

**Avery v Caldwell**

2008 NY Slip Op 30085(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0108829/2006

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK (NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 108829/2006

AVERY, DENNIS

vs

CALDWELL, MOLLY

Sequence Number : 003

AMEND

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion

*is granted.*

*is denied.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JAN 17 2008

COURT

*EJG*

Dated: 1/11/08

Check one:  FINAL DISPOSITION

*N*  NON-FINAL DISPOSITION  
J.S.C. EMILY JANE GOODMAN

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 17

-----X

DENNIS AVERY,

Plaintiff,

-against-

Index No.: 108829706

**FILED**  
JAN 17 2008  
NEW YORK  
COUNTY CLERK

MOLLY CALDWELL,

Defendant.

-----X

**EMILY JANE GOODMAN, J.S.C.:**

In this action, plaintiff Dennis Avery sues his daughter Halina's former long-time partner for breach of an agreement regarding their interests in a cooperative apartment. The partner, defendant Molly Caldwell moves, pursuant to CPLR 3012(d), to permit late service of a Verified Amended Answer, Counterclaims and Third-Party Complaint. For the following reasons, the motion is granted.

This action was filed by the plaintiff, Dennis Avery, on June 23, 2006. The summons and verified complaint were personally served on the defendant, pursuant to CPLR 308(1), on June 28, 2006 at the cooperative apartment which the two women shared beginning in 2001.

It is undisputed that defendant retained Adam L. Aronson, Esq., a solo practitioner, in July 2006. After an oral extension of time was apparently granted, a stipulation to extend defendant's time to answer the complaint until August 7, 2006 was subsequently executed. Mr. Aronson alleges that after he signed the stipulation and sent it to plaintiff's counsel, Yetta G. Kurland, she added the following handwritten conditions which had never been agreed to or discussed: "This is a final extension, and defendant waives any and all defenses to a default

judgment by plaintiff if answer is not filed by 8/7/06 for all related matters, including Index No. 06/109295 06/108829.” See Aronson 4/12/07 Aff. ¶ 9; Pls. Mem. In Opp., Ex. D thereto.

In any event, when no answer was forthcoming by August 7th or thereafter, plaintiff moved for a default judgment in October 2006. By order dated November 20, 2006, this court denied the motion on the ground that the verified complaint did not allege facts sufficiently definite to establish a breach of contract. That motion was opposed by Mr. Aronson, who maintained that his extremely serious medical illness and poor health accounted for the delay in answering and that defendant had meritorious defenses, although none were given. Because defense counsel had not cross-moved for additional time to serve an answer, defendant was granted leave to move for service of a late answer within 30 days of receipt of a copy of the decision and order, with notice of entry. Plaintiff was given leave to renew his motion for a default judgment if no such motion was brought. Plaintiff alleges, but does not attach proof, that the decision and order was served on Mr. Aronson on December 1, 2006.

After Mr. Aronson failed to appear for a preliminary conference on February 1, 2007, he was notified that the conference was adjourned to March 1, 2007. Plaintiff’s counsel offered, by letter dated February 6, 2007, not to oppose any motion for leave to file an answer if such motion was made by February 20th and “a good faith reason” for the delay was provided. Mr. Aronson responded by sending an email, dated February 14, 2007, in which he references his ill health but also accused plaintiff’s attorneys of “unethically and dishonestly exploiting [his] client’s poverty and [his] ill health to present anti-gay legal argument and lies to the court.”

However, after securing pro bono representation by the law firm of Gibson, Dunn & Crutcher LLP, defendant served and filed her “Verified Answer and Counterclaims”

on April 5, 2007. This motion was served on April 12, 2007.

Shortly after the commencement of this action, another related lawsuit was filed by Halina Avery, the plaintiff's daughter. In Halina Avery v Molly Caldwell, Index No. 109295/06, the plaintiff's daughter sought an injunction barring defendant from entering the apartment, a declaration that Halina Avery is the sole owner of the apartment, and the cancellation of a certain life insurance policy. That action was assigned to the Hon. Leland DeGrasse, who by order dated July 31, 2006, granted a preliminary injunction enjoining defendant from entering the apartment during the pendency of that action. Defendant failed to appear in that action and, on March 5, 2007, a default judgment was entered which, inter alia, declared Halina Avery to be the sole owner of the apartment. However, by order dated June 7, 2007, that judgment was vacated by Justice DeGrasse, who also granted defendant permission to serve and file an answer.

Mr. Aronson avers that since the inception of this litigation and the related litigation he has been both physically and mentally unable to devote the necessary time and attention to the timely filing of pleadings and the fulfillment of other responsibilities related to the two litigations. He submits an affirmation from his personal physician who states that Mr. Aronson has multiple conditions that have left him in "debilitated states of varying duration." Affirm. of Paul Chambliss, M.D., ¶ 4. Mr. Aronson further contends that he was not able to transfer these matters to another attorney, claiming that the wrongful conduct of the Averys left his client, Molly Caldwell, financially destitute. He claims that he was finally able to secure the pro bono assistance of Gibson, Dunn & Crutcher LLP in March 2007, and that Gibson Dunn has agreed to act with him as co-counsel for defendant.

Plaintiff opposes the motion, arguing that defendant fails to demonstrate excusable delay

and instead has demonstrated a pattern of wilful delay that has severely prejudiced plaintiff and unnecessarily and unjustifiably increased his legal fees. Plaintiff also contends that defendant's purported third-party claims against Halina Avery are barred by the doctrine of res judicata and/or laches and creates duplicitous litigation. He asks that the court deny the motion, sanction the defendant and award legal fees to plaintiff in the estimated amount of \$60,000.

CPLR 3102(d) provides that "[u]pon 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 the delay or default." The court must consider whether the default was willful or the result of a pattern of delay and whether the delay has prejudiced the plaintiff. Bergida v Wassen, 186 AD2d 522 (1st Dept 1992). Where no default judgment exists, a meritorious defense need not be proved in the First Department, though may be accepted by the court. "While technically there was no need for defendants to set forth a meritorious defense in support of their motion to compel acceptance of their answer, since no default order or judgment had been obtained by plaintiff, we note that defendants have adequately set forth such a defense." Nason v Fisher, 309 AD2d 526 (1st Dept 2003), citing DeMarco v Wyndham Intl., Inc., 299 AD2d 209 (1st Dept 2002); see also Guzetti v City of New York, 32 AD3d 234(1st Dept 2006).

Defendant contends that she has a reasonable excuse for the delay in filing an answer to the complaint due to Mr. Aronson's health problems and because of her own allegedly dire financial condition. No one disputes that Mr. Aronson has a serious life threatening medical condition, nor that Mr. Aronson did not submit an answer to a six-page complaint though he did submit answering papers to plaintiff's November 29, 2006 motion for a default, sent letters and

emails to plaintiff's counsel and engaged in telephone conferences with plaintiff's counsel regarding settlement and other issues such as the safe deposit key. He did make some court appearances and appeared for a court-ordered deposition in the Halina Avery case, but only to make an inappropriate speech regarding his alleged inability to proceed with the deposition (see Pls. Mem. of Law, Exh. I thereto).

Nevertheless, even if defendant's delay in answering is due to "egregious law office failure," the court has the discretion to vacate the default. CPLR 2005; Leary v Pou Pune, Inc., 708 NYS2d 108 (1st Dept 2000). "This State's public policy favors determinations on the merits." Guzetti v City of New York, 32 AD3d at 234, citing CPLR 3012(d); Silverio v City of New York, 266 AD2d 129 (1st Dept 1999). There is no evidence whatsoever that defendant intended to ignore, neglect or default in this matter (and the above facts indicate the contrary), and it appears that her failure to obtain new counsel (prior to the appearance of Gibson, Dunn & Crutcher LLP) was the result of her financial condition.

Where no default judgment exists, a meritorious defense need not be proven. However, defendant has alleged a meritorious defense to the underlying claims, namely that plaintiff gifted the apartment to Halina Avery and defendant jointly, "with no strings attached" (Answer ¶¶ 6, 15, 61), and both of their names appear on the stock certificate for the apartment (Young Aff., Exh. B thereto). In addition, in emails between Halina Avery and defendant sent after the couple broke up, Halina Avery recognizes their joint ownership of the apartment (id., Exhs. C thereto). Although the delay in answering the complaint in this case is approximately 10 months, plaintiff has demonstrated no prejudice, and merely alleged that he incurred significant legal fees as a result of the delay. Accordingly, the motion to permit service of defendant's answer is granted.

I also decline to impose sanctions on Mr. Aronson. In reaching this determination I considered, in addition to his illness, the fact that he received no warning from me as to the potential for sanctions so that his conduct could be adjusted, nor was a hearing held. Moreover, it also appears that opposing counsel also contributed to the problems here. As noted in a July 27, 2007 decision denying plaintiff's motion for my recusal, counsel for both parties<sup>1</sup> have acted without the expected collegiality and professionalism expected of members of the legal profession. Additionally, a large portion of plaintiff's legal fees are self-imposed, such as plaintiff's pursuit of the meritless motion seeking my recusal. Under these circumstances, the court declines to impose any monetary penalty upon defendant or her counsel.

Justice DeGrasse has also now vacated the default judgment in Halina Avery v Molly Caldwell, eliminating any concern over its possible preclusive effect in this case.

On April 5, 2007, defendant purported to serve and file an "Answer and Counterclaims of Defendant Molly Caldwell." Since this document was served and filed without leave of court as required by CPLR 3012(d), that document is a nullity and the court treats the proposed "Verified Amended Answer, Counterclaims and Third-Party Complaint" as the original pleading in this case.

For the foregoing reasons, it is hereby

**ORDERED** that defendant's motion to permit late service of the Verified Amended Answer, Counterclaims and Third-Party Complaint is granted and that document is deemed served and filed as of the date of this decision and order; and it is further

**ORDERED** that plaintiff shall serve and file a reply to the counterclaims within 10 days

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<sup>1</sup>I exclude the firm of Gibson, Dunn & Crutcher LLP from this statement.

[\* 8 ]  
of service of a copy of this order with notice of entry; and it is further

**ORDERED** that defendant shall serve the third-party complaint on non-party Halina Avery within 20 days of service of a copy of this order with notice of entry.

Dated: January 11, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
JAN 17 2008  
NEW YORK  
COUNTY CLERK'S OFFICE