

**Board of Mgr of 425 Fifth Ave.  
Condominium v Kang**

2008 NY Slip Op 32680(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 113062/07

Judge: Emily Jane Goodman

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: EMILY JANE GOODMAN  
Justice

PART 17

Board of Mgrs of 425 FIFTH AVENUE

INDEX NO. 113062/07

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

MOTION SEQ. NO. 001

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

- v -

Kang, CHRISTINA HEEKAYUNG, ET AL.

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided per*

*attached*

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

**FILED**

OCT 03 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/29/08

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

The Board of Managers of 425 Fifth Avenue Condominium,  
on Behalf of All Unit Owners,

Plaintiff,

—against—

Index No.: 113062/07

Christina Heekayung Kang, Jeremy Dello Russo a/k/a  
Jerry Dello Russo, and “Jane Doe”

Defendants.

-----X

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

**FILED**  
OCT 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff moves for a default judgment against Defendants, request to determine fees and expenses owed by Defendant condo unit owner Kang, and for a warrant ejecting Defendants tenants Della Russo and Jane Doe (the tenants) from the apartment. The tenants oppose the motion, pro se, by filing an unsworn “Affidavit in Opposition Counterclaim.” Kang is represented and opposes the motion, but surprisingly does not cross move for the relief sought --acceptance of her pleadings. The motion for a default judgment is denied with leave to renew if Kang and/or Della Russo fail to file a motion for an order directing acceptance of an answer (which motions may be opposed by Plaintiff), within 30 days after receipt of a copy of this Decision and Order, with Notice of Entry.

Plaintiff seeks a default judgment on its first cause of action for a declaration that the lease between Kang and the tenants was properly terminated due to failure to provide access. The verified complaint alleges that “repairs are needed to the exterior of certain “A” line Condominium units” and as permitted by Section 5.6 and 5.9(A) of the By-Laws “a scaffold

must be erected on or about the 49<sup>th</sup> floor of the Building” with “access to the Unit is required in the morning and late afternoon for a period of time not exceed two weeks.” The verified complaint alleges that access was denied by the tenants.

The tenants contend they agreed to provide access to their balcony, if the balcony could be accessed other than through the interior of the apartment, as they were concerned about the noise, potential hazards and difficulty of living around a construction area (especially given that the Della Russo was a medical resident). The tenants attach a letter from the Condominium Association, stating that “it is not anticipated that it will be necessary to access the interior of your apartment for this work to take place” in contradiction to Plaintiff’s statements made in the verified complaint regarding access required in the apartment.

Kang similarly opposes the motion on the basis that the evidence contradicts Plaintiff’s claim that access was required in the apartment and further maintains that this action is an improper attempt to circumvent a prior lawsuit involving access, which was sent to Civil Court by Justice Acosta (The Board of Managers of 425 Fifth Avenue Condominium, on Behalf of Unit Owners v Kang and Russo, Index no 106612/07). Kang also maintains that she has excusable default as she was away in Korea when service was made and her attorney was on vacation.

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).

The tenants, who are pro se, do not address the issue of a reasonable excuse for the delay although the court notes that their delay of approximately two months is short. As to Kang’s reasons for delay, the court notes that it has the discretion to vacate the default even if defendant’s delay in answering is due to “egregious law office failure” CPLR 2005; Leary v Pou Pune, Inc., 708 NYS2d 108 (1st Dept 2000).

Furthermore “[t]his 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 that defendants intended to ignore, neglect or default in this matter.

Where no default judgment exists, a meritorious defense need not be proven. The tenants have alleged meritorious defenses to the claims against them (although they fail to address the issue of excusable default), and Kang has alleged a meritorious defense to the claims against her regarding access, including whether access through the apartment was actually needed, whether the tenants denied access, and whether there is a prior pending action in Civil Court (which includes a claim for attorney’s fees against Kang based upon breach of the governing condominium documents). Plaintiff may ultimately be entitled to a declaration that the renewal

lease is void based on Kang's purported failure to comply with Section 7.2 of the Bylaws (the third cause of action) as well as attorney's fees against Kang under Section 7.11 (the fifth cause of action), but it does not appear that Plaintiff can succeed on the fourth cause of action for ejectment against the tenants. Pursuant to Section 7.1 of the Bylaws, the remedy for breach of Article 7, in the event of an unauthorized lease, is an eviction (which must be commenced in housing court); ejectment is the remedy for an unauthorized sale.<sup>1</sup>

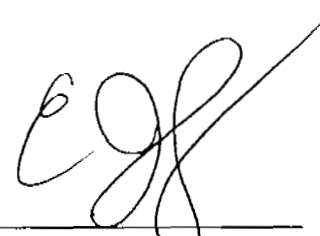
For the foregoing reasons, it is hereby

**ORDERED** that plaintiff's motion for a default judgment is denied with leave to renew if Kang and/or Della Russo fail to file a motion for an order directing acceptance of an answer, within 30 days after receipt of a copy of this Decision and Order, with Notice of Entry; and it is further

**ORDERED** that the parties contact the court for a settlement conference to be conducted by telephone forthwith.

**This Constitutes the Decision and Order of the Court.**

Dated: September 24, 2008

**FILED** ENTER:   
OCT 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
J.S.C.  
**EMILY JANE GOODMAN**

---

<sup>1</sup>Regardless of whether the lease renewal contravened the governing condominium documents, it appears that it has expired. Accordingly, the tenants may have already moved out or may intend to move out, which would obviate the need for an eviction proceeding.