

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30330
O/prt

_____AD3d_____

Submitted - February 23, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-03693

DECISION & ORDER

Stephanie Ogman, etc., et al., appellants, v
Mastrantonio Catering, Inc., respondent.

(Index No. 101370/09)

Howard M. File, P.C., Staten Island, N.Y. (Martin Rubenstein of counsel), for appellants.

Bolan Jahnsen Dacey, Brooklyn, N.Y. (Todd E. Gilbert of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated March 16, 2010, as denied their motion for leave to enter a judgment on the issue of liability against the defendant upon its failure to appear or answer and granted the defendant's cross motion to compel them to accept a late answer.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, the plaintiffs' motion for leave to enter a judgment on the issue of liability against the defendant is granted, and the defendant's cross motion to compel the plaintiffs to accept a late answer is denied.

In support of their motion for leave to enter a judgment on the issue of liability against the defendant upon its failure to appear or answer, the plaintiffs submitted their process server's affidavit of service, an affidavit of merit, and their attorney's affirmation regarding the defendant's default (*see* CPLR 3215[f]).

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To successfully oppose the plaintiffs' motion and in support of its cross motion to compel the plaintiffs to accept the late answer, the defendant was required to demonstrate a justifiable excuse for its default and the existence of a potentially meritorious defense to the action (see CPLR 5015[a][1]; *May v Hartsdale Manor Owners Corp.*, 73 AD3d 713; *Gross v Kail*, 70 AD3d 997, 998; *Leifer v Pilgreen Corp.*, 62 AD3d 759, 760; *Kouziou v Dery*, 57 AD3d 949). The affirmation of the defendant's president, which was submitted in an effort to demonstrate a reasonable excuse for the default and a potentially meritorious defense, was not in an authorized form (see CPLR 2309; *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 n; *Martinez v D'Alessandro Custom Bldrs. & Demolition, Inc.*, 52 AD3d 786, 787; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557; *United Talmudical Academy of Kiryas Joel v Khal Bais Halevi Religious Corp.*, 232 AD2d 547, 548). Furthermore, the affirmation of the defendant's attorney failed to demonstrate a reasonable excuse for the default in answering and for the lengthy delay in cross-moving to compel the plaintiffs to accept the late answer (see *Holloman v City of New York*, 52 AD3d 568, 569; *Miller v Ateres Shlomo, LLC*, 49 AD3d 612, 613; *Robinson v 1068 Flatbush Realty, Inc.*, 10 AD3d 716). Moreover, the defendant's proposed answer was verified only by its attorney, who had no personal knowledge of the facts (see *Gross v Kail*, 70 AD3d at 998; *Baldwin v Mateogarcia*, 57 AD3d 594, 595; *Bekker v Fleischman*, 35 AD3d 334, 335). Accordingly, the plaintiffs' motion should have been granted and the defendant's cross motion should have been denied.

RIVERA, J.P., FLORIO, DICKERSON, HALL and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court