Perez v Liberty Sq. Realty Corp.
2020 NY Slip Op 33156(U)
August 12, 2020
Supreme Court, Bronx County
Docket Number: 24763/2019E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

PEDRO PEREZ,

Plaintiff,

-against-

LIBERTY SQUARE REALTY CORP.

Defendants.

Index No. 24763/2019E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.:

In this personal injury action, defendant moves to vacate this court's January 17, 2020 Order granting plaintiff's motion for a default judgment and setting the matter for an inquest (CPLR 5015); to vacate the Note of Issue filed on May 11, 2020; and, to extend the time to respond to the Complaint until September 3, 2020. Plaintiff cross-moves to oppose defendant's application to file a late Answer, and for a new default judgment against defendant (CPLR 3215).

Plaintiff submits an affidavit in support of his motion wherein he states that on April 16, 2017, at 2:30 p.m. in front of the Old Bronx Borough Courthouse, located at 513 East 161st Street in Bronx County, he fell on a raised crack in the sidewalk and was injured.

Defendant claims that the sidewalk was part of a massive construction project involving, among others, Bagiana Construction Corp. and Jaid Contraction Corp., as contractors. Plaintiff has filed two actions regarding the same incident, seeking the same relief from different parties. The first was filed on October 24, 2017 which, in addition to defendant in the instant action, includes The City of New York, and The Landmarks Preservation Commission of the City of New York as defendants (2017 action). The second action, which is the instant case, was filed on April 22, 2019, against defendant only (2019 action). The Complaints in both cases were verified only by plaintiff's attorney. Defendant notes that despite the existence of the 2017 action, the Request

for Judicial Intervention (RJI) filed by plaintiff's counsel for the 2019 action did not list the 2017 action as a related case.

Notwithstanding the affidavits of service showing that defendant was served with the Summons and Complaint in each action by service upon the Secretary of State--- on October 31, 2017 in the 2017 action, and on April 30, 2019 in the 2019 action--- defendant's President, Henry Weinstein (Weinstein), and Corporate Secretary, Benjamin Klein (Klein), aver in affidavits submitted, that defendant never received the Summons and Complaint from the Office of the Secretary of State in either action. Defendant also claims that it did not receive letters dated November 25, 2019, three days before the Thanksgiving Day holiday, with a copy of the Summons and Complaint and notice, stating that an application for a default judgment would be made in the 2019 action.

Plaintiff's motion for a default judgment in the 2019 action was made on December 23, 2019, which defendant claims to have received on December 31, 2019, being unaware, according to Weinstein and Klein, of either action (see Affidavits). Defendant emailed the papers to its attorney, however, according to defendant's attorney, "[d]ue to the long holiday weekend and problems with the email system, the email was not available or read until after the January 16th return date of the motion." (Gelnick Affirm., p. 4, ¶ 22). Defendant further claims that notice of the default judgment was received at the end of January, at which time defendant's counsel contacted plaintiff's attorney to obtain a stipulation to vacate the default. Due to Covid-19, communication was interrupted and on May 11, 2020, plaintiff filed a Note of Issue. On July 14, 2020, defendant filed the instant motion.

In their affidavits, Weinstein and Klein each claim that throughout 2017, they inspected all of the sidewalks surrounding 513 East 161st Street at least once weekly, and arranged for repair of any defects; that in April 2017 they did not observe any significant defects; and, that the sidewalks

The difference between the two sections is that a motion pursuant to CPLR 5015 must show the existence of a reasonable excuse for the default. Unlike CPLR 317, the manner in which the defendant was served with process is not important. Even a defendant ostensibly served by personal delivery with actual knowledge of the action may seek vacatur by arguing that there is legitimate excuse for not appearing in time to defend the action. In contrast, under CPLR 317 the defendant need not demonstrate a reasonable excuse for the default. The other distinction is the time limit imposed by CPLR 317. (*See Xiao Lou Li v China Cheung Gee Realty, LLC*, 139 AD3d 724, 724-725 [2nd Dept 2016]; *Pena v Mittleman*, 179 AD2d 607, 608-609 [1st Dept 1992].)

To prevail on its application for a default judgment, a plaintiff must demonstrate proof of service of the Summons and Complaint on the defendant; establish that the defendant is in default; and, submit proof of the facts constituting the plaintiff's claim (CPLR 3215 [f]). When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to Business Corporation Law § 306 (b), an affidavit shall be submitted to show that an additional service of the Summons by first class mail has been made upon the defendant corporation (CPLR 3215 [g] [4] [i]). Moreover, "[s]ome proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]).

Plaintiff agrees to vacating the default judgment because there were insufficient admissible evidentiary facts to support the merits of the negligence claim, which is necessary to obtain the default (*see Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). However, based on the unrefuted affidavits of service, and plaintiff's affidavit regarding how the accident occurred, plaintiff now seeks to once again have a default judgment entered. Plaintiff argues that affidavits submitted by defendant are conclusory and that the delay in submitting the Answer was intentional and not inadvertent, as evidenced by defendant's counsel's January 30, 2020 email to plaintiff's attorney

stating that he was investigating the matter. Inasmuch as the default judgment is vacated, defendant's arguments are considered in opposition to plaintiff's cross motion for a default judgment.

Notwithstanding that defendant avers that it did not have notice of the litigation until December 31, 2019, plaintiff has filed proof of service of the Summons and Complaint, proof of an additional service (CPLR 3215 [g] [4] [i]), and proof of the default. However, although plaintiff submits an affidavit stating that he was injured, he does not provide proof of the facts constituting a claim against defendant, especially in light of defendant's assertion that the sidewalk was part of a massive construction project involving several contractors (*see Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1st Dept 1999]; *Feffer v Malpeso*, 210 AD2d at 61). Nor does plaintiff provide an explanation regarding the identical action filed in 2017, wherein he seeks identical relief from other defendants.

CPLR 3012 (d) provides:

> d) Extension of time to appear or plead. 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*. (emphasis added).

In *Guzetti v City of New York* (32 AD3d 234, 238 [1st Dept 2006]), the Court explained that the legislative history behind CPLR 3012 (d) established that "the potential merits of a defense are only one factor in the court's discretionary determination; the length of delay, the excuse offered, the absence (or presence) of willfulness and the possibility of prejudice to other parties to the action must also be considered and balanced in determining whether relief is appropriate." (*See Emigrant Bank v Rosabianca*, 156 AD3d 468, 481 [1st Dept 2017].)

In the affidavits submitted by defendant, details are provided regarding how process was received, and the issues that arose because of the timing and events related to the service of process, including Covid-19. Defendant also provided a possible meritorious defense.

The Court in *Schroeder v IESI NY Corp.* (24 AD3d 180, 181 [1st Dept 2005]) explained that the Uniform Rules for Trial Courts provide two distinct methods for obtaining disclosure after a note of issue (CPLR 3402; 22 NYCRR § 202.21) is filed. The one applicable here, 22 NYCRR § 202.21 (d), "permits the court to authorize additional discovery '[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness' that would otherwise cause 'substantial prejudice.'" (*See Hill v Elliman-Gibbons & Ives*, 269 AD2d 117, 118 [1st Dept 2000]; *Audiovox Corp. v Benyamini*, 265 AD2d 135 139 [2nd Dept 2000].)

Plaintiff's Note of Issue was filed in anticipation of the inquest, which will not be held in light of the vacatur of the prior default judgment. Thus, the Note of Issue is vacated pending completion of discovery, or when filing of the Note of Issue is otherwise appropriate, without payment of an additional fee (*see Pierce v Memorial Hosp.*, 190 AD2d 929, 931 [3rd Dept 1993]).

The court finds that defendant has demonstrated a reasonable excuse for the default, and a possible meritorious defense to the underlying action sufficient to allow the extension of time requested for defendant to serve its Answer.

CPLR 3019 provides in part:

> (b) Subject of cross-claims. *A cross-claim may be any cause of action in favor of one or more defendants* or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable. A cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.
> (d) Cause of action in counterclaim or cross-claim deemed in complaint. A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint, except that separate process, trial or judgment may not be had unless the court so orders. *Where a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant*. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim or cross-claim. Such defendant shall serve a reply or answer as if he or she were originally a party. (emphasis added).

A nonparty that is added as a party to the action must be served with the Summons and

Answer. In accordance with CPLR 3019, a nonparty may not be added on a cross claim unless the claim lies against someone already named and joined as a party (*see Fleck v Goehrig*, 167 Misc 2d 208, 209-210 [Sup Ct, Eire County 1995]).

Prior to service, defendant's proposed Answer must be amended to delete the cross claims against Bagiana Construction Corp. and Jaid Construction Corp. (paragraphs 22 and 23), as they are not yet parties to the action. If appropriate, defendant may proceed in accordance with the CPLR and serve Bagiana Construction Corp. and Jaid Construction Corp. to join them as parties.

Accordingly, defendant' motion to vacate this court's January 17, 2020 Order, to vacate the Note of Issue filed on May 11, 2020, and to extend the time to respond to the Complaint, is granted.

Plaintiff's cross motion for a default judgment is denied.

Plaintiff is directed to accept defendant's Answer, as proposed with the amendments directed, within 30 days from service of this Order with Notice of Entry.

Plaintiff shall serve defendant with a copy of this Order with Notice of Entry within 30 days from the date of its entry and shall serve the Clerk of the Court, who is directed to reflect the vacatur of the January 17, 2020 Order, by restoring the action to active status, and vacatur of the Note of Issue by striking the action from the trial calendar and making required notations in the records of the court.

This constitutes the Decision and Order of the court.

Dated: August 12, 2020

Ruben Franco

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO