

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

D54623
C/htr

_____AD3d_____

Argued - November 6, 2017

SHERI S. ROMAN, J.P.
JOSEPH J. MALTESE
HECTOR D. LASALLE
BETSY BARROS, JJ.

2015-07266

DECISION & ORDER

Baldwin Route 6, LLC, respondent, v Bernad
Creations, Ltd., appellant.

(Index No. 2503/14)

Moses & Singer, LLP, New York, NY (Robert D. Lillienstein of counsel), for
appellant.

Daniels, Porco and Lusardi, LLP, Carmel, NY (Robert C. Lusardi of counsel), for
respondent.

In an action to recover damages for breach of contract, the defendant appeals from
an order of the Supreme Court, Putnam County (Lubell, J.), dated June 16, 2015, which denied its
motion pursuant to CPLR 2004 to compel the plaintiff to accept its late answer.

ORDERED that the order is reversed, on the facts and in the exercise of discretion,
with costs, and the defendant's motion pursuant to CPLR 2004 to compel the plaintiff to accept its
late answer is granted.

In December 2014, the plaintiff commenced this action to recover damages for breach
of contract. The defendant served its answer on January 22, 2015, which the parties agree was two
days after the statutory deadline to answer had expired. After the plaintiff's counsel rejected the
answer as untimely, the defendant moved pursuant to CPLR 2004 to compel the plaintiff to accept
its late answer. The Supreme Court denied the defendant's motion. We reverse.

CPLR 2004 provides that, "[e]xcept where otherwise expressly prescribed by law,
the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms
as may be just and upon good cause shown, whether the application for extension is made before or
after the expiration of the time fixed." Given the strong public policy favoring the resolution of
cases on the merits, "the Supreme Court may compel a plaintiff to accept an untimely answer (*see*

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CPLR 2004, 3012[d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists” (*Yongjie Xu v JJW Enters., Inc.*, 149 AD3d 1146, 1147; *see Tewari v Tsoutsouras*, 75 NY2d 1, 12; *Calderone v Molloy Coll.*, 153 AD3d 491). Here, in light of the defendant’s brief and unintentional delay in serving its answer, the lack of prejudice to the plaintiff, and the existence of a potentially meritorious defense, the Supreme Court improvidently exercised its discretion in denying the defendant’s motion pursuant to CPLR 2004 to compel the plaintiff to accept its late answer (*see Yongjie Xu v JJW Enters., Inc.*, 149 AD3d at 1147; *Roy v 81E98th KH Gym, LLC*, 142 AD3d 985, 986; *Spence v Davis*, 139 AD3d 703, 704; *Klein v Yeshiva M’kor Chaim*, 116 AD3d 672; *see also Calderone v Molloy Coll.*, 153 AD3d at 491).

ROMAN, J.P., MALTESE, LASALLE and BARROS, JJ., concur.

2015-07266

DECISION & ORDER ON MOTION

Baldwin Route 6, LLC, respondent, v Bernad Creations, Ltd., appellant.

(Index No. 2503/14)

Motion by the respondent to strike stated portions of the appellant’s brief and stated portions of the appellant’s reply brief on an appeal from an order of the Supreme Court, Putnam County, dated June 16, 2015, on the ground that they improperly raise arguments for the first time on appeal. By decision and order on motion of this Court dated September 15, 2016, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is granted to the extent that the portion of the appellant’s reply brief which begins on page 13 with the words “[m]oreover, if Baldwin’s argument,” and ends on page 14 with the words “potentially meritorious defense,” is deemed stricken, and has not been considered on the appeal, and the motion is otherwise denied.

ROMAN, J.P., MALTESE, LASALLE and BARROS, JJ., concur.

ENTER: 
Aprilanne Agostino
Clerk of the Court