgment in favor of Plaintiff and against Defendants and Liberty jointly and severally in the amount of $218,296.80 plus interest is denied; and it is further

ORDERED that the cross-motion by Defendants compelling Plaintiff to accept the Verified Answer filed by Defendants in the action on November 21, 2019, pursuant to CPLR 3012 (d), is granted; and it is further

ORDERED that the counsel for Defendants shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within twenty (20) days after the Governor's Executive Order 202.8 or any other order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Order of the Chief Administrative Judge of the Courts dated March 20, 2020 (AO/71/20).

The foregoing constitutes the decision and order of this Court.

3/27/2020
DATE

ROBERT DAVID KALISH, J.S.C.

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