

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
HON. BERNARD J. FRIED Justice

E-FILE PART 60

Assos Construction Corp.,

INDEX NO. #103573/11

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. #001

1141 Realty LLC,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

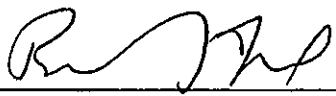
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

Dated: 10/13/2011


J.S.C.
HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [] REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X
ASSOS CONSTRUCTION CORP.,

Plaintiff,

-against-

Index No. 103573/11

1141 REALTY LLC,

Defendant.

-----X

For Plaintiffs:

For Defendants:

Kazlow & Kazlow
237 West 35th Street, 14th Floor
New York, NY 10001
(Stuart L. Sanders)

Ronald Francis, Esq.
350 Fifth Avenue, Suite 4510
New York, NY 10118

FRIED, J.

This action was brought to recover the amount due from defendant 1141 Realty LLC to plaintiff Assos Construction Corp. for the price of labor and materials allegedly provided by plaintiff to defendant in connection with defendant's construction of a hotel at 1141 Broadway, New York, NY, which property is owned by defendant. Plaintiff asserts that the summons and complaint was delivered to the Secretary of State on March 28, 2011 (Aff. of Stuart L. Sanders, ¶ 4; *see* Exh C), and was mailed to defendant on April 4, 2011 at its last known business address of 1141 Broadway, New York, NY (*id.*, ¶ 5; *see* Exh D). However, defendant did not appear in the action within 39 days after the service of the summons and complaint, and thereby defaulted. On June 22, 2011, a default judgment was entered against defendant.

Defendant now moves for an order vacating the default judgment. As set forth below, defendant's motion is granted.

In order to vacate a default judgment on the basis of CPLR 5015 (a) (1), the moving party must set forth both a reasonable excuse for the default, and a meritorious defense to the action (*see Kasumu v City of NY*, 78 AD3d 560 [1st Dept 2010]; *Theatre Row Phase II Assocs. v H & I, Inc.*, 27 AD3d 216 [1st Dept 2006]; *Easton v Associates Leasing, Inc.*, 24 AD3d 141 [1st Dept 2005]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (*see Antoine v Bee*, 26 AD3d 306 [2d Dept 2006]; *Scarlett v McCarthy*, 2 AD3d 623 [2d Dept 2003]). In addition, courts have broad discretion to grant relief from pleading defaults where the default was not willful, and the opposing party is not prejudiced (*see Harris v City of New York*, 30 AD3d 461 [2d Dept 2006]; *Bunch v Dollar Budget, Inc.*, 12 AD3d 391 [2d Dept 2004]).

In support of its motion to vacate, defendant submits the affidavit of Mabrouk Sayari, defendant's manager, who asserts that he is authorized to act on behalf of defendant, and that he is personally familiar with the facts. Sayari contends that defendant's default is excusable because the summons and complaint was never served on defendants, and it never received a copy from the New York Secretary of State (Sayari Aff., ¶ 3). Sayari bases this conclusion on his review of defendant's files, as well a conversation with the superintendent of the building who was responsible for retrieving the mail during the time of the alleged service (Sayari Reply Aff., ¶ 5). Sayari asserts that, if the summons and complaint were mailed to defendant at 1141 Broadway, New York, NY, he would have received the papers (Sayari Aff., ¶ 3). Sayari further asserts that, had defendant received the summons and

complaint, it would have timely served an answer, and challenged the lawsuit (*id.*, ¶ 4).

Ronald Francis, defendant's attorney, asserts that he obtained a copy of the summons and complaint from the court file after plaintiffs' attorney refused to provide him with a copy (Francis Aff., ¶ 3). Francis contends that, although plaintiff's attorney knew he was the attorney representing defendant from another case that he commenced against defendant on behalf of another client, he only notified Francis of this action after he obtained a default judgment against defendant (*id.*, ¶ 4).

Based upon these facts, I find that defendant's default is excusable, particularly in view of the strong public policy of deciding cases on the merits (*see Bobet v Rockefeller Center, North, Inc.*, 78 AD3d 475 [1st Dept 2010]). In addition, there is no evidence that defendant's default was made in bad faith, or with an intention to abandon the action (*see Ahmad v Aniolowiski*, 28 AD3d 692 [2d Dept 2006]; *Cadle Co. II, Inc. v Becker*, 261 AD2d 201 [1st Dept 1999]). In addition, plaintiff has neither alleged nor established that it would be prejudiced if the default were vacated (*see Ahmad v Aniolowiski*, 28 AD3d 692, *supra*; *Hyde Park Motor Co., Inc. v Sucato*, 24 AD3d 724 [2d Dept 2005]).

Defendant has also established that it has a meritorious defense to plaintiff's claims. According to Sayari, plaintiff was a subcontractor of Born to Build, LLC (BTB), the general contractor hired by defendant to perform construction work at the premises (Sayari Aff., ¶ 6). Sayari asserts that defendant never entered into a contract with plaintiff, never requested that plaintiff supply it with any materials, and does not owe any money to plaintiff (*id.*, ¶¶ 5-6). Thus, defendant contends, if plaintiff is owed any money on the project, it must recover it from BTB, not defendant. Sayari further asserts that defendant paid to BTB more

than the value of the work and materials that it provided to defendant, and that defendant has a counterclaim against BTB for over \$14,000,000 in another action entitled *Born to Build LLC, et al. v 1141 Realty, et al.* (Index No. 113855/10 [Sup Ct, NY County]) (*id.*, ¶ 7; see Exh C). I find that these contentions, particularly at this early stage of the action, are sufficient to show a meritorious cause of action (*see Goodwin v New York City Hous. Auth.*, 78 AD3d 550 [1st Dept 2010]).

Although plaintiff contends that I should disregard Sayari's affidavit because, since he was only recently appointed manager, he completely lacks personal knowledge about the matters at issue in this case, I reject this contention, given Sayari's assertion that "my personal knowledge of the facts concerning this action is based upon my observations of the project while I was working there as a contractor, my conversations with John Mei [the former manager], and my review of the books and records of 1141 Realty" (Sayari Reply Aff., ¶ 3).

I also reject plaintiff's contention that defendant does not have a meritorious cause of action because an independent contract exists between the parties. Although plaintiff attaches two undated documents that appear to be agreements between plaintiff and defendant to perform steel work at the construction site (*see Sanders Aff.*, Exhs K and L), Sayari asserts that his "review of the files and conversations with Mr. Mei reveal that no direct contract was ever made between 1141 Realty and Assos Construction Corp.," and that "copies of plaintiff's exhibits K and L are not contained in our files and have never been seen before by any of the owners of 1141 Realty" (Sayari Reply Aff., ¶ 7). Sayari also presents evidence that the work included on the documents attached to plaintiff's papers was not

included in the Construction Contract between defendant and BTB. (*see id.*, Exh A). Sayari further contends that defendant's records reveal that all payments for the construction work were paid to BTB, and that the change orders signed by BTB demonstrate that plaintiff was a subcontractor for BTB (*id.*, ¶¶ 11-12). These allegations are sufficient to rebut plaintiff's contentions at this stage of the litigation.

Accordingly, it is

ORDERED that defendant's motion to vacate its default herein is granted on condition that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 158); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 248, 60 Centre Street, on November 14, 2011, at 11:30 a.m.

DATED: October 13, 2011

ENTER:



J.S.C.

HON. BERNARD J. FRIED