

Green v City of New York
2022 NY Slip Op 30712(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 152576/2021
Judge: J. Machelle Sweeting
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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

RAYMOND GREEN,

Plaintiff,

- v -

CITY OF NEW YORK, BRYAN WALKER, MARC HANNON,
KEVIN EARL, SHEILA RAMOS, JOHN OR JANE DOE 1-10

Defendants.

-----X

INDEX NO. 152576/2021

MOTION DATE 07/27/2021

MOTION SEQ. NO. 001

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34

were read on this motion to/for EXTEND - TIME.

This is an action to recover damages for personal injuries that plaintiff allegedly sustained on December 5, 2019, when he alleges that he was falsely arrested in the vicinity of the intersection of East 115th Street and Lexington Avenue. Plaintiff commenced this action against THE CITY OF NEW YORK; against four individually named officers, namely BRYAN WALKER (“Walker”), MARC HANNON (“Hannon”), KEVIN EARL (“Earl”) and SHEILA RAMOS (“Ramos”); and against JOHN OR JANE DOE 1-10. Defendant THE CITY OF NEW YORK is referred to herein as the “City,” and the four named officers are collectively referred to herein as the “Officers.”

Pending now before the court is a motion filed by the Office of the Corporation Counsel (“Corp. Counsel”) seeking an order, pursuant to CPLR Sections 2004, 2005, and 3012(d), compelling plaintiff to accept service of the City’s Answer to the Complaint, filed on May 18, 2021, as timely served *nunc pro tunc*.

Also before the court is a cross-motion filed by plaintiff seeking an order, pursuant to sections 3215 (a) and (b) of the Civil Practice Law and Rules, (i) directing the Clerk of the Court to enter judgment by default against all defendants; (ii) scheduling the matter for an inquest or trial as to damages; and (iii) awarding plaintiff costs and reasonable attorney's fees relative to the instant motion and all related papers.

Procedural History

The procedural history is as follows:

On March 15, 2021, plaintiff filed a Summons and Complaint.

Two months later, on May 18, 2021, Corp. Counsel served a verified Answer on behalf of defendant City, and not on behalf of any other defendants.

Six days later, on May 24, 2021, plaintiff filed a Notice of Rejection, rejecting the City's Answer as untimely.

On July 27, 2021, Corp. Counsel filed the instant motion seeking to compel plaintiff to accept service of the City's Answer as timely served *nunc pro tunc*.

On September 7, 2021, counsel for plaintiff requested an adjournment *nunc pro tunc* of the City's motion.

In an Interim Order, dated September 16, 2021, this court granted plaintiff's request and adjourned the City's motion and set a briefing schedule.

On October 20, 2021, plaintiff filed the instant cross-motion seeking a default judgment against all defendants; an inquest or trial as to damages; and costs and reasonable attorney's fees relative to said cross-motion and all related papers.

Eight days later, on October 28, 2021, Corp. Counsel filed an Amended Answer on behalf of the City and the four individually named Officers.

The following day, on October 29, 2021, Corp. Counsel filed papers in opposition to plaintiff's motion, and in reply to the City's motion.

A few days later, on November 4, 2021, plaintiff filed a Notice of Rejection, rejecting the Amended Answer as untimely.

Plaintiff did not file a reply to his cross-motion.

Original Answer on Behalf of the City

Corp. Counsel argues that, pursuant to CPLR Sections 2004, 2005, and 3012(d), the court should compel plaintiff to accept service of the City's Answer, filed on May 18, 2021, as timely served *nunc pro tunc*. They argue that the City's brief delay in serving the Answer was reasonable under the circumstances; that there is a lack of prejudice to plaintiff; that the City has meritorious defenses; and that public policy favors the resolution of cases on the merits.

With respect to reasonable excuse for the delay, Corp. Counsel argues that their operations continue to be presently limited due to the Covid-19 pandemic, and that their Pleadings Unit is continuing to work its way through a voluminous backlog as a result of the pandemic, which has resulted in a delay in Answers being served. Moreover, their office was transitioning to working remotely, and there were staffing shortages, which compounded these challenges.

With respect to a lack of prejudice to plaintiff, Corp. Counsel argues that the City's Answer was filed well in advance of any Preliminary Conference or Case Scheduling Order, and that no meaningful discovery has taken place to date, so plaintiff cannot claim to be "surprised" by the affirmative defenses set forth by defendant City in its Answer.

With respect to the City having a meritorious defense, Corp. Counsel argues that the City's Answer asserts several meritorious defenses, and is indicative of the City's willingness and ability to defend this case on the merits.

Finally, Corp. Counsel argues that public policy strongly favors resolution of matters on the merits, especially where, as here, there is no demonstrable prejudice to the plaintiff.

In opposition, plaintiff argues, first, that the City never requested an extension or additional time to answer plaintiff's complaint or to otherwise respond or appear to defend the claims alleged, prior to the City's service of the untimely Answer as rejected by Plaintiff. Second, plaintiff argues that the moving papers filed on behalf of the City cannot demonstrate a meritorious defense. Plaintiff also argues that the very fact that no meaningful discovery has taken place supports plaintiff's argument that he has been prejudiced, as he has been deprived of discovery materials that will reveal the involvement of additional defendants, witnesses or causes of action and that if discovery reveals additional claims or defendants, the applicable statute of limitations may prohibit plaintiff from amending his complaint to add such claims or defendants.

The Appellate Division First Department has a strong public policy favoring the resolution of cases on the merits. *See 38 Holding Corp. v. New York*, 179 A.D.2d 486 (Sup. Ct. App. Div. 1st Dept. 1992) (preferring trial on the merits wherever possible and a liberal policy with respect to opening default judgments in furtherance of justice so that parties may have their day in court to litigate the issues); *Gluck v. McDonough*, 139 A.D.3d 628 (Sup. Ct. App. Div. 1st Dept. 2016) (referencing that "strong public policy favors resolving cases on the merits") and *Acosta v. Riverdale Dev., LLC*, 72 A.D.3d 525 (Sup. Ct. App. Div. 1st Dept. 2010) ("Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits").

Here, the Summons and Complaint was served on March 15, 2021, and pursuant to CPLR 3012 (a), the City's Answer was to have been filed within 20 days, by April 4, 2021. Instead, the City's Answer was not served until May 18, 2021, which was a delay of 44 days. This court finds that the City has established good cause for the delay and that under the totality of the circumstances, the delay of 44 days is relatively short. *See Nason v Fisher*, 309 AD2d 526 (Sup. Ct. App. Div. 1st Dept 2003) ("The motion court properly exercised its discretion in granting defendant's motion to compel plaintiff to accept service of its late answer since the delay in serving the answer was *relatively short* and attributable to law office failure [. . .]. Here, the verified answer was served (and rejected by plaintiff) *only about three months* after the amended complaint was served [...] [emphasis added]).

Additionally, this court further finds that the City asserts a meritorious defense and that given the preliminary nature of this case, plaintiff has not alleged to have suffered any actual prejudice, and that claims that plaintiff may suffer prejudice at some unnamed date in the future are speculative.

For the aforementioned reasons, this court grants the City's motion seeking to compel plaintiff to accept service of the City's Answer, filed on May 18, 2021, as timely served *nunc pro tunc*. *See also Forastieri v Hasset*, 167 AD2d 125, 126 (Sup. Ct. App. Div. 1st Dept 1990) ("In view of the existence of an apparently meritorious defense, the relatively short delay involved, the lack of prejudice to plaintiffs and the fact that the lapse in time was partially attributable to law office failure, this matter seems to present precisely the sort of situation which warrants the exercise of the court's discretion under CPLR 3012(d) to compel the acceptance of a pleading which has not been timely served 'upon such terms as may be just'").

Amended Answer on Behalf of the City and the Officers

In opposition to plaintiff's motion seeking a default judgment against all defendants, Corp. Counsel sets forth substantive arguments as to why the court should compel plaintiff to accept the Amended Answer, which was filed on behalf of the both the City and the individually named defendant officers.

Corp. Counsel argues that the delay was a result of the volume of new matters the City must attend to every month, combined with a limited number of employees to process incoming cases. They argue that this matter is assigned to the New York City Law Department's Tort Division, which defends the City against more than approximately 7,500 new personal injury and property damage cases annually. Due to the ban on filing complaints between March 22, 2020 and May 25, 2020, their office experienced "an explosion in filings" in July, August, and September 2020, as the approximate 600 cases that typically comprise the monthly number of new filings, amounting to approximately 1,200 cases for April and May 2020, were filed in the succeeding three months or so. Corp. Counsel argues that this situation caused a substantial backlog to accrue that their office had not cleared at the time plaintiff filed his Complaint in March 2021.

Further, and directly as it relates to the Amended Answer on behalf of the individually named officers, Corp. Counsel argues that, pursuant to New York General Municipal Law ("GML") § 50-k, their office is tasked with the responsibility of defending the City and its employees against thousands of claims filed annually, and that in defending against these claims, employees of Corp. Counsel must prepare an answer to each complaint and, in many cases, must also conduct interviews of individual City employees who are also named as defendants in order to prepare answers on behalf of those individually named defendants.

Additionally, Corp. Counsel maintains that it is required to assess an employee's eligibility for legal representation by determining whether the employee acted within the scope of their employment at the time of the underlying incident, and such assessment includes an investigation into the facts of the incident, as well as a representation interview of the employee. Assuming the employee is deemed eligible for representation, the employee must then decide whether they wish to be represented by their office, and if so, provide written authorization. Corp. Counsel argues that their office can only proceed with filing an answer on behalf of an individually named defendant after this lengthy process concludes.

Here, the Amended Answer was filed approximately three months late with respect to Officers Earl and Ramos, and almost six months late with respect to Officers Bryan and Hannon. Nevertheless, as Corp. Counsel properly argues, appellate courts have routinely held that Corp. Counsel's necessary initial investigation into the representation of a municipal employee constitutes an excusable delay. *See, e.g., Hirsch v New York City Dept. of Educ.*, 105 AD3d 522 (Sup. Ct. App. Div. 1st Dept 2013) ("The City's delay in answering on behalf of the individual defendants was reasonable in that it was due to its investigation of its obligation to defend them").

With regard to the possibility of prejudice to adverse parties, Corp. Counsel argues that plaintiff was not prejudiced by the delay, as plaintiff is unable to name any additional defendants that need to be served, and plaintiff is unable to describe any discovery materials he needs in order to determine whether additional defendants can or should be added to his complaint. Corp. Counsel also argues that plaintiff did not move for a default judgment until after the City moved to compel acceptance of its original Answer. As noted above, plaintiff has not demonstrated that he has been prejudiced by the delay in filing.

As determined above, resolution on the merits is preferred. In consideration of all the factors, which 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; this court grants that branch of the City's motion which, in opposition to plaintiff's cross-motion for default judgement, seeks to compel plaintiff to accept service of the Amended Answer, filed on October 28, 2021, as timely served *nunc pro tunc* (see *Guzetti v City of New York*, 32 AD3d 234 [Sup. Ct. App. Div. 1st Dept 2006])[affirming the trial court's ruling granting defendants' cross-motion to compel acceptance of an amended answer *nunc pro tunc*]).

Default Judgment Against Defendants

Plaintiff's cross-motion seeks an order, pursuant to sections 3215 (a) and (b) of the Civil Practice Law and Rules, (i) directing the Clerk of the Court to enter judgment by default as against all defendants; (ii) scheduling the matter for an inquest or trial as to only damages; and (iii) awarding plaintiff costs and reasonable attorney's fees relative to the instant motion and all related papers.

As discussed herein, this court directs acceptance of the Answer and the Amended Answer *nunc pro tunc*. Accordingly, plaintiff's request for a default judgment against defendants is denied. See *Silverio v City of New York*, 266 AD2d 129 (Sup. Ct. Ap. Div. 1st Dept 1999)(finding that the trial court did not abuse its discretion in denying plaintiff's motion for default judgment against police officers and in granting leave for an answer to be interposed on the officer's behalf, where there was no showing that plaintiff suffered any prejudice by reason of the police officers' delay in answering the complaint, and there were no other circumstances warranting deviation from New York's strong public policy in favor of litigating matters on the merits"); *Myers v City of New York*,

110 AD3d 652 (Sup. Ct. App. Div. 1st Dept 2013) (unanimously affirming, without costs, an order of the trial court granting the cross motion to compel plaintiff to accept service of the late answer and denying plaintiff's motion for a default judgment against the City of New York. The court found that the City's delay in answering on behalf of the individual defendants was reasonable in that it was due to its investigation of its obligation to defend them; no prejudice to plaintiff had been shown; and New York's public policy strongly favors litigating matters on the merits.

Conclusion

For all of the aforementioned reasons, it is hereby:

ORDERED that the motion filed by Corp. Counsel seeking an order, pursuant to CPLR Sections 2004, 2005, and 3012(d), compelling plaintiff to accept service of the City’s Answer, filed on May 18, 2021, as timely served *nunc pro tunc*, is GRANTED; and it is further

ORDERED that, consistent with the findings made herein, plaintiff shall accept service of the Amended Answer, filed on October 28, 2021, as timely served *nunc pro tunc*; and it is further

ORDERED that the cross-motion filed by plaintiff seeking an order, pursuant to sections 3215 (a) and (b) of the Civil Practice Law and Rules, (i) directing the Clerk of the Court to enter judgment by default against all defendants; (ii) scheduling the matter for an inquest or trial as to only damages; and (iii) awarding plaintiff with costs and reasonable attorney’s fees relative to the instant motion and all related papers, is DENIED.

This is the Decision and Order of this court.

3/28/2022

DATE


J. MACHELLES MEENTING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE