

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Trial Term, Part: JCP**

**Index # 18092/2006
Mot. Cal. Date: 2-1-11
Mot Cal.: N/A**

-----x
ADAM REALTY CORP.,

Plaintiffs,

-against-

A.I. BOYMELGREEN DEVELOPERS, LLC,C
BOYMELGREEN DEVELOPERS, LLC, ATLANTICC
COURT, LLC, ALISA CONSTRUCTION CO, INC.,C
DOUG MOSHER, RICK HOLOCHAK, JOHN DOE, d/b/aC
LEVIEV BOYMELGREEN, SHAYA B. PACIFIC, LLC,C
BRIDGEFRONT, LLC, LIN ASSOCIATES ARHITECTS,C
P.C., ANHONY MO, d/b/a MO ENGINEERING,C
GOLDSTEIN ASSOCIATES CONSULTINGC
ENGINEERING, PLLC, and LEVIEV & BOYMELGREENC
DEVELOPERS, LLC,C

Defendants.

-----x
ATLANTIC COURT, LLC,

TP Index No: 75155/2007

Third-Party Plaintiff,

-against-

DMC BUILDERS CORP. and FALCON GROUP
ENTERPRISES, INC.,

Third-Party Defendants.

-----x
ATLANTIC COURT, LLC,

TP Index No: 75436/2008

Second Third-Party Plaintiff,

-against-

MARINE BULKHEADING, INC.,

Second Third-Party Defendant.

-----x
ALISA CONSTRUCTION CO., INC.,

TP Index No: 75498/2008

Third Third-Party Plaintiff,

-against-

DMC BUILDERS CORP. and FALCON GROUP
ENTERPRISES, INC.,

Third Third-Party Defendants.

-----x
ALISA CONSTRUCTION CO., INC.,

TP Index No: 75494/2008

Fourth Third-Party Plaintiff,

-against-

MARINE BULKHEADING, INC.,

Fourth Third-Party Defendant.
-----x

Recitation, as required by CPLR §2219(a), of the papers 1-13 considered
in the review of the motion and cross-motion herein.

Papers

Numbered

Order to Show cause by defendant-third party plaintiff Atlantic Court, LLC, to Vacate Default Judgment /Affidavits/Affirmations/Exhibits Annexed.....	___ 1-2 (A-B)___
Separately bound exhibits to Order to Show Cause.....	___ 3(A-M)___
Affirmation in opposition to motion to vacate judgment Affidavits/Affirmations/Exhibits Annexed.....	___ 4(A-U)___
Reply Affidavit/Affirmations/Exhibits.....	___ 5(A-E)___
Sur-Reply Affidavit/Affirmations/Exhibits.....	___ 6 (A-B)___
Further Affirmation.....	___ 7___
Notice of Cross-motion to Intervene /Affidavits/Affirmations/Exhibits Annexed.....	___ 8-9 (A-E)___
Affirmation in opposition to motion to intervene Affidavits/Affirmations/Exhibits Annexed.....	___ 10___
Affirmation of Ashley H. Gray in support of motion to intervene /Affidavits/Affirmations/Exhibits Annexed....	___ 11(Exs 1-6)___
Other (Memorandum of Law in Support of Motion to intervene; Stipulations Adjourning	___ 12-13___

Defendant/third-party plaintiff Atlantic Court, LLC, moves by order to show cause, for various relief, including an order vacating a default judgment that was entered in favor of the plaintiff in the amount of \$2,571,204.42 following an inquest on damages. PMFI Atlantic Court Member, LLC and PMFI Atlantic Court LLC cross-move to intervene in the action.

Throughout most of the litigation, defendant/third-party plaintiff Atlantic Court, LLC, as well as defendants, A.I. & Boymelgreen Developers, LLC, Boymelgreen Developers, LLC, John Doe d/b/a Leviev Boymelgreen, Shaya B. Pacific, LLC, Bridgefront LLC and Leviev & Boymelgreen Developers, were represented by Satterlee Stephents Burke & Burke. On February 24, 2009, without obtaining leave of Court, Satterlee Stephents Burke & Burke withdrew as their attorneys by filing and serving an Attorney Withdrawal form. The above defendants voiced their consented to the withdrawal by signing the Attorney Withdrawal form. Apparently neither defendant/third-party plaintiff Atlantic Court, LLC, nor any of the other defendants that were previously represented by Satterlee Stephents Burke & Burke, had representation in this action after the withdrawal until the institution of the within motion.

The Attorney Withdrawal form, which was thereafter served on the attorneys for the plaintiff, set forth the method as to how service of legal papers was to be effected after the withdrawal on the defendants that Satterlee Stephents Burke & Burke were representing in the action.

After Satterlee Stephents Burke & Burke withdrew as the attorneys for the above defendants, plaintiff filed and served a Note of Issue and Certificate of Readiness placing the matter on the trial calendar. Thereafter, plaintiff made a motion for partial summary judgment on the issue of liability which was granted on default. When the matter eventually appeared on the trial calendar, the matter was marked "inquest" due to defendants failure to answer the calendar call. An inquest was scheduled for and held on November 16, 2009, at which time there was no appearance by the defendants. Damages in the amount of \$2,467,469.900 were assessed against the moving defendant at the inquest. A judgment in the amount of \$2,571,204.42 was thereafter entered against the moving defendant.

Parenthetically, following Satterlee Stephents Burke & Burke's withdrawal, plaintiff continued serving Satterlee Stephents Burke & Burke with all legal papers, including the Note of Issue and Certificate of Readiness, the motion for partial summary judgment and a notice of the inquest which took place on November 16, 2009. The notice of inquest was served by first class mail on the defendants on October 27, 2009. Parenthetically, not only did the plaintiff serve all legal papers on Satterlee Stephents Burke & Burke, plaintiff also served all defendants with all legal papers in the manner set forth in the service provision contained in the Attorney Withdrawal form.

Defendant Atlantic Court, LLC now seeks to vacate the judgment.

A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must proffer both a

reasonable excuse for the default and a meritorious defense to the action (*see Gray v. B.R. Trucking Co.*, 59 N.Y.2d 649, 650, 463 N.Y.S.2d 192, 449 N.E.2d 1270; *Westchester County Med. Ctr. v. Allstate Ins. Co.*, 283 A.D.2d 488, 724 N.Y.S.2d 879). “The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court” (*Maspeth Fed. Sav. & Loan Assn. v. McGown*, 77 A.D.3d at 890, 909 N.Y.S.2d 403; *see Star Indus., Inc. v. Innovative Beverages, Inc.*, 55 A.D.3d 903, 904, 866 N.Y.S.2d 357; *Antoine v. Bee*, 26 A.D.3d 306, 306, 812 N.Y.S.2d 557). Here, the moving defendant did not demonstrate a reasonable excuse for the multiple defaults which led to the entry of the default judgment.

The papers before the Court make clear that it was the moving defendant’s choice not to be represented in the action after Satterlee Stephts Burke & Burke withdrew as its attorneys. There is no indication in the record that the moving defendant ever sought new representation until plaintiff sought to execute the judgment. While it may be true that it was improper for Satterlee Stephts Burke & Burke to withdraw as defendants’ attorneys without obtaining leave of Court, the moving defendant consented to the withdrawal, and it was not plaintiff’s obligation to make sure that the defendants had representation in the action as defendants now suggest. For all of these reasons, the moving defendant’s multiple defaults can only be viewed as intentional. As the moving defendant failed to demonstrate a reasonable excuse for its multiple defaults, the Court need not address whether a meritorious defense has been established (*see Westchester County Med. Ctr. v. Allstate Ins. Co.*, *supra* at 489, 724 N.Y.S.2d 879; *Hegarty v. Ballee*, 18 A.D.3d 706, 707, 795 N.Y.S.2d 747, 748).

Defendant’s contention that it did not receive the required notice of the inquest pursuant to CPLR § 3215(g) is without merit. As stated above, the plaintiff’s attorneys mailed a notice of inquest to the defendants on October 27, 2009 advising defendants that the inquest would be held on November 16, 2009. CPLR § 3215(g) only required that defendants be given five days notice of the time and place of the inquest.

The Court has considered defendant’s remaining arguments and find them to be unavailing.

The cross- motion of PMFI Atlantic Court Member, LLC and PMFI Atlantic Court LLC to intervene is granted, but only to the extent that they may intervene for the purposes of taking an appeal (*see Auerbach v. Bennett*, 64 A.D.2d 98, 105, 408 N.Y.S.2d 83, 86) .

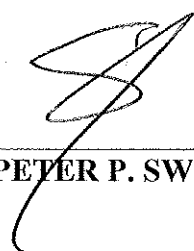
Accordingly, it is hereby

ORDERED that the motion of defendant/third-party plaintiff Atlantic Court, LLC is **DENIED** in all respects; and it is further

ORDERED that the cross- motion of PMFI Atlantic Court Member, LLC and PMFI Atlantic Court LLC to intervene is **GRANTED only to the extent** that they may participate in an appeal.

This constitutes the decision and order of the Court.

Dated: August 1, 2011


PETER P. SWEENEY, A.J.S.C.

Supreme
**PETER SWEENEY
A.J.S.C.
COURT REPORTER**