

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

**TRIAL/IAS, PART 10
NASSAU COUNTY**

**ANTHONY PERFETTI and
PEMMASANI LIMITED PARTNERSHIP,**

Plaintiff(s),

-against-

**RICHARD BASILE, EDWARD GENOVA,
NRB LAUNDRY SERVICES, INC. and
JOHN L. MACCARONE, ESQ.,**

Defendant(s).

**ORIGINAL RETURN DATE: 08/08/05
SUBMISSION DATE: 09/28/05
INDEX No.: 015046/04**

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Reply.....	4

Motion by plaintiffs for an order pursuant to CPLR 3215 awarding plaintiffs a default judgment against defendants, scheduling an inquest to assess monetary damages, directing specific performance and disqualifying defendant John L. Maccarone, Esq. as defendants' counsel is denied in all respects except that defendant Maccarone is disqualified from the representation of defendants Richard Basile, Edward Genova and NRB Laundry Services, Inc. (NRB).

Cross-motion by defendants for an order pursuant to CPLR 3212 awarding them summary judgment is denied.

This action arises out of two related contracts of sale executed in March, 2004 involving the sale of a business and the premises in which the business is situated. In the premises contract, plaintiffs agreed to buy from defendants Basile and Genova the premises located at 57 Sugar Maple Lane, Glen Cove, NY for \$650,000.00. \$40,000.00 was paid as a deposit to defendant Maccarone as escrow agent. The sale was conditioned upon plaintiffs securing a written commitment for a mortgage of up to \$520,000.00 within 60 days of the contract and further

conditioned upon plaintiffs purchasing NRB's business. The effective date of this contract is unclear since plaintiffs' copy is dated March 24, 2004 at page one but devoid of dates on the signature page, while defendants' copy is undated on page one but bears the date March 12, 2004 next to plaintiff Perfetti's signature.

In the business contract, plaintiffs agreed to purchase from defendant NRB its business for the sum of \$225,000.00 with \$10,000.00 paid on deposit and held in escrow by defendant Maccarone. The sale was conditioned upon plaintiffs securing a mortgage of up to \$155,000.00 within 60 days of the contract. Plaintiffs' copy is dated March 22, 2004 on page one and defendants' copy is undated.

Plaintiffs commenced the underlying action on or about October 21, 2004 with the purchase of an index number and filing (CPLR 304). Defendant NRB was served on January 10, 2005 pursuant to Business Corporation Law §306. It is unclear when or whether defendants Basile, Genova and Maccarone were effectively served since the affidavits of service upon them rely upon CPLR 308(2) and (4).

Pursuant to CPLR 308(2) and (4), service is not complete until 10 days after filing proof of service with the County Clerk. Since the copies of the affidavit of service attached to plaintiffs' moving papers do not reflect the required filing, the date service was completed against the individual defendants has not been established.

Nor have plaintiffs particularized how they or their counsel purportedly rejected defendants' concededly late answer despite having served a reply dated January 24, 2005.

Incredibly, however, defendants fail to attach a copy of their answer and neither party identifies when the answer was actually served.

With the foregoing as background, the court now turns to the motion and cross-motion.

While defendants do not explicitly seek vacatur of their default, such relief is implicit in their opposition to plaintiffs' motion for a default and a necessary prerequisite to consideration of defendants' cross-motion for summary judgment.

It is well settled that to vacate a default judgment, defendants are to demonstrate both a reasonable excuse for their default and the existence of a meritorious defense (Kaplusky v. Mazor, 307 AD2d 916 [2nd Dept., 2003]).

Equally well settled is the principle that "whether a default should be vacated is a matter within the sound discretion of the trial court (see, Fidelity & Deposit Co. V. Anderson & Co., 60 NY2d 693) (Zachary v. County of Nassau, 167 AD2d 537 [2nd Dept., 1990]).

As the Second Department wrote in Goldman v. City of New York, 287 AD2d 482, 483, "Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or

defense is meritorious, the default was not wilful and the other party is not prejudiced (citations omitted)". Vacatur of a default under such circumstances is not an abuse of discretion since it furthers "the strong public policy in favor of resolving cases on the merits" (Henry v. Kuveke, 9 AD3d 476 [2nd Dept., 2004]). Permitting vacatur in such instances has also been described as warranted since "the interest of justice is best served by vacating the default and permitting the case to be decided on the merits (citations omitted)". (Vita v. Alstom Signaling, Inc., 308 AD2d 582, 583 [2nd Dept., 2003]).

So strong is the state's public policy favoring determinations on the merits that if defendant has demonstrated a potentially meritorious defense and the delay was both brief and without resultant prejudice to plaintiff, it has been held an abuse of discretion to deny vacatur notwithstanding that the proffered excuse is "somewhat dubious" (Cotter v. Consol. Edison Co. of N.Y. Inc., 99 AD2d 738 [1st Dept., 1984]). The approach adopted by the First Department in Cotter has been cited with approval by the Second Department in both DeCicco v. Cobble Hill Nursing, 196 AD2d 476 and Shapsin v. Siben & Siben, 189 AD2d 811.

Here, the deficiencies in the submissions render it impossible to determine the precise length of defendants' default. The languid pace of plaintiffs' pursuit of this action, however, demonstrates the absence of prejudice by said delay. The factual dispute regarding the circumstances surrounding plaintiffs' failure to timely obtain mortgage financing establishes the potential merit to defendants' claim that plaintiffs breached the contracts thereby forfeiting their \$50,000.00 deposit held in escrow.

While defendants' excuse for their delay in serving their answer may accurately be described as "somewhat dubious", the court is satisfied that they never intended to abandon their defense and claim to the escrowed funds.

In keeping with the public policy of this state and consistent with the holdings in Cotter, DeCicco and Shapsin, vacatur of defendants' default to allow trial of this action on the merits is an appropriate exercise of the court's discretion.

Defendants' answer is deemed served.

Insofar as plaintiffs additionally seek disqualification of defendant Maccarone as counsel for the named co-defendants, the court is not persuaded that plaintiffs' unsubstantiated allegations of potential escrow improprieties warrants disqualification. Disqualification is, however, warranted pursuant to the Code of Professional Responsibility at DR 5-102(A) (22 NYCRR 1200.21[a]).

Said section provides, with certain exceptions not here relevant, "that if an attorney, after undertaking employment in contemplated or pending litigation, learns or it becomes obvious that he ought to be called as a witness on behalf of his client, he [or she] shall withdraw from the case" (108th Street Owners Corp. v. Overseas Commodities, Ltd., 238 AD2d 324, 326 [2nd Dept., 1997], quoting Matter of Benincasa v. Garrubbo, 141 AD2d 636, 639).

A motion to disqualify is addressed to the court's discretion and any doubts are to be resolved in favor of disqualification (Matter of Stober v. Gaba & Stober, P.C., 259 AD2d 554 [2nd Dept., 1999]; 108th Street Owners Corp. v. Overseas Commodities, Ltd., supra).

Defendant Maccarone does not dispute his personal involvement in an alleged unsuccessful attempt by plaintiff Perfetti "to directly pay to Mr. Maccarone monies necessary to perform remedial repairs with respect to the subject premises" (affidavit of Perfetti, dated September 7, 2005, ¶37). Given the relevance of this incident to plaintiffs' claim that defendants failed to cooperate to allow satisfaction of a condition required by the bank before issuing the mortgage commitment on the premises' contract, defendant Maccarone ought to be called as a witness on the claims against defendants Basile, Genova and NRB.

Defendants' cross-motion for summary judgment is denied. As previously noted, questions of fact exist. In any event, the failure to include a copy of defendants' answer precludes such relief (see CPLR 3212(b)).

All proceedings against defendants Basile, Genova and NRB are stayed for a period of 30 days to allow said defendants to retain substitute counsel. Defendant Maccarone, as former counsel for said defendants, is directed to serve a copy of this order upon them forthwith.

Defendant NRB is advised that as a corporate entity, it must appear by counsel (CPLR 321(a)).

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

All parties are directed to appear on November 16, 2005 at 2:30 P.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

No adjournment of this Preliminary Conference shall be permitted and all parties are forewarned that failure to attend may result in the striking of pleadings (22 NYCRR 202.27) or the imposition of monetary sanctions (22 NYCRR 130-2.1).

This decision constitutes the order of the court.

Dated: 10-6-05

Ronald P. Shifren, Esq.
Attorney for Plaintiffs
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HON THOMAS P. PHELAN
ENTERED
OCT 13 2005
NASSAU COUNTY
COUNTY CLERK'S OFFICE
J.S.C.

RE: PERFETTI v. BASILE, et al.

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