SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:		
	<u> THOMAS P. PHELAN,</u>	 Justice
		TRIAL/IAS PART 5
		NASSAU COUNTY
COTEL CONTRACTING, IN	C.,	ORIGINAL RETURN DATE:07/15/08
	Plaintiff(s),	SUBMISSION DATE: 08/18/08 INDEX No.: 005058/08
-against-		
MARK GREENE and EVELYN PALTROW,		MOTION SEQUENCE #1,2
	Defendant(s).	
The following papers read on t	this motion:	
Notice of Motion		1
Cross-Motion		2 3
Affidavit of Jordan Ros	senhaus	3
Affirmation of Kimber	ly B. Grotell	4
Affirmation of Alexand	ler Sasha Bau	5
Reply		
Plaintiff's Memorandu	m of Law	7
Defendant's Memorano	dum of Law	8

Defendant Mark Greene's ("Greene") motion for an order, pursuant to CPLR 3012(b), dismissing this action as against him with prejudice on the grounds that plaintiff (1) failed to timely serve a complaint and (2) is not entitled to the relief requested, and for costs pursuant to CPLR 8106 and 8202, is denied. Plaintiff's cross-motion for an order, pursuant to CPLR 3012(d), compelling defendant Greene to accept service of its complaint is granted.

Counsel for defendant Greene submits that Greene was served with a summons with notice on or about March 26, 2008. By letter to plaintiff's attorneys dated April 9, 2008, counsel for Greene demanded service of a complaint pursuant to CPLR 3012(b). Plaintiff's time within which to serve the complaint was extended to May 21, 2008. The complaint was not mailed to defendant Greene's counsel until June 3, 2008.

Plaintiff's counsel submits that the reason for the delay was that he incorrectly calendared the day the complaint was to be served. CPLR 2005 provides, as follows: "Upon an application

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satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure."

Plaintiff submits an affidavit of merit of Avi Greenheim, its president, in support of its action for breach of contract, quantum meruit and account stated. In an effort to refute the merit of plaintiff's claims, defendant, Greene, submits an affidavit of Jordan Rosenhaus, the purported owner of the apartment where the construction work was performed. Although Mr. Rosenhaus avers that he has personal knowledge, he refers to complaints made by the co-defendant, Evelyn Paltrow, to plaintiff. No affidavit has been submitted from either defendant.

"Given the strong public policy in favor of resolving cases on the merits, the apparent merit to the instant action, the lack of prejudice to the defendant caused by the plaintiff's delay in serving the complaint, and the fact that the plaintiff's delay in serving the complaint was not willful, the plaintiff should not be deprived of [its] day in court (citations omitted)" (Burgess v. Brooklyn Jewish Hosp., 272 AD2d 285 [2d Dept. 2000]).

Accordingly, defendant Greene shall have twenty (20) days from the date hereof to answer plaintiff's complaint.

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

Counsel are directed to appear on November 12, 2008 at 9:30 A.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: 9-24-08

HON THOMAS P. PHELAN

Hollander & Strauss, LLP Attn: Anthony P. DeCapua, Esq. Attorneys for Plaintiff 40 Cutter Mill Road, Suite 203 Great Neck, NY 11021

SEP 3 0 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

RE: COTEL CONTRACTING v. GREENE, et al.

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