

**High Point Prop. Group Acquisition LLC v
Professional Settlement Corp.**

2020 NY Slip Op 33327(U)

October 5, 2020

Supreme Court, Kings County

Docket Number: 504691/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

-----X
HIGH POINT PROPERTY GROUP
ACQUISITION LLC,

Plaintiff,

-against-

PROFESSIONAL SETTLEMENT CORPORATION
ARTHUR GOODRICH & MICHELLE GOODRICH,

Defendants.
-----X

Decision and Order

Index No. 504691/2019

Cal. No. 14-18

Mot. Seq. 1, 2, 3, 5, 6

Date: OCT 5 2020

After oral argument on September 25, 2020, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers Numbered

Plaintiff's Notice of Motion granting a default judgment against defendants for failure to answer and for specific performance and other relief, dated June 22, 2019; Affidavit of Drew Popkin, sworn to on June 17, 2019; Attorney Affirmation of Matthew Hearle, affirmed on June 22, 2019;	
Exhibits A-(Plaintiff must use #s in the future) Summons and Complaint; B-Acknowledgement of Service dated March 28, 2019; C-Affidavit of Service sworn to on 4/17/2019; D-Affidavit of Service sworn to on April 17, 2019;.....	1
Defendants Goodridge's Notice of Cross Motion to Dismiss the Complaint dated October 3, 2019; Attorney Affirmation of Jimmy Wagner, Esq. (but signed by Thaniel J. Beinert, Esq) dated October 3, 2019;	
Exhibits A-Summons and Complaint; B-Portions of a Contract of Sale with pages apparently missing; C-Order of the Hon. Dawn Jimenez-Salta entered on April 16, 2019 directing that Professional Settlement Corporation transfer 2/3 ownership interest in real property to the Goodridges.....	2
Plaintiff's Attorney Affirmation in Opposition of Matthew Hearle, affirmed on September 22, 2020.....	3
Plaintiff's Order to Show Cause dated July 21, 2020 returnable on August 11, 2020 for default judgment against Defendant Professional Settlement Corporation; Attorney	

<p>Affirmation of Mathew Hearle, affirmed on July 20, 2020; Affidavit of Drew Popkin, sworn to on July 10, 2020; Affidavit of Steven Rosenberg, sworn to on July 20, 2020;</p> <p>Exhibits:</p>	
<p>1-Commercial Contract of Sale/Multiple Dwelling dated June 5, 2018; 2-Complaint dated March 4, 2019; 3-Order of the Court directed transfer of 2/3 ownership from Professional Settlement Corporation to Goodridge, Index No. 501018/2019, entered April 16, 2019; 4-Amended Complaint dated May 25, 2020; 5-Notice of Rejection of Amended Complaint dated June 14, 2020; 6-Email dated June 14, 2020.....</p>	4
<p>Notice of Cross-Motion by Proposed Intervenors Wilfred Moseley, Oneil Moseley, Dennis Trevor Moseley and Jasmine Thompson, dated March 2, 2020; Attorney Affirmation of David Binson, Esq., affirmed on March 2, 2020; Affidavit of Wilfred Moseley, sworn to on March 2, 2020;</p> <p>Exhibits</p>	
<p>1-Intervenors' Verified Complaint dated March 2, 2020; 2-Deed to Lillian Goodridge dated ____ (1953); 3-ACRIS cover page. 1/3 interest from Myrvin Goodridge to Michelle Goodridge and Arthur Goodridge; 4-ACRIS cover page. Deed from Goodridges to Goodridges and Professional Settlement Corp. 5-ACRIS cover page. Deed from Goodridges and Professional Settlement Corporation to Professional Settlement Corporation; 6-Summons and Complaint (NO INDEX NO.); 7-Summons and Complaint (NO INDEX NO.); 8-Order of the Court directed transfer of 2/3 ownership from Professional Settlement Corporation to Goodridge, Index No. 501018/2019, entered April 16, 2019; 9-Acknowledgement of Service dated March 28, 2019; 10-NYS DOS Corporation Search results.....</p>	5
<p>Defendant Professional Settlement Corporation's Notice of Motion dismissing the plaintiff's amended complaint, dated June 16, 2020; Attorney Affirmation of Ernest E. Wilson Esq., affirmed on June 16, 2020;</p> <p>Exhibits</p>	
<p>A-Acknowledgment of Service; B-Affidavit of Service of Notice of Pendency, etc., sworn to on 4/17/2019; C-Affidavit of Service of Notice of Pendency, etc., sworn to on 4/17/2019; D-Notice of Motion dated June 22, 2019; E-Amended Complaint dated May 25, 2020; F-Notice of Rejection of Amended Complaint dated June 14, 2020.....</p>	6
<p>Plaintiff's Attorney Affirmation of Matthew Hearle, Esq., affirmed on October 7, 2019 in further support of its motion for default and in Opposition to Cross-Motion;</p> <p>Exhibits</p> <p>A-Deed dated May 9, 2017 from Goodridges to Professional Settlement Corp; B-Deed dated March 7, 2017 from Goodridges to Goodridges and professional Settlement Corporation; C-Agreement with Goodridges and Professional Settlement Corp. dated March 14, 2018.....</p>	7

Reply by Proposed Intervenors by Jimmy Wagner, Esq., affirmed on December 9, 2019;	
Defendant Professional Settlement Corporation’s Attorney Affirmation of Ernest E. Wilson, Esq., in Support of Cross Motion, affirmed on March 3, 2020.....	8
Proposed Intervenors’ Attorney Affirmation of David Binson, in further support of intervenors’ motion and in opposition to plaintiff’s motion, affirmed on September 21, 2020;	
Exhibit 1-Notice of Cross Motion dated March 2, 2020.....	9

MONTELIONE, RICHARD J., J.

The plaintiff seeks default judgment against the defendants but has withdrawn its motion for specific performance under a contract of sale of real property and now seeks the return of its deposit. Defendants Professional Settlement Corporation and Defendants Goodridges respectively move to vacate their default, serve its answer and dismiss the action. There is also a motion to intervene brought by non-parties Wilfred Moseley, Oneil Mosely, Dennis Trevor Mosely and Jasmine Thompson based on their alleged interest in the real property. The complaint was served on defendants Arthur Goodridge and Michelle Goodridge on April 16, 2019 through conspicuous service, and on defendant Professional Settlement Corporation on March 28, 2019. These affidavits of service regarding defendants Goodridge were filed on April 23, 2019 and regarding defendant Professional Settlement Corporation was filed on April 1, 2019. All the defendants failed to timely serve answers. There is a related action Arthur and Michele Goodridge v Professional Settlement Corporation, Index No. 501018/2019. There is no motion to consolidate.

The original contract of sale, dated “March 2018” with a First Amendment to Contract of Sale dated June 5, 2018, was between plaintiff and defendant Professional Settlement Corporation and provided for the closing to occur August 31, 2018, or sixty days following evidence that the premises were vacant and would be delivered at closing vacant and receipt of confirmation of purchaser receiving fee simple title. Since the execution of the contract of sale, the premises were never vacant. Per the Order of the Hon. Dawn Jimenez-Salta, entered on April 16, 2019, Defendant Professional Settlement Corporation, who held title to the property in its name alone, was ordered to transfer two thirds of the ownership interest to defendants Arthur Goodridge and Michelle Goodridge. The proposed intervenors are alleged to be related to the decedent Lillian Goodridge. After Lillian Goodridge’s demise, title was transferred to defendants Arthur Goodridge and Michelle Goodridge.

On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the claim by an affidavit made by the party, and proof of the defendant's default (*see* CPLR 3215[f]; *Mercury Cas. Co. v. Surgical Ctr. at Milburn, LLC*, 65 A.D.3d 1102, 885 N.Y.S.2d 218; *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202).

A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer (*see* *Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 58, 970 N.Y.S.2d 260, 262; *Ennis v. Lema*, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see* *Mid-Hudson Props., Inc. v. Klein*, 167 A.D.3d 862, 864, 90 N.Y.S.3d 264; *White v. Inc. Vill. of Hempstead*, 41 A.D.3d 709, 710, 838 N.Y.S.2d 607, 608). Moreover, whether to grant such relief is discretionary (*see* *Goldfarb v. Zhukov*, 145 A.D.3d at 759, 43 N.Y.S.3d 135), and relief may be denied "where, for example, a defendant's failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice" (*Eugene Di Lorenzo, Inc.*, 67 N.Y.2d at 143)(*see* *Stevens v. Stepanski*, 164 A.D.3d 935, 937, 84 N.Y.S.3d 1, 3 [App. Div. 2d Dept. 2018]).

Although all the defendants were in default regarding the original complaint, and a motion for default judgment was returnable on July 15, 2019, the plaintiff amended its complaint on May 27, 2020 (NYCEF Doc. 49) which provided the defendants with additional time to answer. Whatever agreement defendant Professional Settlement Corporation may have believed regarding answering the complaint at its leisure pursuant to the March 28, 2019 email, it was required to timely answer after being served the amended complaint on May 27, 2020. "Generally, an amended complaint supersedes the original pleading, the defendant's original answer has no effect, and a new responsive pleading is substituted for the original answer (*see* *Brooks Bros. v. Tiffany*, 117 A.D. 470, 102 N.Y.S. 626; *Rifkind v. Web IV Music*, 67 Misc.2d 26, 323 N.Y.S.2d 326; *cf. Volpe v. Manhattan Sav. Bank*, 276 A.D. 782, 92 N.Y.S.2d 797; *see also* 3 *Weinstein-Korn-Miller*, N.Y.Civ.Prac., par. 3025.12)" (*Stella v. Stella*, 92 A.D.2d 589, 459 N.Y.S.2d 478 [1983]). "The original complaint is no longer viable, inasmuch as the amended complaint 'takes the place of the original pleading' (internal citations

omitted)” (*Golia v. Vieira*, 162 A.D.3d 863, 80 N.Y.S.3d 297 [App. Div. 2018]). However, defendant Professional Settlement Corporation rejected the amended complaint on June 14, 2020. Notwithstanding defendant Professional Settlement Corporation’s arguments to the contrary, plaintiff’s time to amend as of course includes “within 20 days after a responsive pleading” is served. CPLR 3025(a).

The court finds that none of the defendants have offered any reasonable explanation as to why they have defaulted in answering the amended complaint. The court need not look to the merits. *See Cervini v Cisco Gen. Const., Inc.*, 123 A.D.3d 1077, 1077, 1 N.Y.S.3d 195 (2d Dept 2014), “(i)n view of the lack of a reasonable excuse, it is unnecessary to consider whether the defendant sufficiently demonstrated the existence of a potentially meritorious defense (*see Abdelqader v Abdelqader*, 120 AD3d at 1275; *Cavalry SPV I, LLC v Frenkel*, 119 AD3d at 724);” *OneWest Bank v. Schiffman*, 175 A.D.3d 1543, 109 N.Y.S.3d 365 (2d Dept 2019).

Further, even if the court were to consider a meritorious defense, there is no meritorious defense. The proposed answer only pertains to the original complaint and not the amended complaint. The contract between plaintiff and defendant Professional Settlement Corporation was contingent upon the premises being delivered vacant and broom clean. All sides concede defendants Goodridges have been in continuous occupancy. The Court’s decision per the Hon. Dawn Jimenez-Salta, *supra.*, directing that two-thirds of the ownership interest to be transferred from defendant Professional Settlement Corporation to defendants Arthur Goodridge and Michelle Goodridge clouds the title and only the purchaser has a contractual right to take subject to that cloud on title (Contract ¶ 13.02) which it chose not to do. The amended complaint is one based on breach of contract, and not specific performance, where plaintiff seeks the return of its down payment after the law day has passed and after notice of “time of the essence” was given and inasmuch as the defendants do not appear to have a viable defense, even if all the affidavits were considered, plaintiff is entitled to void the contract of sale and have its security deposit returned. (*See Lane v Seltzer*, 303 AD2d 378 [2d Dept 2003]).

See Wise v Classon Vil., L.P., 172 AD3d 1444, 1446 [2d Dept 2019])

reflects the following:

However, Classon Village failed to establish a potentially meritorious defense, as its moving papers contained conclusory and hearsay assertions, without any

evidentiary support, in response to the plaintiff's claims (*see Jian Hua Tan v AB Capstone Dev., LLC*, 163 AD3d 937, 938-939, 83 N.Y.S.3d 86; *John v Rikud Realty, Inc.*, 149 AD3d 707, 709, 51 N.Y.S.3d 165; *New York Hosp. Med. Ctr. of Queens v Insurance Co. of State of Pa.*, 16 AD3d 391, 392, 791 N.Y.S.2d 145; *Peacock v Kalikow*, 239 AD2d 188, 190, 658 N.Y.S.2d 7; *Reilly-Whiteman, Inc. v Cherry Hill Textiles*, 191 AD2d 486, 487, 596 N.Y.S.2d 708). Accordingly, Classon Village was not entitled to vacatur of its default pursuant to CPLR 317.

Likewise, the failure of Classon Village to set forth a potentially meritorious defense also precluded a vacatur of its default pursuant to CPLR 5015(a)(1), which requires that the defaulting party demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (*see Xiao Lou Li v China Cheung Gee Realty, LLC*, 139 AD3d 724, 726, 32 N.Y.S.3d 198; *Sussman v Jo-Sta Realty Corp.*, 99 AD3d 787, 788, 951 N.Y.S.2d 683). In any event, Classon Village failed to demonstrate a reasonable excuse for its default, as it did not adequately explain its failure to advise the Secretary of State of its new address for the service of process (*see Gershman v Midtown Moving & Stor., Inc.*, 123 AD3d at 975; *Sussman v Jo-Sta Realty Corp.*, 99 AD3d at 788; *Yellow Book of N.Y., Inc. v Weiss*, 44 AD3d 755, 756, 843 N.Y.S.2d 190).

Neither good cause, nor in the interest of justice, has been shown to vacate the defendants' default. (*State of NY Mtge. Agency v Braun*, 182 AD3d 63 [2d Dept 2020]). The defendants Goodridges did not answer the original complaint that was filed on April 23, 2019 or the amended complaint filed on May 27, 2020. The defendant Professional Settlement corporation did not answer the original complaint where they acknowledged service on March 28, 2019 and improperly rejected the amended complaint on June 14, 2020.

Based on the foregoing, it is

ORDERED that Plaintiff's motion for default judgment against defendants on the grounds that defendants failed to answer the Amended Complaint by Order to Show Cause dated July 21, 2020 (Mot. Seq. 6) is granted and a default judgment

is entered against defendants Professional Settlement Corporation, Arthur Goodrich and Michelle Goodrich; and it is further

ORDERED, ADJUDGED, AND DECLARED:

A. that defendant Professional Settlement Corporation failed to satisfy its obligations under the Contract of sale so as to be ready, willing and able to close thereunder on the law date and, as such, is in default thereunder; and

B. that defendant Professional Settlement Corporation's inability and/or failure to deliver title to the Premises vacant and free of occupants constitutes a failure of a condition precedent to closing; and

C. that the notices of pendency filed against the premises and not removed by defendant Professional Settlement Corporation prior to closing rendered title unmarketable and uninsurable and rendered Seller unready and unable to deliver title to the Premises as required by the Contract;

D. that the Court order in *Arthur and Michele Goodridge v Professional Settlement Corporation*, Index No. 501018/2019, rendered title unmarketable and uninsurable, and rendered defendant Professional Settlement Corporation unready and unable to deliver title to the Premises as required by the Contract;

E. that the pendency of the Goodridge action and Mosely action rendered defendant Professional Settlement Corporation unready and unable to deliver title to the Premises as required by the Contract;

F. that plaintiff was not obligated under the contract to proceed with the sale with defendant Professional Settlement Corporation based on the unmarketable and uninsurable title; and

G. that defendant Professional Settlement Corporation breached the contract of sale; and it is further

ORDERED that the defendant Professional Settlement Corporation's counsel is directed to forthwith release the \$425,000.00 down payment currently held in escrow to the plaintiff's counsel; and it is further

ORDERED that plaintiff, upon receipt of the down payment, to the extent that it filed a Notice of Pendency or other encumbrance on the subject real property, is to remove such Notice of Pendency or other encumbrance forthwith; and it is further

ORDERED, that plaintiff shall submit a Bill of Costs, together with proof of the costs and expenses of title, along with a proposed judgment, with notice of settlement; and it is further

ORDERED that any other relief by the plaintiff is denied (Mot Seq. 1); and it is further

ORDERED that all defendants' respective motions, cross-motions or other requests for relief (Mot. Seq. 2, 4, 5) are denied; and it is further

ORDERED that the proposed intervenors Wilfred Moseley, Oneil Mosely, Dennis Trevor Mosely and Jasmine Thompson's motion to intervene (Mot. Seq. 3) is denied as moot; and it is further

ORDERED that plaintiff shall serve upon all parties and the proposed Intervenor a copy of this decision, order and declaration within fifteen (15) days of its entry with notice of entry.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY



RICHARD J. MONTELIONE, A.J.S.C.

2020 OCT -9 PM 12:32
KINGS COUNTY CLERK
FILED

