

H.P.S.O.N.Y., Inc. v City of New York

2011 NY Slip Op 31042(U)

April 21, 2011

Supreme Court, New York County

Docket Number: 104209/2010

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE

PART 5

Index Number : 104209/2010

MACDOUGAL STREET

vs
DEPARTMENT OF BUILDINGS

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL # 505

The following papers, numbered 1 to _____ were read on this motion to/for default judgment + other

PAPERS NUMBERED

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

1, 2, 3, 4

Answering Affidavits — Exhibits _____

5, 6

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

APR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 4/21/11
APR 21 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

BARBARA JAFFE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
H.P.S.O.N.Y., INC. and MACDOUGAL
STREET SYNAGOGUE-BETH MIDRASH,

Plaintiffs,

-against-

THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF BUILDINGS,

Defendants.

-----X
BARBARA JAFFE, JSC.:

For plaintiff MacDougal:
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For plaintiff H.P.S.O.N.Y.:
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Index No.: 104209/10

Motion Date: 2/15/11
Motion Seq. No.: 007
Motion Cal. No.: 12

DECISION AND ORDER

FILED

APR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

For defendants:
Louise Moed, ACC
Michael A. Cardozo
Corporation Counsel
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New York, NY 10007
212-788-0768

Plaintiffs, landlord H.P.S.O.N.Y., Inc. (H-Inc) and net lessee MacDougal Synagogue-Beth Midrash (Synagogue) move for a default judgment against defendants pursuant to CPLR 3215; for a judgment declaring that: (1) section 27-2077 of the Administrative Code of the City of New York is inapplicable to alterations made by the former occupants and/or plaintiffs to the premises that are the subject of this litigation, known as 1370 York Avenue a/k/a 501 East 73d Street (1370 York), 1372 York Avenue (1372 York) and 1374 York Avenue (1374 York) (jointly, Synagogue properties), (2) Synagogue properties are exempt from any and all "dwelling alteration and/or conversion to rooming unit restrictions" as long as the converted dwellings and units are used as residences for visitors to New York who participate in plaintiffs' Teaching

Tolerance Programs (Tolerance programs) and comply with all government laws, rules and regulations pertaining to health and safety, and (3) Synagogue has the absolute right, pursuant to Administrative Code § 27-2077, to alter and convert all or part of Synagogue properties from dwellings into rooming units for persons visiting New York to participate in the Tolerance programs; and for a permanent injunction enjoining defendants, jointly and severally, and their agents, servants and employees, including but not limited to the Mayor's Task Force, Office of Special Enforcement, from impeding and otherwise interfering with the right of Synagogue to alter and/or convert any or all parts of Synagogue properties from dwellings into rooming units in order to provide rooming for persons participating in the Tolerance programs.

Defendants, City and the New York City Department of Buildings (DOB), oppose the motion and, by notice of cross motion dated November 15, 2010, cross-move pursuant to CPLR 3212 for an order granting them summary judgment dismissing the complaint in its entirety.

I. FACTUAL BACKGROUND

A. Synagogue and properties

Synagogue was incorporated in New York State on November 15, 2007, pursuant to Article 10 of the Religious Corporation Law. (Affidavit of Rabbi Y. Shmaya Katz, dated Oct. 1, 2010 [Katz Affid.], Exh. 1). Synagogue subsequently net-leased several mixed use buildings (the premises) in order to house visitors to New York who participate in the Tolerance programs, which include instructional materials, self-study courses, books, audio-visual materials, and educational programs. (*Id.*, Exhs. 3, 4, 5). H-Inc owns 1370 York, non-party N.Y.A.H., Inc. owns 1372 York, and non-party R.C.F.H.P. owns 1374 York. (Affirmation of Louise Moed, ACC, dated Nov. 15, 2010 [Moed Aff.], Exhs. 3, 4; Affidavit of Vladimir Pugach, dated Nov.

15, 2010 [Pugach Affid.]).

The premises are located in an R10 Residence District and are old-law tenements, classified as Class 3, non-fireproof, multiple dwellings. They are registered with the New York City Department of Housing Preservation and Development as multiple dwellings (MDRs), each consisting of five stories with 18 Class A apartments and no Class B apartments. (Moed Aff., Exhs. 1, 2). The MDRs reflect that all three buildings are owned and managed by Synagogue and Synagogue's address is listed as 14 St. Marks Place in Manhattan, which is classified as an SRO building containing 45 Class B units. (*Id.*, Exh. 8).

Synagogue maintains a website, www.macdougallstreetsynagogue.com, on which no schedule of activities appears, nor is there is an invitation to visit or participate in any activities. (Moed Aff.). Also, the premises are advertised on the internet on various travel websites as hostels available for rent by tourists. (*Id.*, Exhs. 7-10). On one website, the hotel services are listed as including a reception desk and concierge, television, laundry service, linens and towels, storage of luggage, a travel desk, and a currency exchange, and while it mentions that the premises are being rented as a fundraising effort by Synagogue to build a new synagogue and teach tolerance, it does not state that the purpose or requirement for renting a room is the participation in plaintiffs' Tolerance programs. (*Id.*, Exh. 7).

According to Synagogue's president, visitors to the premises are given Synagogue's weekly newsletter and study materials and offered "counseling, books, pamphlets, DVDs and other resources during their stay." (Katz Affid.).

B. Defendants' enforcement activities

The Mayor's Office of Special Enforcement (OSE) is responsible for coordinating

enforcement activities between and among various City agencies in order to address quality of life issues, including adult use locations, clubs, trademark counterfeiting bazaars, and illegal conversions of apartment buildings into hotels. (Pugach Affid.).

Beginning in 1999, City received complaints from various sources, including elected officials, on behalf of their constituents and members of the public through the City's 311 complaint system, alleging, among other things, that the premises were being used as illegal hotels. (Pugach Affid., Exhs. 11, 12, 13). As a result of the complaints, on February 2, 2010, OSE inspected the premises at 1370 and 1372 York. Pugach, an Associate Construction Inspector for DOB and Special Enforcement Inspector for OSE who inspected the premises, observed that the apartments had been subdivided into three or four rooms, each separately locked and containing bunk beds and ladders leading up to platforms which were being used as sleeping quarters. In his view, the units violate the various safety measures required for such rooms and the New York City Zoning Resolution, New York City Administrative Code, and the Building Code. (Pugach Affid.). OSE was unable to access the premises at 1374 York. (*Id.*).

As a result of the inspection, Pugach issued five notices of violation returnable to the New York City Environmental Control Board (ECB) relating to apartments at 1370 York, alleging that the premises were being used as illegal transient-use hotel units, were being illegally occupied as Class B rather than Class A apartments, had work performed in them without permits, had been illegally converted to transient use without two means of egress, and did not comply with the maximum floor area allowed per occupant. (*Id.*, Exh. 15). Pugach also issued two DOB notices of violation relating to 1370 York, alleging that the premises did not contain an adequate fire alarm system or documents indicating the floor plan, and a sprinkler system. (*Id.*,

Exh. 16). A vacate order for 1370 York issued (first vacate order). (*Id.*, Exh. 17).

Two notices of violation issued by DOB related to 1372 York, alleging that work had been performed without permits and that unobstructed exit passageways were not provided. (*Id.*, Exh. 18).

On February 4, 2010, OSE gained access to another apartment at 1370 York Avenue and issued ECB notices of violation for illegal occupancy and work done without a permit. (*Id.*, Exh. 19). The first vacate order was amended to include the new violations. (*Id.*, Exh. 17).

As a result of additional complaints, OSE again inspected 1370 York on September 2, 2010, and during the inspection, Pugach was told by occupants that they had pre-paid for their rooms on internet sites and were given room keys by a man sitting outside of the premises. (*Id.*). While there, Pugach spoke to two women who alleged that they lived in an apartment at the premises under long-term leases and that the landlord had entered the apartment without their permission and subdivided it to create a third bedroom, which was being used by a succession of European tourists. (*Id.*).

OSE issued seven ECB notices of violation for 1370 York, alleging that work had been performed without a permit, that there was illegal occupancy, that the rooms were without two means of egress, that an unobstructed exit passageway was not provided, and that there was illegal use in a residential district. (*Id.*, Exh. 23). Another OSE inspector issued a Violation Order relating to 1370 York, directing that obstructions be removed from blocking the fire escape in the front of the building. (*Id.*, Exh. 24).

OSE found at 1374 York the same living conditions and issued five ECB notices of violation. (*Id.*, Exh. 25). DOB also issued a partial vacate order for the inspected units at 1374

York (second vacate order). (*Id.*, Exh. 26).

On September 7, 2010, another OSF inspection of 1370 York and 1374 York resulted in the issuance of an ECB notice of violation and a Violation Order. (*Id.*, Exhs. 27, 28).

II. PROCEDURAL BACKGROUND

On March 31, 2010, plaintiffs filed a Notice of Claim. (Katz Affid., Exh. 20). On April 15, 2010, plaintiffs served a summons and complaint on a receptionist at the office of City's corporation counsel. (*Id.*, Exh. 21).

Plaintiffs allege that, approximately two weeks after serving City, an assistant corporation counsel called them to request an extension of time to June 30, 2010 to answer the complaint, and sent them an email dated April 30, 2010, asking them to confirm that 1374 York Avenue was the address of the property, observing that as City was served on April 15, if counsel sought to amend, City would have until the end of May to answer, and that plaintiffs would have six weeks to amend. (*Id.*, Exh. 22).

The assistant corporation counsel asserts that plaintiffs' counsel assured her that there would be no problem in extending the time to answer as he intended to amend the complaint. She forwarded a proposed stipulation setting forth a schedule for the amendment and answer, and although plaintiffs' counsel did not respond to it, she did not answer the complaint, believing that plaintiffs' counsel had orally agreed to an extension. (Affidavit of Virginia Waters, ACC, dated Nov. 15, 2010 [Waters Aff.]).

On or about September 23, 2010, I declined to sign plaintiffs' order to show cause seeking a default judgment. When defendants' counsel received notice of the ex parte application, she contacted counsel to get a copy of page five of the complaint, and when she

received no response, she filed and served defendants' answer on or about September 24, 2010. (Waters Aff.; Katz Affid., Exh. 22.1). Plaintiffs thereafter rejected defendants' answer. (*Id.*, Exhs. 22.2 and 22.3).

III. DEFAULT JUDGMENT

A. Contentions

Plaintiffs maintain that they are entitled to a default judgment against defendants as they properly served their summons and complaint on defendants and defendants failed to answer timely. (Katz Affid.). Defendants contend that plaintiffs' motion is brought in bad faith and that their initial failure to answer the complaint was based on counsel's misunderstanding of her conversation with plaintiffs' attorney. They also argue that their late answer should be excused given the strong public policy favoring the resolution of cases on their merits, and because plaintiffs never provided them with the page that was missing from the complaint and are not prejudiced by the delay. (Mocd Aff.).

In reply, plaintiffs deny that they agreed to extend defendants' time to serve their answer or that defendants have a meritorious defense. (Affirmation by Mark E. Fant, Esq., dated Dec. 16, 2010 [Fant Aff.]; Affirmation of Andrew Squire, Esq., dated Dec. 16, 2010).

B. Analysis

Pursuant to CPLR 3215, a plaintiff may seek entry of a default judgment whenever a defendant has failed to appear, plead or proceed to trial, upon proof of service of a summons and complaint or a summons and notice upon said defendant. However, the court has discretion to deny a default judgment even where a defendant is technically in default when the defendant establishes a reasonable excuse for the default and the failure to serve an answer timely is neither

inadvertent nor willful, that the defendant quickly sought relief once it learned of the default and the delay was short, that defendant has a meritorious defense, and that the plaintiff has not shown any resulting prejudice. (73 NY Jur 2d, Judgments § 123 [2011]; *Morrison Cohen LP v Fink*, 81 AD3d 467 [1st Dept 2011] [to oppose entry of default judgment, defendant must demonstrate reasonable excuse for default and meritorious defense]).

Here, defendants demonstrate a reasonable excuse for their default and that their failure to answer timely was not willful as they reasonably believed that plaintiffs were going to amend the complaint and/or provide defendants with the page that was missing from the complaint and that they would then have an extension of time to serve their answer. (*See Dilorio v Antonelli*, 240 AD2d 537 [2d Dept 1997] [entry of default judgment denied as defendant offered reasonable excuse for delay as it had relied on parties' oral agreement to extend time to answer, delay was brief, default was unintentional, and plaintiff not prejudiced]). Defendants also served their answer immediately upon learning that plaintiffs were seeking a default judgment, the five-month delay was brief, and, as discussed below, defendants have a meritorious defense to the action. (*Rosa v 42 Holding Corp.*, 254 AD2d 213 [1st Dept 1998] [excusing six-month delay]; *Forastieri v Hasset*, 167 AD2d 125 [1st Dept 1990] [finding 10-month delay relatively short]). Nor has plaintiff shown any resulting prejudice from the delay. (*See Jolkovsky v Legeman*, 32 AD3d 418 [2d Dept 2006] [default judgment denied as defendant's delay in answering was brief, default not willful, and plaintiff not prejudiced]).

IV. DECLARATORY RELIEF AND MOTION TO DISMISS

A. Contentions

Plaintiffs contend that, as a religious organization providing accommodation to persons

participating in their educational program on tolerance, their premises are exempt from the requirements of the Administrative Code, and that defendants' attempts to close down their premises violate the First Amendment of the United States Constitution. They specifically argue that the restrictions on rooming units set forth in New York City Administrative Code § 27-2077(a)(2) do not apply to premises that are owned and operated without profit by a religious institution as a residence for students attending a school or college. They thus claim that plaintiffs' units, used by visitors who participate in Synagogue's Tolerance programs, are exempt. Synagogue maintains that the first vacate order was not properly served on it, and that City's rescission of allegedly approved building permits and other requirements have made it impossible to begin correcting the alleged violations. They also maintain that the second vacate order was not properly served on it. (Katz Affid.).

According to defendants, plaintiffs admit that they are using the subject buildings for short-term transient stays by visitors to New York and that thus, pursuant to Zoning Resolution (ZR) §§ 12-10 and 32-14, such transient accommodations are not allowed in the district in which the buildings are located. They also deny that the buildings qualify as community facilities as defined in ZR § 22-13 as they are not student dormitories, or that they are accessories to the Synagogue's principal purpose, as they are not located on the same zoning lot as the Synagogue, thereby precluding plaintiffs from operating a transient residence. Defendants also assert that the use of the building for transient visitors creates objectionable conditions in the zoning area. (*Id.*).

Defendants reject plaintiffs' allegation that they are exempt from Administrative Code § 27-2077, observing that plaintiffs' web advertisements indicate that the rentals are for short-term, transient use, and do not reflect any educational aspect. They moreover argue that the

provision and availability of various materials related to tolerance do not meet the Administrative Code's requirement that housed students attend a school or college, and defendants' claim that the rooms violate various health and safety codes, as stated in the violations attached to both motions, in and of itself, warrants dismissal of plaintiffs' complaint, even if plaintiffs could establish that they are engaged in a permitted use of the buildings. (Moed Aff.).

In reply, plaintiffs argue that defendants are not entitled to a summary dismissal as, without the answer, issue has not been joined, and that Synagogue has the absolute right to use the buildings as short-term accommodations under the Administrative Code. Moreover, plaintiffs seek only a determination that the current use of the buildings is permitted and do not deny that there are violations of the health and safety codes, which they wish to correct, and contend that a Synagogue is presently being built at 1374 York and that the premises are adjacent and thus an accessory use to it. (Fant Aff.).

B. Applicable law

Section 2077 of Title 27 of the New York City Administrative Code, in addressing the conversion of Class A multiple dwellings into rooming houses, provides that:

[n]o rooming unit which was not classified and recorded as such in the department prior to May fifteenth, nineteen hundred fifty-four or converted to such use prior to April thirtieth, nineteen hundred fifty-six, shall be created in any dwelling, whether such conversion is effected with or without physical alterations, except for rooming units:
 (2) Owned and operated without profit by an educational, religious or charitable institution as a residence for the aged, or for working girls or women, or for working boys or men, or for delinquent, dependent or neglected children, or for students attending a school or college. . . .

Pursuant to the Multiple Dwelling Law, Class A apartments are those that are to be occupied for permanent residences only, whereas Class B apartments are those intended for

transient dwelling. (Administrative Code § 27-2004[8], [9]; Multiple Dwelling Law § 4[8], [9]).

ZR § 12-10 permits a nonprofit institution to operate a transient hotel as an accessory to its primary use, which is (a) “a use conducted on the same zoning lot as the principal use to which it is related (whether located within the same or an accessory building or other structure, or as an accessory use of land)”; (b) a use which is clearly incidental to, and customarily found in connection with such principal use; and (c) either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use.”

In an R10 zoning district, community facilities are permitted as long as they “may appropriately be located in residential areas to serve educational needs or to provide other essential services for the residents . . . and do not create significant objectionable influences in residential areas.” (ZR § 22-13). Community facilities include “colleges or student dormitories . . . and philanthropic or non-profit institutions with sleeping accommodations” (*Id.*). On the other hand, transient hotels are permitted only in certain commercial districts. (ZR § 32-14).

C. Analysis

As neither 1372 nor 1374 York are mentioned in the complaint, they are not part of this action. Consequently, there is no basis for declaratory relief with respect to these locations.

Moreover, as issue has not yet been joined, plaintiffs’ motion seeking the same relief as sought in their complaint, i.e. a declaratory judgment and permanent injunction, is premature. (*See McHugh v Weissman*, 46 AD3d 369 [1st Dept 2007] [even if defendant’s request for declaratory relief was proper, he improperly moved for relief prior to joinder of issue]; *Elec.*

Data Sys. Corp. v Xerox Corp., 273 AD2d 28 [1st Dept 2000] [declaration cannot be made at pre-answer stage of litigation]; *Durkin v Durkin Fuel Acquisition Corp.*, 224 AD2d 574 [2d Dept 1996] [“permanent injunctions and declaratory judgments are not provisional remedies and may not be obtained in a motion prior to the joinder of issue”]; *see also St. Paul Fire and Marine Ins. Co. v York Claims Svce., Inc.*, 308 AD2d 347 [1st Dept 2003] [by granting ultimate relief sought by plaintiff on motion for preliminary injunction, motion court effectively treated motion as one for summary judgment which was improper as issue had not been joined]).

In any event, plaintiffs have failed to establish, *prima facie* and as a matter of law, that the exception set forth in Administrative Code § 27-2077 applies to them absent evidence as to whether the premises are owned and operated without profit and whether their renters can be considered “students attending a school or college,” or that they are entitled to an injunction in light of their admission that various health and safety violations are present at the premises. Moreover, defendants’ papers set forth a meritorious defense to the action as they raise issues as to whether plaintiffs are exempt from or are violating zoning and health and safety requirements.

Although I deny plaintiffs’ motion for a default judgment, defendants do not cross-move to vacate their default, nor do they move for an order compelling plaintiffs to accept their answer or granting them an extension of time to serve their answer. (See CPLR 3102[d] [court may extend time to answer or compel acceptance of answer upon application by party]; *McGee v Dunn*, 75 AD3d 624 [2d Dept 2010] [while default judgment properly denied, court should not have granted defendant’s pre-answer motion to dismiss as it effectively excused defendant’s default in absence of request for such relief]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005] [court erred in deeming answer timely served nunc pro tunc absent motion]; *Blam v*

Netcher, 17 AD3d 492 [2d Dept 2005] [in absence of cross-motion, court should not have considered defendant's informal request for extension of time to answer]).

Thus, at this stage of the proceeding, where defendants have not yet answered, their motion for summary judgment is premature. (See CPLR 3212[a] [party may move for summary judgment after issue has been joined]; *City of Rochester v Chiarella*, 65 NY2d 92 [1985] [strict adherence to requirement that summary judgment motion may not be made before issue joined]; *Union Turnpike Assocs., LLC v Getty Realty Corp.*, 27 AD3d 725 [2d Dept 2006] [court lacked authority to grant summary judgment prior to joinder of issue]).

IV. CONCLUSION

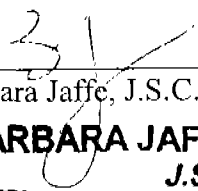
Accordingly, it is hereby

ORDERED, that plaintiffs' motion for a default judgment against defendants is denied unless defendants fail to serve and file their answer within 30 days of service on them of a copy of this order with notice of entry; it is further

ORDERED, that plaintiffs' motion for declaratory relief and a permanent injunction is denied; and it is further

ORDERED, that defendant's cross motion is denied.

ENTER:



Barbara Jaffe, J.S.C.
BARBARA JAFFE
J.S.C.

DATED: April 21, 2011
New York, New York
APR 21 2011

FILED

APR 25 2011

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