

Fusaris v Paul's Outdoor Servs., Inc.
2024 NY Slip Op 35499(U)
August 27, 2024
Supreme Court, Westchester County
Docket Number: Index No. 59629/2024
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
MARLENE FUSARIS,

Plaintiff,

-against-

PAUL'S OUTDOOR SERVICES, INC.,

Defendant.
-----X

WOOD, J.

DECISION & ORDER

Index No.: 59629/2024

Sequence Nos. 1&2

In an action, inter alia, involving plaintiff's rights under a purported easement for a septic system partly upon defendant's real property, New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 1-29 were read in connection with plaintiff's motion (Seq 1) for a default judgment as against defendant pursuant to CPLR 3215, or in the alternative, summary judgment pursuant to CPLR 3212, on plaintiff's first cause of action for a declaratory order regarding plaintiff's rights to an easement to a septic system, and restraining order against defendant from interfering with plaintiff's rights under the subject easement; and defendant's cross-motion (Seq 2) pursuant to CPLR 3211(a)(8) or CPLR 3212 dismissing this action on the grounds that the court lacks jurisdiction over defendant; or, in the alternative, extending defendant's time to serve an answer pursuant to CPLR 3012(d), and compelling plaintiff to accept service of the answer previously served.

A plaintiff seeking leave to enter a default judgment must file proof of proper service of the summons and the complaint, the defendant's default, and the facts constituting the claim (*see* CPLR 3215[f]; (*Glob. Liberty Ins. Co. v Surgery Ctr. of Oradell, LLC*, 153 AD3d 606 [2d Dept

2017)). A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action “to avoid the entering of a default judgment or to extend the time to answer” (*Mellon v Izmirligil*, 88 AD3d 930, 931 [2d Dept 2011]). There is a strong public policy in favor of resolving cases on their merits whenever possible (*Espinal v New York City Health & Hospitals Corp.*, 115 AD3d 641[2d Dept 2014]). But, “[l]itigation cannot be conducted efficiently if deadlines are not taken seriously...[and] that disregard of deadlines should not and will not be tolerated” (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]).

Pursuant to CPLR 2004, “(e)xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” Similarly, CPLR 3012(d) states that upon a motion by 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.” It is within the discretion of the Supreme Court whether to grant such an extension of time (*Oliver v Town of Hempstead*, 68 AD3d 1079, 1080 [2d Dept 2009]). In view of the public policy in favor of resolving cases on the merits, the court may excuse a defendant's failure to timely answer where the delay in answering is relatively short, there is no showing of prejudice to plaintiff, a potential meritorious defense exists, and no willfulness on the part of the defendant has been shown (*Finkelstein v Sunshine*, 47 AD3d 882 [2d Dept 2008]).

Here, plaintiff commenced this action by summons and complaint on April 1, 2024. According to the affidavit of service, service was effectuated upon defendant by service upon the Secretary of State on April 11, 2024 (NYSCEF#8). On May 15, 2024, defendant filed a Verified

Answer (NYSCEF#5), which was rejected by plaintiff, as the time to serve it had expired under CPLR 3012 (NYSCEF # 7). Hence, plaintiff proved prima facie defendant's default in answering.

Elizabeth Jones, president of defendant, gives the reason for service of the late answer as follows:

"I have been advised that the answer served on behalf of the Defendant was served four days after the date it should have been served. I respectfully request that the Court excuse that four day delay. I am a widow running a busy landscape business since my husband passed away. When I received the papers from the NYS Secretary of State I at first didn't know what I was supposed to do. After the passage of a short period of time I realized that I needed to speak to the attorney who I consulted about a year before with respect to this matter ("NYSCEF#22).

Taking into consideration the parties' arguments, the court finds that the delay in serving an answer was very short, this matter is in its early stage, discovery has not begun, and plaintiff failed to demonstrate that she has been severely prejudiced by allowing defendant to interpose an answer. While defendant's professed ignorance of the law and a lack of understanding of the need to serve an answer generally does not constitute reasonable excuse, under these circumstances, the court in its discretion finds a reasonable excuse was set forth (*M & T Bank v Ronnermann*, 199 AD3d 996 [2d Dept 2021]).

As for a potentially meritorious defense, the record shows that in July 1995, the subject house at 153 Spring Street in South Salem ('the premises'), was purchased by plaintiff and her ex-husband from seller Patricia DeLaura ("Patricia")¹, subject to a septic system that partly ran underneath defendant's land pursuant to "Subsurface Sewage Disposal System License Agreement" entered between Patricia and defendant on October 24, 1994 (the "1994 Easement").

Under the 1994 Easement, Patricia and her assigns, including plaintiff, was entitled to a perpetual unobstructed license in defendant's premises for the maintenance and repair of the Subsurface Sewage Disposal System. However, Paragraph 2(c) of the 1994 Easement provides that: defendant could terminate the easement if the septic system prevented it from getting Board of Health approval and/or a permit to build a one family residence on the parcel (NYSCEF #24).

On May 18, 1995, the "Easement for Continuation of the Existing Subsurface Sewage Disposal System" ("the 1995 Easement") was purportedly executed by Patricia individually and Paul Jones, as president of defendant. The 1995 Easement was identical to the 1994 Easement except for the removal of the clause permitting defendant to terminate the easement in the event defendant built a house.

The crux of the dispute between the parties is the authenticity of the 1995 Easement, and the effects it has on the parties' rights to the septic system. Plaintiff represents that it appears that the original copy of the 1995 Easement was lost and not filed. Defendant allegedly forbade plaintiff to enter defendant's premises to repair the septic tank, but did relent to do so in early October 2023. Plaintiff asserts that she is trying to put the house up for sale, and defendant's threat to terminate plaintiff's rights to the septic system will make it impossible to find a buyer due to the septic system issue.

In opposition, defendant claims that defendant never entered into the 1995 Easement, and neither plaintiff, nor her attorney nor her prior real estate attorney ever saw Mr. Jones sign the 1995 Easement. Moreover, the 1995 Easement is significantly different from the 1994 Easement. Ms. Jones, the current president of defendant, denies that Mr. Jones ever signed the 1995 Easement. Prior to his passing, the late Mr. Jones discussed with Ms. Jones all important business decisions.

Ms. Jones claims that the right to terminate the license for the septic system was key to agreeing to the 1994 License Agreement (NYCEF#22).

Plaintiff replies that the proof is overwhelming that Paul Jones obligated his corporation to grant plaintiff a perpetual easement to maintain a septic system under a portion its land. Jayne Hinchcliffe, who is the notary reflected in the 1995 Easement, attests that she examined the signature page of the 1995 Easement, and that the signature of the notary dated May 17, 1995 under the signature of Paul Jones is her signature. "I would not have notarized Mr. Jones' signature if he were not present before me. No one else ever had access to my notary stamp" (NYSCEF#28).

Lawrence Jay Braunstein, Esq. was the attorney for plaintiff and her ex-husband in connection with their purchase of the premises. Braunstein attests that the 1995 Easement attached to the Amended Verified Complaint as Exhibit "A", is the final, executed version of the easement negotiated, and to the best of his recollection, the original signed 1995 Easement was given to the title company at the closing. "Any suggestion that I was involved in a conspiracy to alter the terms of the easement by forging Paul Jones' signature, or grafting an authentic signature page from some other document he signed, is a lie" (NYSCEF#18).

Additionally, plaintiff's counsel argues that plaintiff has presented an exact, contemporaneous, date and time-stamped fax copy of easement setting forth verbatim all of its language. The original of the 1995 Easement could simply not be found.

In light of the foregoing, the court finds that defendant presented a potential meritorious defense, in that there are questions of fact as to the authenticity of the easement and the parties' understanding of their rights and agreements as to the subject easement. Accordingly, plaintiff's application for a default judgment is denied, and the branch of defendant's cross-motion to compel plaintiff to accept the late answer is granted.

Turning to the alternative relief requested, it is well settled that a proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Orange County-Poughkeepsie Ltd. Partnership v Bonte*, 37 AD3d 684, 686-687 [2d Dept 2007]; see also *Rea v Gallagher*, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; see also *Khan v Nelson*, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion (*Yelder v Walters*, 64 AD3d 762, 767 [2d Dept 2009]; see *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Based upon the record, there are triable issues of fact regarding the 1995 Easement that cannot be resolved on this record. At least at this early juncture, defendant offers an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within plaintiff's control, and thus, for this reason alone, this motion for summary judgment is premature (*Marshall v. Manuel*, 227 AD3d 978, 980 [2d Dept 2024]).

Finally, as for the permanent injunction sought in plaintiff's first cause of action, while the mere existence of an issue of fact will not itself be grounds for the denial of the motion for permanent injunction (*91-54 Gold Rd., LLC v Cross-Deegan Realty Corp.*, 93 AD3d 649, 650 [2d Dept 2012]), under these circumstances, there is a question as to whether plaintiff's property

is benefitted by an easement over the subject portion of defendant's property. Thus, at this time, this relief for permanent injunction is denied.

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision. This constitutes the decision and order of the court.

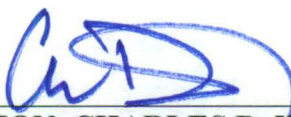
Accordingly, it is hereby

ORDERED, that plaintiff's motion for a default judgment against defendant (Seq 1) is **denied**, as well as the branches of the motion for declaratory relief and restraining order, and denied otherwise; and it is further

ORDERED, that defendant's cross- motion (Seq 2) is granted to the extent that plaintiff is directed to deem and accept defendant's Answer as timely interposed, and plaintiffs may respond to said answer in accordance with the mandates of the CPLR. The Clerk shall mark his records accordingly; and it is further

ORDERED, that within twenty days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order electronically, with notice of entry, upon all parties, and file proof of service on NYSCEF within five days of service.

Dated: White Plains, New York
August 27, 2024



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF