A-41

OPINION-HON. ANTHONY J. CERRATO-JUNE 30, 1980

[A41-A44]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER _____ X

GEORGE SASSOWER,

Plaintiff,

-against-

APPELLATE DIVISION OF THE SUPREME COURT, SECOND JUDICIAL DEPARTMENT,

Defendant

Index #21226/79

Mot. Cal. Date:6/20/80

Mot. Cal. #

_____ X

CERRATO, J.

On June 17, 1980, an order in the abovecaptioned action was submitted to the undersigned for signature. In that order the plaintiff sought to have the defendant judicially declared to be in default and also to have the matter set down for an Inquest upon the payment of the appropriate fees and the filing of a Note of Issue.

Without delving into the nature of the action, or passing upon the validity of the claims and absolute defenses set forth in the verified answer (which has been rejected by plaintiff as untimely), this Court, in essence, has before it an application by plaintiff to enter a default and take an inquest against a defendant on whose behalf an answer was served a few days late.

The Attorney General 's office indicates that the lateness of the Answer is inconsequential, and that the Court is empowered and has the discretion to vacate a claimed default.

Upon the papers submitted to this Court, and upon due deliberation thereon, this Court declines to sign the order

finding the defendant in default and setting this matter down for inquest. Pursuant to sections 2001 and 2004 of the CPLR and the discretion vested in this Court to cure defaults (LeCesse v. Giancursio, 38 AD 2d 873; Fusco v. Malcolm, 50 AD 2d 685; see 5 Weinstein-Korn-Miller, NY Civ. Prac., par. 5015.02), this Court does hereby direct the plaintiff to accept the defendant's verified Answer and grants the defendant 15 days from entry of an order to serve said answer.

It is well settled in New York that actions should be determined on the merits so that parties may have their day in court. To effectuate that broad public policy, courts have been extremely liberal in vacating defaults.

The plaintiff argues that the defendant has not submitted any affidavit of merit in support of its request to vacate their default. In point of fact, the Attorney General, in an affirmation, has asserted the defendant's immunity from suit for libel such as that commenced here and has further pointed out that plaintiff's basic cause of action has already been dismissed by the Court of Claims and the Federal District Court. This would seemingly satisfy any requirement that the defendant justify its defense. Moreover, there is authority for the proposition that an affidavit of merits (or support for the defenses sought to be interposed) is unnecessary where the delay is so minor as here. (Lehigh Valley Railroad Co. v. North American Van Lines, Inc., 25 AD 2d 923).

Similarly, a requirement that there be a showing of a reasonable excuse for a delay, if applicable under the circumstances,

would also be satisfied by the Assistant Attorney General detailing as to how and why a technical default occurred.

The failure of the Court to vacate a default under these circumstances would merely precipitate additional and unnecessary motion practice. The delay in interposing the defense was minimal, a few days. Moreover, the plaintiff himself has been guilty of delay in this case. Indeed, the Attorney General's Office, on behalf of the defendant, served on December 6, 1979, a Notice of Appearance and Demand for Complaint. Under CPLR 3012(b), "if the complaint is not served within twenty days after service of the demand, the Court, upon motion, may dismiss the action." The complaint was not in fact served until four months after the aforementioned demand. Clearly, the plaintiff was in technical default for well over three months and the defendant could have moved for a dismissal even after service of the late complaint (Wilkening v. Fogarty, 40 AD 2d 1031).* Now plaintiff would seek to hold defendant in default for being a mere few days late in answering the complaint. This Court cannot, in fairness, permit such practice. While the defendant is not entitled to any more consideration than any other litigant, it should not be denied the same consideration as would be afforded to any other litigant.

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* Apparently, in response to the plaintiffs request to enter a default, the defendant urges this Court to dismiss the complaint pursuant to CPLR 3012(b) as untimely served, as well as for failure to state a cause of action and lack of jurisdiction. Should the Court require plaintiff to demonstrate that his delay was excusable and that his cause of action is meritorious to avoid dismissal of his action pursuant to CPLR 3012(b) or should not this matter be determined on the merits of the complaint and the merits of defendant's answer? Public policy in this state strongly favors the latter course.

Finally, this Court notes that it has not made any determination as to the merits of plaintiff's action nor considered the obvious claims of immunity or jurisdictional issues nor any of the other defenses raised in the answer tendered by defendant. Following the service of the answer pursuant to an order to be entered hereon, either party may make formal motions with respect to the other's pleadings.

SUBMIT ORDER ON NOTICE.

Dated: White Plains, New York
June 30, 1980

Anthony J. Cerrato J.S.C.