

<b>NIM, LLC v Vevant, LLC</b>
2011 NY Slip Op 31161(U)
April 18, 2011
Supreme Court, Nassau County
Docket Number: 017042-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
NIM, LLC,

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 017042-10  
Motion Seq. Nos. 2 and 3  
Submission Date: 2/23/11**

**VEVANT, LLC and STACEY ANDREADAKIS,**

**Defendants.**

-----x

**The following papers having been read on these motions:**

- Notice of Motion.....X**
- Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affirmation in Opposition/Support,  
Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Opposition/Support.....X**
- Supplemental Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Reply/Further Support.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff NIM, LLC ("NIM" or "Plaintiff") on February 3, 2011, and 2) the cross motion filed by Defendant Vevant, LLC ("Vevant") on February 22, 2011, both of which were submitted on February 23, 2011. For the reasons set forth below, the Court 1) denies the motion; and 2) grants the cross motion and directs Plaintiff to accept the Answer and Counterclaim of Vevant.

**BACKGROUND**

**A. Relief Sought**

NIM moves, pursuant to CPLR § 3215, for an Order awarding NIM a default judgment against Vevant.

Vevant opposes NIM's motion, and cross moves, pursuant to CPLR § 3012(d), for an Order compelling NIM's acceptance of the Answer and Counterclaim of Vevant.

### B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated March 16, 2011 ("Prior Decision") in which the Court denied the motion by Defendant Stacey Andreadakis ("Andreadakis") to dismiss the Complaint, and granted Plaintiff leave to file a second amended complaint. The Court incorporates the Prior Decision herein by reference.

As discussed in the Prior Decision, this action relates to an agreement entered into by Vevant, allegedly the alter ego of Andreadakis, and NIM regarding consulting work to be performed by NIM on the Vevant website ("Website"). In the Prior Decision, the Court concluded that the amended complaint then before the Court contained insufficient factual allegations in support of Plaintiff's claim that Andreadakis abused the privilege of doing business in the corporate form. In light of evidence before the Court suggesting that there was support for this theory, however, the Court granted Plaintiff leave to file an amended complaint containing more specific allegations in support of its claim that the Court should pierce the corporate veil and hold Andreadakis personally liable for the debts of Vevant (Prior Decision at p. 7).

In his application in support of Plaintiff's instant motion for a default judgment, counsel for Plaintiff ("Plaintiff's Counsel") affirms as follows:

Plaintiff filed this action on or about September 7, 2010. On September 7, 2010, counsel for Defendants ("Defendants' Counsel") accepted service on their behalf. In support, Plaintiff's Counsel provides a copy of a series of emails dated September 7, 2010 (Ex. 2 to Rose Aff. in Supp.). These include an e-mail from Defendants' Counsel to Plaintiff's Counsel which read as follows:

Yes, we will accept service on behalf of both defendants upon the condition that you consent such defendants have up to and including Friday October 8, 2010 to answer or otherwise move with respect to the Complaint.

Please confirm and we will send you a formal stip for signature. Thank you.

Plaintiff's Counsel responded with an e-mail that included the following language:

We will run it by our client, but I don't suspect it will be a problem.

On September 30, 2010 Plaintiff filed an Amended Complaint. On October 25, 2010, Plaintiff and Defendants entered into a stipulation (“Stipulation”) (Ex. 4 to Rose Aff. in Supp.) extending to November 12, 2010 Defendants’ time to answer or otherwise move. On or about November 11, 2010, Andreadakis filed the motion (“Prior Motion”) that was the subject of the Prior Decision. On or about December 1, 2010, Plaintiff submitted its opposition to the Prior Motion. Vevant failed to answer or otherwise move by November 12, 2010, as required by the Stipulation.

In his Affidavit in Support (Ex. 5 to Rose Aff. in Supp.), Adam Cohen (“Cohen”), the President of NIM, outlines the details of the relevant agreements between the parties, the manner in which Defendants allegedly breached the Contract at issue, and Plaintiff’s damages.

In his Affirmation in Opposition/Support, Defendants’ Counsel affirms as follows:

Defendants’ Counsel confirms the affirmations of Plaintiff’s Counsel as they relate to the initial filing of this action and execution of the Stipulation. Defendants’ Counsel affirms, however, that after he filed the Prior Motion, NIM served its Memorandum of Law in Opposition which “made up new facts not included in the Amended Complaint, which were directly contradicted by documentary evidence and to which he lacked any personal knowledge, in a futile attempt to cure the fatal flaws in the Amended Complaint as against Andreadakis” (Muchmore Aff. in Supp./Opp. at ¶ 8). On or about December 3, 2010, Defendants’ Counsel sent to Plaintiff’s Counsel a proposed stipulation (“Proposed Stipulation”) (Ex. D to Muchmore Aff. in Supp./Opp.) that would extend Vevant’s time to answer until ten days after service of notice of entry of the decision on the Prior Motion. On or about January 4, 2011, Defendants’ Counsel served a Reply Affidavit of Andreadakis in connection with the Prior Motion. On or about February 3, 2011, following an appearance before the Court on the Prior Motion, NIM served Defendants’ Counsel, in court, with the instant motion for a default judgment. Plaintiff’s Counsel provided Defendants’ Counsel with no advance notice of its intention to file the instant motion.

In her Affidavit in Support, Andreadakis affirms that 1) NIM breached the agreements at issue by failing to, *inter alia*, provide promised functionality to the Website, meet delivery deadlines and correct problems with the Website’s design; and 2) NIM’s alleged breaches are the basis for Vevant’s affirmative defenses and counterclaim set forth in Vevant’s Answer and Counterclaim (“Answer”) (Ex. G to Andreadakis Aff. in Supp.).

In his Supplemental Affirmation, Plaintiff’s Counsel affirms, *inter alia*, that 1) as

reflected by the emails provided (Ex. 5 to Rose Supp. Aff.), Plaintiff's Counsel declined to grant Defendants' Counsel's request in December of 2010 for an additional extension of time to answer; and 2) Vevant did not file any answer, pleading or motion until February 18, 2011, more than three months after the deadline provided in the Stipulation.

### C. The Parties' Positions

NIM submits that it has demonstrated its right to a default judgment against NIM by establishing its claim through the Cohen Affidavit and other documentation submitted, and the default of Vevant by failing to appear or move by the date set forth in the Stipulation.

Defendants oppose NIM's motion, and submit that the Court should compel Plaintiff to accept service of Vevant's Answer in light of the fact that 1) the brief delay in serving the Answer stemmed from Defendants' Counsel's involvement in filing the Prior Motion; 2) Plaintiff's Counsel has been aware at all times that Defendants' Counsel represented both Defendants; 3) there is no prejudice to Plaintiff; 4) the brief delay is attributable to NIM's "assertion of frivolous claims and engagement in frivolous motion practice" (Ds' Memorandum of Law at p. 4); and 6) Vevant has meritorious defenses, as set forth in the Andreadakis Affidavit.

In reply, NIM submits that 1) as Plaintiff's Counsel extended to one request by Defendants' Counsel for an extension of time to answer, his decision not to consent to a second request for an extension was reasonable and well documented, and Defendants' Counsel could not reasonably have believed that Plaintiff's Counsel was acceding to his second request; 2) the Court should reject as "irrational" (Reply Memorandum of Law at § 2) Defendants' explanation that the delay in serving the Answer was attributable to Defendants' involvement with filing the Prior Motion; and 3) Andreadakis' Affidavit does not provide evidence of a meritorious defense, but merely states, in conclusory fashion, that NIM breached the agreements at issue.

## RULING OF THE COURT

### A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. InCorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007). Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

B. Extension of Time to Appear or Plead

CPLR § 3012(d), titled "Extension of time to appear or plead," provides as follows:

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.

Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

C. Application of these Principles to the Instant Action

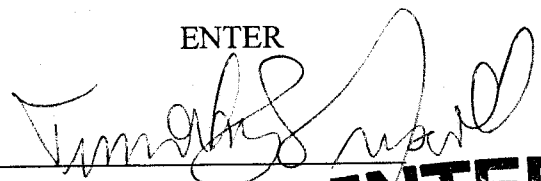
The Court is mindful of the legal principles cited by Plaintiff, and aware that Plaintiff has extended some courtesies to Defendants. In light, however, of 1) the public policy favoring resolution of matters on the merits, 2) the numerous exchanges between counsel for the parties which reflect Defendants' intention to respond to the allegations in the Complaint and provide some context for Defendants' delay in answering, and 3) the Affidavit of Andreadakis which provides evidence of a meritorious defense, the Court denies Plaintiff's motion for a default judgment, grants Defendants' cross motion, and directs Plaintiff's to accept the Answer and Counterclaim of Vevant. The Court anticipates that counsel for the parties will, heretofore, comply with all statutory deadlines as well as any directives issued by the Court.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on May 25, 2011 at 9:30 a.m. for a Preliminary Conference.

DATED: Mineola, NY  
April 18, 2011

ENTER  
  
HON. TIMOTHY S. DRISCOLL  
J.S.C.  
**ENTERED**  
APR 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE