

**Kondratick v Orthodox Church in Am.**

2010 NY Slip Op 30148(U)

January 6, 2010

Supreme Court, Nassau County

Docket Number: 22717/2007

Judge: Denise L. Sher

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**SHORT FORM ORDER  
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice**

\_\_\_\_\_  
**ELIZABETH KONDRATICK,** **TRIAL/IAS, PART 32**  
**NASSAU COUNTY**

**Plaintiff.**

**Sequence No.: 09, 11  
Index No.: 22717/2007**

*- against -*

**ORTHODOX CHURCH IN AMERICA  
and THEODOSIUS LAZOR,**

**Defendants.**

\_\_\_\_\_  
**ORTHODOX CHURCH IN AMERICA,**

**Plaintiff,**

**Index No. 9111/2008**

*- against -*

**ROBERT KONDRATICK and  
ELIZABETH KONDRATICK,**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion, Affirmation and Exhibits</b>	<b>1</b>
<b>Affirmation in Opposition and Exhibits</b>	<b>2</b>
<b>Reply Affirmation</b>	<b>3</b>
<b>Notice of Motion, Affirmation and Exhibits</b>	<b>4</b>
<b>Affirmation</b>	<b>5</b>

**Affirmation**

6

**Affirmation and Exhibit**

7

In an action on a promissory note the plaintiff moves for a default judgment against the defendant Lazor (motion #9). The court previously addressed this motion wherein it noted that the it could not discern if defendant Lazor was an incapacitated person incapable of defending his interests. The court adjourned the motion to Nov 30, 2009 for proof with respect to that issue. Instead of providing such proof, the defendant Lazor (who had been utilizing out of state counsel as his "friend") retained New York counsel who moved by separate motion (#11) for an order compelling the plaintiff to accept a late answer, (and thereby vacating his default), and striking the note of issue. The defendant Orthodox Church In America hereinafter referred to as the "Church" in essence has no opposition to either application.

However, in a related action to be tried jointly with action #1 wherein the "Church" seeks to recoup monies allegedly misappropriated by the defendants, the "Church" seeks a protective order vacating certain discovery demands seeking disclosure of minutes of the Holy Synod of Bishops. The parties discussed this matter at one of the innumerable court conferences, and, unable to come to a reasonable agreement resolving the issue, were authorized to make this motion. The motion for a protective order is strenuously opposed by the defendants in action #2.

The original complaint in action #1 alleges five separate causes of action all stemming from the common factual allegations that the Kondraticks loaned money to the "Church" the loan was allegedly secured by a note executed by the defendant Lazor as a representative of the "Church". The complaint is not artfully drawn and while it alleges that defendant Lazor acted in a representative capacity, it further alleges that if he did not have authority to bind the church he committed a fraud because he represented to the Kondratciks that he did have such authority.

A copy of the note in question is not attached as an exhibit to the complaint. Notwithstanding the fact that there is only one discernible cause of action pled against Lazor, the relief sought asks for a judgment on all causes of action against the defendants (plural) on all causes of action. The amended complaint attempts to rectify these glaring deficiencies by specifying causes of action for 1) unjust enrichment, 2) breach of contract, 3) quantum meruit, 4) negligence, 5) fraud.

With respect to motion #9 the movants have established that the defendant Lazor was served personally in the State of Pennsylvania on June 9, 2009. A supplemental summons and complaint was served on July 13, 2009 by mail to the defendant Lazor in Pennsylvania. The movants concede that the defendant had until August 13, 2009 to answer the supplemental summons and complaint. Nonetheless the instant motion was interposed on July 30, 2009. The motion is unaccompanied by any proof of a person possessed of personal knowledge about the allegations concerning defendant Lazor. In opposing the motion the defendant Lazor attempts, in effect, to ask to be excused from his default and set forth a basis thereto. The opposing affidavits were mailed September 4, 2009. The attorney for Lazor offers as an excuse for not answering the complaint that negotiation between the respective counsel were underway. The attorney denies the authenticity of the letter agreement but states even if authentic that a meritorious defense is evidenced by a perusal of the letter itself which the defendant Lazor suggests negates the claims asserted against him. By affidavit the defendant Lazor states that the letter cannot be construed as a promissory note as it does not contain any promise to pay, and merely was signed in an official capacity acknowledging certain facts potentially adverse to the position of the "Church".

Motion # 9 must be denied. In the first instance when the motion was interposed it was premature; as the time to respond to the pleadings in question had not yet expired. Secondly, the

moving papers were devoid of any proof of the merits of the claims against the defendant Lazur. In order to prevail on a motion for a default judgment the bar is quite low, but the movant must nonetheless prove that a default exists and establish the facts constituting the claim. *Grinage v City of New York* 45 AD3d 729, 846 NYS2d 300, *Giordano v Berisha* 45 AD3d 416, 345 NYS2d 327. *599 Ralph Ave Development LLC, v 799 Sterling Inc.* 34 AD3d 726, 825 NYS2d 129. The plaintiffs proof herein fails on both counts. Accordingly, motion #9 in action #1 is denied. The defendant Lazor is awarded motion costs in accordance with CPLR¶ 8202

Conversely motion #11 by the defendant Lazor to vacate his default must be granted. In view of the totality of the circumstances including , inter alia, 1) the brief period of the default, 2) the fact that the defendant Lazor was of advanced age with infirmities that put in issue his capacity to defend his interests, 3)the negotiations between the attorneys including an offer to accept a late answer dependent on an agreement as to a discovery schedule establishes a valid excuse for failing to serve a timely answer. Those circumstances also negate any willfulness in the default. In addition to the justifiable excuse the court finds the existence of meritorious defense to wit that the defendant Lazor's action did not and could not result in said defendant being liable to the Kondratick's for any of the "Church's" liabilities, requires that the motion to vacate the default and compel the plaintiffs in action #1 to accept the proposed answer of the defendant Lazor subject to certain conditions set forth herein be granted. CPLR§3012 (d) See e.g. *Schmidt v City of New York* AD3d 854 NYS2d 741 *Leogrande v Glass* 106 AD2d 43, 482 NYS2d 525. Where the afore said circumstances exist and any potential prejudice can be easily be obviated, the public policy of determining disputes on the merits is advanced by permitting a late service of pleadings. See *Friedman v Ostreicher* 22 AD3d 798, 803 NYS2d 703, *Kaiser v Delaney* 255 AD2d 362, 679 NYS2d 686 . Accordingly, the defendant Lazor's motion is granted

and the proposed answer shall be timely served and the note of issue vacated; provided said defendant accepts all discovery previously conducted, abides by all orders regarded previously directed to the other parties, and in lieu of oral depositions of Kondraticks( who reside outside of New York) serve concise written interrogatories of any information desired from the Kondraticks within 30 days of receipt of a copy of this order. The defendant Lazor is awarded motion costs on this motion in accordance with CPLR§ 8202.

Lastly the motion #1 in action #2 seek to strike the demands for discovery of the Kondradick as it pertains to minutes of the meetings of the Holy Synod of Bishops from 1998 to date. The supporting attorneys affidavits states in pertinent part that “OCA responded with formal Responses in both actions... and produced in excess of 26,365 pages of responsive documents, including among other things, **relevant portions of minutes** of the Holy Synod of Bishops and **complete reports from the Treasurer** to the Synod” . (emphasis added). Additionally, the “Church” alleges that confidential material is contained in the items to be sought. The defendants in action #2 oppose the request for a protective order and insist that the items are material and relevant to their defense of misappropriation of “Church” funds, but without providing any specificity and is sorely lacking in any means to narrow the scope of documents to be produced. The Kondraticks have failed to analyze the material previously submitted and have failed to demonstrate to the court why the items provided are inadequate; as one would expect a Treasurer’s report to at least indicate any potential irregularities of the type asserted in this litigation. Accordingly, the motion is granted without prejudice to the right to renew upon a proper proof which would include, inter alia, some corroboration that the material sought is likely to exists and is relevant to an issue in litigation, and can be referenced within a concise period of time. The movant is awarded motion costs for this motion in accordance with

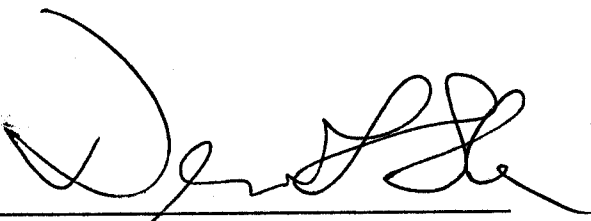
[\* 6]

CPLR§8202. The court has repeatedly admonished the parties for what is has viewed as unnecessary and extensive motion practice. Therefore, in accordance with it prior decisions, all future applications pertaining to any future item of discovery are directed to a JHO to be designated by the Clerk of this Court in accordance with CPLR §3104 (a). The court sua sponte extends all OCA deadlines as to certification or filing of notes of issue in both actions for 120 days from the date of this order in order to accommodate all the relief granted herein.

So ordered.

**Dated: Mineola, New York  
January 6, 2010**

**ENTER:**



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A.J.S.C.

**ENTERED**  
JAN 14 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE