

**Henry v Kitt**

2024 NY Slip Op 34878(U)

July 23, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 623874/2023

Judge: George Nolan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

Index No. 623874/2023

SUPREME COURT – STATE OF NEW YORK  
PART 55 – SUFFOLK COUNTY

**P R E S E N T:**

**Hon. George Nolan**  
Justice Supreme Court

-----x  
LINDSAY HENRY,

Plaintiff,

-against-

AUSTIN KITT,

Defendant.  
-----x

Mot. Seq. No. 001 – MD  
Orig. Return Date: 12/29/2023  
Mot. Submit Date: 02/01/2024

Mot. Seq. No. 002 – MG  
Orig. Return Date: 05/23/2024  
Mot. Submit Date: 05/23/2024

**PLAINTIFF’S ATTORNEY**  
MARGIOTTA LAW  
165 South Wellwood Avenue  
Lindenhurst, New York 11757

**DEFENDANT’S ATTORNEY**  
SILVERBERG P.C.  
320 Carleton Avenue, Suite 6400  
Central Islip, New York 11722

Upon the e-filed documents numbered 03 through 08, 10 through 20, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

**ORDERED** that the following motions are consolidated solely for purposes of this decision and order and, as so consolidated, are determined as set forth hereinafter; and it is further

**ORDERED** that plaintiff Lindsay Henry’s motion (motion sequence no. 001) for an order pursuant to CPLR 3215 granting him a default judgment against defendant Austin Kitt for his failure to answer the complaint is denied; and it is further

**ORDERED** that defendant Austin Kitt’s motion (motion sequence no. 002) for an order pursuant to CPLR 2004 and CPLR 3012(d) compelling plaintiff to accept his answer is granted; and it is further

**ORDERED** that plaintiff shall accept the defendant’s answer as timely filed *nunc pro tunc*.

This is an action for damages as a result of defendant’s alleged defamation. The defendant Austin Kitt owns property in the Village of Babylon (“Village”) at 167 Araca Road (“premises”). In 2020 the Village issued a permit to the defendant for repair and reconstruction work at the

premises. Kitt hired a contractor, Joseph Pinola and T Rex Construction d/b/a BRJ Construction (“Pinola”) to perform the work. The project did not go according to plan. The defendant, apparently believing he had been wronged by Pinola and various local officials, began lashing out on social media and elsewhere targeting Pinola, Babylon Town officials and Village officials, including the defendant, Lindsay Henry. Mr. Henry is an attorney and a part-time prosecutor for the Village. Multiple lawsuits ensued. The Court has four separate but related actions pending in its inventory arising from the failed construction project at the premises: *Pinola v. Kitt* (Index No. 203258/2022), a breach of contract/defamation action; *Kitt v. Incorporated Village of Babylon, et al* (Index No. 609114/2023), a negligence/breach of contract/harassment action; the subject action; and *Adams v. Kitt* (Index No. 618853/2023), another defamation action brought by the Mayor of the Village (collectively “the related actions”). Defendant Kitt was initially represented by Long Tuminello LP in the first two actions.

Plaintiff commenced this action by filing a summons and complaint on September 25, 2023. The plaintiff has submitted an affidavit of service indicating that service of process was effectuated upon the defendant on October 10, 2023. On December 14, 2023, plaintiff moved for a default judgment asserting the defendant’s failure to timely answer. On April 29, 2024, defendant filed a motion to compel plaintiff to accept his answer.

In order to obtain a default judgment, a plaintiff must move within one year of the default, demonstrate compliance with the provisions of CPLR 3215, including affidavits of service, filings with the clerk of the court to complete service where required, mailings pursuant to CPLR 3215(g) if necessary, and submission of plaintiff’s affidavit of the amounts due or a complaint verified by a party (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]).

CPLR 2005 states:

Upon an application satisfying the requirements of subdivision (d) of CPLR 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.

Further, CPLR 3012(d) provides:

Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

To avoid the entry of a default judgment, a defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action (*see Sadowski v. Windsor Village Apartments Company, LLC*, 200 AD3d 816, 156 NYS3d 120 [2d Dept 2021]). “A defendant who moves pursuant to CPLR 3012(d) to compel the plaintiff to accept late service of an answer is required to make a similar showing” (*Yuxi Li v. Caruso*, 161 AD3d 1132, 1133, 77 NYS3d 685 [2d Dept 2018]). “Whether a proffered excuse is ‘reasonable’ is a ‘sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the

opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits” (*Friend v. Jacob Holding, Inc.*, 110 AD3d 56, 60, 970 NYS2d 260 [2d Dept 2013] quoting *Harcztark v. Drive Variety, Inc.*, 21 AD3d 876, 876-877, 800 NYS3d 612 [2d Dept 2005]).

In support of his motion and to demonstrate an excuse for his default, the defendant has submitted an affidavit in which he states, *inter alia*, that when he was served with the plaintiff’s complaint in October 2023 he assumed “it was mere harassment and retaliation” by the Village. He also states that he mentioned the subject lawsuit to the counsel that was handling his other cases at the time but “she was silent as to how to proceed.” This excuse is inadequate. However, the Court is aware – through compliance conferences, motion practice and an incarceration hearing conducted in the *Pinola v. Kitt* action<sup>1</sup> -- that approximately one month before this action was commenced, the defendant’s prior counsel, Long Tuminello LP, moved to sever the plaintiff’s defamation cause of action against Kitt and, further, asked to be relieved as Kitt’s counsel as to that defamation claim. The Court denied that motion by an order dated December 4, 2023, but on January 18, 2024, Kitt consented to change attorneys and proceed as *pro se* party in the *Pinola v. Kitt* and *Kitt v. Village of Babylon* actions. Kitt obtained new counsel to represent him in the related actions in February 2024.

The Court is faced with an exceedingly difficult decision on these motions. However, under the unique circumstances presented and mindful of the strong public policy favoring the resolution of cases on the merits the Court determines to exercise its discretion and excuse the defendant’s default. While the defendant has not established law office failure as an excuse for his default, it is apparent that the defendant’s legal representation in the related actions was in a state of flux beginning in August 2023 and continuing for several months thereafter. The defendant’s delay in filing an answer herein was significant but the plaintiff has not demonstrated that he will be prejudiced by the delay. Further, the defendant has a potentially meritorious defense as the plaintiff may be considered a public official and, therefore, be required to show (in addition to all the other elements of a defamation claim) that the defendant knew that his alleged defamatory statements were false or that he acted in reckless disregard of the truth or falsity of the statements.

As it is within the court’s proper exercise of discretion to consider the late answer to have been interposed timely and to require the defendant to accept it *nunc pro tunc* (*Hutchinson v. NYC Health and Hospital Corp.*, 118 AD3d 945, 988 NYS2d 675 [2d Dept 2014]), the plaintiff shall accept defendant’s answer.

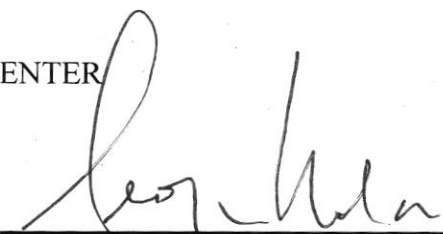
The parties are directed to complete and upload to NYSCEF a preliminary conference order on or before September 19 2024.

The foregoing constitutes the decision and Order of the Court.

---

<sup>1</sup> Plaintiff asked the Court to take judicial notice of the proceedings, exhibits and actions in the *Pinola v. Kitt* action. In addition to the legal representation issue discussed above, the Court notes that Kitt was twice held in contempt for violating a court order in that action. The Court also notes that Kitt paid the fines imposed by the Court and to the Court’s knowledge, Kitt is now in compliance with that court order.

DATE: July 23, 2024  
Riverhead, NY

ENTER   
HON. GEORGE NOLAN, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION