Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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PIZZA PLUS OF ROCKAWAY, INC.,

Plaintiff,

Index No: 23593/06
Motion Date: 10/24/07
Motion Cal. No.: 32
Motion Seq. No.: 2

-against-

ARVERNE ASSOCIATES,

Defendant.

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The following papers numbered 1 to 11 read on motion by defendant Arverne Associates for an order, pursuant to CPLR § 3215, directing the entry of judgment in favor of defendant and against plaintiff Pizza Plus of Rockaway, Inc., for the relief demanded in the counterclaim upon the ground that plaintiff has failed to answer or otherwise respond to the counterclaims, and pursuant to CPLR § 3215, directing the taking of an Inquest and assessment of damages, or, in the alternative for the instant motion to be treated as one for summary judgment.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition.....	6 - 8
Reply Affidavits in Further Support of Cross-Motion- Exhibits.....	9 - 11

Upon the foregoing papers, it hereby is ordered that the motion is disposed of as follows:

This is an action for damages for breach of a lease agreement between defendant Arverne Associates ("Arverne Associates") and plaintiff Pizza Plus of Rockaway, Inc.("Pizza Plus"), a commercial tenant with a leasehold interest in premises owned by Arverne Associates, executed by the parties on January 20, 2006, for premises located at 57-17 Shore Parkway Avenue, Arverne, New York. By order dated April 30, 2007, this Court denied Pizza Plus' application for a Yellowstone injunction permanently enjoining Arverne Associates from commencing any summary or other proceedings to terminate or cancel the leasehold interest and the lease of Pizza Plus with respect to the premises, and staying the period within which to cure any alleged default under the lease. The Notice of Default then at issue alleged a violation of Paragraphs 2 and 88 of the Lease. Paragraph 2 provides:

> Tenant shall use and occupy the demised premises for a pizzeria, selling pizza, chicken, pasta and similar Italian fast food items made to order, breakfast items and made to order sandwiches and up to 300 square feet may be used for New York State Lotto sales, sales of phone cards, greeting cards and stationary items, sale of cigarettes in packs (no carton sales), prepackaged snacks such as chips and candy, in individual size packages only, and sales of newspapers and magazines. Tenant acknowledges that another store at the property has an exclusive right to operate as a supermarket or grocery store and tenant agrees it will not violate such exclusive.

Paragraph 88 of the Lease states:

> Anything in Paragraph 2 to the contrary notwithstanding, Tenant shall not use the demised premises for the sale of groceries, prepackaged food or grocery items or alcoholic beverages.

On February 8, 2007, Arverne Associates served its Verified Answer and Counterclaims. The First and Second Counterclaims seek injunctive relief, barring Pizza Plus from selling specified items, including cigars; the Third Counterclaim seeks money damages derivatively based upon the alleged losses of OV Food Market Corp., its tenant, based upon Pizza Plus' breach of the lease agreement; and the Fourth Counterclaim seeks legal expenses associated with the alleged breach of the lease agreement. Based upon Pizza Plus' failure to answer the counterclaim, Arverne Associates now moves, inter alia, for a default judgment on its counterclaims. Pizza Plus' opposition to the motion is based upon it having served an answer to the Counterclaims on October 8, 2007, just prior to the return date of this motion, and its contention that Arverne Associates has not been prejudiced by its filing of the late verified answer, as it had notice of the disputed issues of fact raised in the Counterclaims.

It is well-settled that to successfully oppose a defendant's motion for leave to enter a default judgment upon the plaintiff's failure to serve a timely reply to his counterclaim, the plaintiff is required to demonstrate a reasonable excuse for its delay in serving a reply and a potentially meritorious defense. See, MMG Design, Inc. v. Melnick, 35 A.D.3d 823 (2d Dept. 2006)l; Twersky v. Kasaks, 24 A.D.3d 657, 658 (2d Dept. 2005); Beizer v. Funk, 5 A.D.3d 619 (2d Dept. 2004); Bensimon v. Fishman, 242 A.D.2d 551 (2d Dept. 1997). What constitutes a reasonable excuse and a meritorious defense is generally left to the sound discretion of the Supreme Court to determine. See, Beizer v. Funk, supra; Scarlett v. McCarthy, 2 A.D.3d 623 (2d Dept. 2003). And, where there is no evidence of willfulness, deliberate default, or prejudice to the other side, the interest of justice is best served by permitting the case to be decided on its merits. White v. Incorporated Village of Hempstead, 41 A.D.3d 709 (2d Dept. 2007); Beizer v. Funk, supra; Photovision Intl. v. Thayer, 235 A.D.2d 467 (2d Dept. 1997).

Here, Pizza Plus failed to demonstrate either a reasonable excuse for its delay in serving a reply to the counterclaims or a potentially meritorious defense. Moreover, the belated service of a reply to the counterclaims was of no consequence since such service did not comply with the requirements of CPLR § 3012(d), which, in pertinent part, 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.

Nor can this Court even give consideration to the Reply to Counterclaims, which was annexed as an exhibit to the opposition papers. See, Grinage v. City of New York, __ A.D.3d __, 846 N.Y.S.2d 300, (2d Dept. 2007)["in the absence of a cross motion for such relief. . ., the Supreme Court erred in granting . . . leave to serve a late answer"]; Hosten v. Oladapo, 44 A.D.3d 1006 (2d Dept. 2007)[The court erred in deeming the defendant's answer timely filed and served in the absence of a cross motion for this relief and without the necessary showing of a reasonable excuse for the default and a meritorious defense.]; Giovanelli v. Rivera, 23 A.D.3d 616 (2d Dept. 2005)["Supreme Court should not have extended his time to serve an answer in the absence of a cross motion for such relief"]; Blam v. Netcher, 17 A.D.3d 495 2d Dept. 2005)[in the absence of a cross motion the Supreme Court should not have considered the defendant's informal request for an extension of time to answer].

Based upon the foregoing, Arverne Associates application for a default judgment is granted with respect to the Fourth counterclaim which seeks legal expenses associated with the alleged breach of the lease agreement money. The Third Counterclaim is novel in that it seeks money damages derivatively based upon the alleged losses of OV Food Market Corp., its tenant, based upon Pizza Plus' breach of the lease agreement damages. In its moving papers, Arverne Associates alleges:

> By Pizza Plus selling the same items being sold by another tenant in this housing development, OV Food Market Corp. ("Food Market"), Pizza Plus impaired the ability of the Food Market to pay rent. The Food Market was entitled to be the sole grocery store in the housing development whose residents constitute the sole consumers for the Food Market. By turning itself into a competing grocery store, Pizza Plus took sales away from the Food Market. By reason of this misconduct, the Food Market, during the period that Pizza Plus was operating as a grocery store in contravention of its leave [sic], was unable to pay approximately Thirty Thousand Dollars ($30,000.00) in rent that it owed to Arverne Associates.

Arverne Associates presents no authority to support such a cause of action; OV Food Market is not a party to this litigation. However, in its Reply Affirmation, Arverne Associates only addresses the issue of money damages with respect to Attorneys' Fees, stating: "defendant is entitled to default

judgment on its fourth counterclaim and this court should schedule an inquest to calculate the amount of fees thus owed." Accordingly, Arverne Associates is granted a default judgment on its Fourth Counterclaim. The inquest shall be held at the time of the trial of this action.

Dated: December 20, 2007

J.S.C.