

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

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CARL SCHMIGELSKI and ROBYN SCHMIGELSKI,

Plaintiffs,

-against-

HIGHLANDER CONTRACTING CORPORATION,
ROBERT COLQUHOUN, individually
and ROBERT COLQUHOUN d/b/a HIGHLANDER
CONSTRUCTION

Defendants.

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 18

Index No.: 009541/07

Motion Seq. Nos.:01,02&03

DECISION AND ORDER

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In Motion Sequence number one (1) the Plaintiff moves by Notice of Motion for an Order pursuant to CPLR §3215(a) and (b) directing that a Default Judgement be entered against all Defendants for failure to appear in this Action, or in the alternative, setting this matter down for an inquest in favor of Plaintiffs, assessing damages in a sum certain or for a sum which can by computation be made certain and awarding costs.

In Motion Sequence number two (2) Defendants Highlander Construction Corporation and Robert Colquhoun move for an Order pursuant to CPLR §2004 granting Defendants an extension of time to appear and answer in this Action.

The Defendants were served with the Summons and Complaint on June 11, 2007. Pursuant to CPLR §320 an Answer should have been served by July 1, 2007. According to the Defendant upon receipt of the Summons and Complaint he forwarded the documents to his insurance company. The insurance company denied coverage about 2 ½ weeks later. At that time the Defendant hired an attorney who requested an extension of time from the Plaintiff to answer, the Plaintiff denied the request.

Based on the relatively brief nature of the delay, the lack of prejudice to the Plaintiff, a reasonable excuse for the delay, evidence of meritorious defenses, the lack of evidence of a willful default or intent to abandon any defense to the action and public policy favoring resolution of cases on the merits, the Plaintiffs' application is for a default judgement **denied** and the

Defendants' Motion for an extension to serve an Answer is **granted**.

The Defendants' verified Answer is deemed served as of the date of service of this decision on the Plaintiffs.

In Motion Sequence number three (3), the Defendants move for an Order denying the Plaintiff's Default Judgement application and disqualifying Plaintiff, Robyn Schmigelski as attorney for the Plaintiffs.

The Plaintiffs are suing the Defendants for breach of contract. In 2004 the Defendants installed a roof on the Plaintiffs' home. Subsequently, the Plaintiffs sustained property damage which they allege was caused by the improper installation of the roof. One of the Plaintiffs, an attorney is representing herself and her husband.

The Defendants argue that because of Robyn Schmigelski's potential role as a witness at the trial she should be disqualified. The Defendants claim to have discussed the water damage with Robyn Schmigelski on two occasions.

The Plaintiff Carl Schmigelski has submitted an affidavit wherein he stated that he primarily interacted with the Defendants - i.e. negotiated the contract, paid for the job, and contacted the Defendants when the water damage occurred.

An attorney witness "ought" to be called "only when it is likely that the testimony to be given by the witness is necessary" (S&S Hotel Ventures Ltd. Partnership, 69 NY 2d 437 (1987)). Merely because an attorney "has relevant knowledge or was involved in the transaction at issue" does not make that attorney's testimony necessary (Id. at 445). Plaintiff has failed to establish that testimony from Robyn Schmigelski is necessary. Nor has the Defendant sufficiently shown that the testimony of Robyn Schmigelski would necessarily be prejudicial or antithetical to the interests of Highlander. Accordingly, the Defendant's application to disqualify Robyn Schmigelski is **denied**.

The Defendants' application to deny the Plaintiffs' request for a default judgement is moot.

The parties are directed to appear for a Preliminary Conference on January 22, 2008 at 9:30 a.m. in DCM.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 14, 2007
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD

J.S.C.

ENTERED

DEC 18 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE