

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

TIANRUN GUO and DAN ZHAO,

Plaintiffs,

Index No.: 021812/10
Motion Sequence...01, 02
Motion Date...04/13/11

-against-

NAYCI CONTRACTING ASSOCIATES, LLC.,
AYHAN NAYCI, MEHMET NAYCI a/k/a
MATT NAYCI and SUNNY PLUMBING
SUPPLY & HARDWARE, LLC.,

Defendants.

Papers Submitted:
Notice of Motion.....X
Notice of Cross-Motion.....X
Affirmation in Support.....X
Affidavit in Support.....X
Reply Affirmation.....X
Sur-Reply Affirmation¹.....X

Upon the foregoing papers, the Plaintiffs' motion (Mot. Seq. 01), pursuant to CPLR § 3215, seeking a default judgment against the Defendants, and the Defendants' cross-motion (Mot. Seq. 02), pursuant to CPLR §§ 317, 2004, 3012 and 3211, seeking an order denying the Plaintiffs' motion for a default judgment, dismissing the Plaintiffs' complaint,

¹ This document will be deemed the Defendants' Reply in further support of their cross-motion. It was incorrectly labeled as a "Sur-Reply".

or, in the alternative, permitting the Defendants to serve and file an Answer to the Plaintiffs' complaint, are decided as hereinafter provided.

This action was commenced by the Plaintiffs to recover for damages allegedly sustained as a result of the Defendants' breach of a construction contract entered into between the Plaintiffs and the Defendant, NAYCI CONTRACTING ASSOCIATES, LLC. ("Nayci Contracting"). The Plaintiffs filed the summons and verified complaint with the Nassau County Clerk on November 23, 2010. The Plaintiffs purportedly caused service to be effectuated upon the individual Defendants, AYHAN NAYCI ("Ayhan") and MEHMET NAYCI a/k/a MATT NAYCI ("Mehmet"), by delivering a copy of the summons and verified complaint to a person of suitable age and discretion at 5 Nassau Road, Great Neck, New York, 11104. The Plaintiffs caused service to be effectuated upon the corporate Defendants, Nayci Contracting and SUNNY PLUMBING SUPPLY & HARDWARE, LLC. ("Sunny Plumbing"), via the Secretary of State. The Plaintiffs now move for a default judgment against all the Defendants due to their failure to timely interpose an answer to the complaint.

The Plaintiffs contend that service was effectuated upon the individual Defendants by delivering a copy of the summons and verified complaint to Ebru Nayci, Ayhan's fifteen-year-old daughter, on November 27, 2010. On November 29, 2010, the Plaintiffs' counsel mailed a copy of the summons and verified complaint to each of the individual Defendants at the same location, 5 Nassau Road, Great Neck. *See* Affidavits of Service for Ayhan and Mehmet, dated November 29, 2010, attached to the Plaintiffs' Notice of Motion as Exhibits "B" and "C", respectively. According to the Plaintiffs' counsel's

Affirmation, the Affidavits of Service were filed with the Nassau County Clerk's Office on December 10, 2010.

Pursuant to CPLR § 308 (2), in order for service to be complete, there is an additional requirement of filing proof of service with the clerk of the court. Service is complete ten (10) days after filing proof of service with the Court. Accordingly, in this matter, service upon the individual Defendants was "complete" on December 20, 2010. Completion of service starts the running the Defendants' thirty-day time limit to appear in the action. The Defendants' time to appear in the action expired on or about January 20, 2011, and the instant motion for a default motion quickly followed on January 29, 2011.

The Defendants cross-move for dismissal of the Plaintiffs' complaint, or in the alternative, to extend their time to answer. A proposed Answer on behalf of all the Defendants, containing affirmative defenses and counterclaims, is attached to the Defendants' cross-motion.

The Defendant, Ayhan, contends that service upon him was defective as the address at which substituted service was made was not his actual dwelling place, usual place of abode or usual place of business. In opposition, Ayhan submitted a valid copy of his driver's license as well as a post-marked utility bill which indicates that Ayhan's current address is 501 Panorama Drive, Mohegan Lake, NY and not the Great Neck address utilized by the Plaintiffs to effectuate service. Ayhan states in his affidavit that the Great Neck address is the residence of his ex-wife.

The Defendant, Mehmet, who is also Ayhan's son, was also served by

substituted service at the Great Neck address. Notably, the opposition papers are silent as to the actual residence of Ayhan's son, Mehmet. Mehmet's affidavit merely states that he was not personally served with the summons and complaint. However, the affidavit does not specifically contest the contents of the Affidavit of Service submitted by the Plaintiffs in support of their motion.

Service upon the corporations, Nayci Contracting and Sunny Plumbing, were effectuated via the Secretary of State. In addition to the Affidavits of Service establishing service as to the corporations, the Plaintiffs also submitted the Notices of Default that were sent to each corporate Defendant pursuant to CPLR § 3215 (g). However, the Notice of Default and additional mailing were made to the wrong business address for Nayci Contracting. According to the New York State Department of State, Division of Corporations website, the current address for Nayci Contracting is 40-01 Greenpoint Avenue, Sunnyside, New York. *See* Exhibit "B" attached to the Defendants' Notice of Cross-Motion. The address at which the Notice of Default was mailed was 40-15 Greenpoint Avenue, Sunnyside, New York, which is the current address only for Sunny Plumbing.

Pursuant to CPLR §317, a person served with a summons other than by personal delivery, who fails to timely appear may be permitted to defend the action within one year of obtaining knowledge of default, upon a finding by this Court that the Defendant did not personally receive notice and has a meritorious defense. CPLR § 3215 provides for the awarding of a default judgment based upon the failure of a defendant to appear or answer a summons and complaint. The preference of the Court is to decide cases on their merits.

See Lichtman v. Sears, Roebuck & Co., 236 A.D.2d 373 (2d Dept. 1997); *Davies v. Contel of New York*, 155 A.D.2d 809 (3rd Dept. 1989).

It is clear from the foregoing facts that service was not properly effectuated upon the Defendant, Ayhan, and, as such, the case must be dismissed for lack of jurisdiction as against Ayhan, only.

With respect to the corporate Defendants, service was properly made upon the Secretary of State. However, the additional mailing to the Defendant, Nayci Contracting was defective as the summons and verified complaint were mailed to an incorrect address. Thus, a default judgment cannot be granted as against the Defendant, Nayci Contracting as the requirements of CPLR § 3215 have not been fully satisfied.

From a review of the record, service upon the Defendants, Mehmet and Sunny Plumbing, appear to be proper. As such, the Court must now determine whether their default in failing to timely appear in the action is excusable.

The Defendants, Mehmet and Sunny Plumbing, contend that they have established a meritorious defense to the Plaintiffs' claims. The Plaintiffs allege in their complaint that the Defendant, Mehmet is a member, stockholder, owner, officer, director and agent of Nayci Contracting and/or Sunny Plumbing. The complaint further alleges that Mehmet exercised dominion and control over NCA and engaged in unjust and wrongful conduct against the Plaintiffs by failing to adhere to formalities of corporate existence. Specifically, the complaint states that Mehmet was responsible for Nayci Contracting failing to keep adequate records relating to the governance of its corporate affairs and accounting

of its financing resulting in its inability to pay its debts. The contract was executed by Ayhan, on behalf of Nayci Contracting, and the Plaintiffs. The Defendant, Mehmet, contends that he should not be named as a Defendant herein as he was not a party to the contract. Additionally, Mehmet did not execute a personal guarantee for the contract.

The corporate Defendant, Sunny Plumbing also claims that it has a meritorious defense to the action. The Plaintiffs allege in the fourth cause of action in the complaint alleging that Sunny Plumbing received \$3,000.00 from the Plaintiffs as a loan which was to be used as a credit against further installment payments under the contract. The Defendants' counsel claims in opposition that the Plaintiffs received \$3,000.00 worth of plumbing materials warranting a payment of that amount to Sunny Plumbing.

The well-established policy of the State of New York strongly favors resolution of disputes on the merits and disfavors default judgment. *Sippin v. Gallardo*, 287 A.D.2d 703 (2d Dept. 2001); *Rudick v. Goldbetter*, 273 A.D.2d 456 (2d Dept. 2000); *Morgese v. Laro Maintenance*, 251 A.D.2d 307 (2d Dept. 1998).

In light of New York's strong public policy, the Defendants' meritorious defenses, the Defendants' efforts to litigate this action after only a brief delay and the lack of any prejudice to the Plaintiffs, this Court will not prevent the substantive adjudication of this dispute. The Plaintiffs failed to establish any prejudice from the short delay and the circumstances herein reveal that the Defendants intend to defend the action. *See Harley v. Hawkins*, 269 A.D.2d 496 (2d Dept. 2000) (finding that plaintiff's motion for default was properly denied "[i]n light of the brief, inadvertent delay, the absence of prejudice to the

plaintiff, and the defendant's meritorious defenses.”); *See also Sippin v. Gallardo*, 287 A.D.2d 703 (2d Dept. 2001) (affirming denial of default entry and noting that “[p]ublic policy favors the resolution of cases on the merits, and in this case there was a relatively short period of delay, a possible meritorious defense, no claim of prejudice to the plaintiffs, and no willfulness by the defendants); *St. Charles Hosp. & Rehab. Ctr. V. Royal Globe Ins. Co.*, 282 A.D.2d 593 (2d Dept. 2001) (reversing entry of default where defendant demonstrated a good faith intent to intend the action, the period of delay was relatively short, and the plaintiffs would not be prejudiced by vacating the default).

In the case at bar, a default judgment cannot be granted as against the Defendant, Nayci Contracting as Plaintiffs’ Notice of Default, pursuant to § 3215 (g), was defective. Service was not properly effectuated upon the individual Defendant, Ayhan, and, as such, the case must be dismissed as against him for lack of jurisdiction. It is not contested that the individual Defendant, Mehmet, was not personally served with the summons and verified complaint. With respect to the Defendants, Mehmet and Sunny Plumbing, the Court, in its discretion, accepts the Defendants’ explanation for the delay incurred in answering the summons and verified complaint in this matter as an excusable delay and will permit the late filing of their Answer.

A review of the applicable case law demonstrates that the brief delay in this case, less than two months, in appearing in the action is not the type of delay that courts have held to warrant the “drastic remedy of a default judgment.” *Scott v. Allstate Ins. Co.*, 124 A.D.2d 481, 484 (1st Dept. 1986). The Court, in excusing the default with regard to the

Defendants, Mehmet and Sunny Plumbing, notes that the Plaintiffs instituted this default motion a mere nine days after the responsive pleading was due, a time frame which the Court views as de minimis. It is both disturbing and puzzling that counsel for the parties could not have amicably resolved this issue given the extremely short time frame between the due date of the responsive pleading and the date by which the Plaintiffs' counsel was first made aware that the Defendants sought to appear and defend the action. The law does not concern itself with trifles - "de minimis non curat lex".

The Defendants also cross-moved to dismiss the Plaintiffs' complaint. The Court finds that the Defendants' cross-motion is premature at this juncture. A plain reading of the four corners of the Plaintiffs' complaint supports the conclusion that it states a cause of action as against the corporate Defendants, Nayci Contracting and Sunny Plumbing. Moreover, the individual Defendant, Mehmet, failed to submit sufficient proof to establish that he is not a member, stockholder, officer or director of either Nayci Contracting and/or Sunny Plumbing, thereby precluding a summary dismissal of the claims against him.

Accordingly, it is hereby

ORDERED, that the Plaintiffs' motion for a default judgment (Mot. Seq. 01), pursuant to CPLR § 3215, is **DENIED** in its entirety; and it is further

ORDERED, that the branch of the Defendants' cross-motion (Mot. Seq. 02), pursuant to CPLR § 3211, seeking an order dismissing the complaint is **GRANTED** for lack of jurisdiction as against the Defendant Ayhan only; and it is further

ORDERED, that the branch of the Defendants' cross-motion (Mot. Seq. 02),

pursuant to CPLR § 3211, seeking an order dismissing the complaint as against the Defendants, Mehmet, Nayci Contract and Sunny Plumbing, is **DENIED**; and it is further

ORDERED, that the branch of the Defendants' cross-motion (Mot. Seq. 02), seeking an order permitting the Defendants to serve and file a late Answer to the Plaintiffs' complaint, is **GRANTED**; and it is further

ORDERED, that the Defendants, Mehmet, Nayci Contracting and Sunny Plumbing, are directed to serve a responsive pleading, in accordance with the terms of this order, upon counsel for the Plaintiffs pursuant to the CPLR within twenty (20) days of the date of this Order; and it is further

ORDERED, that a preliminary conference in this matter shall be held on **July 21, 2011 at 9:30 a.m.** at the courthouse lower level.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
June 10, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
JUN 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE