

<b>Altman v 139 E. 57th St. LLC</b>
2011 NY Slip Op 34104(U)
August 15, 2011
Supreme Court, New York County
Docket Number: 115314/09
Judge: Michael D. Stallman
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This opinion is uncorrected and not selected for official publication.



2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
SONIA ALTMAN and BERNARD ALTMAN,

Plaintiffs,

- against -

139 EAST 57<sup>TH</sup> STREET LLC, THE CITY OF NEW YORK,  
NEW YORK CITY TRANSIT AUTHORITY, and THE  
METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.  
-----X

Index No. 115314/2009

**Decision and Order**

**FILED**

**AUG 17 2011**

**HON. MICHAEL D. STALLMAN, J.:**

NEW YORK

COUNTY CLERK'S OFFICE

Plaintiffs commenced this action by filing a summons with notice on October 20, 2009. By a notice of appearance and demand dated February 22, 2010, defendant City of New York demanded a copy of the complaint. (Bila Affirm., Ex B.). Similarly, by a notice of appearance and demand dated February 24, 2010, defendant New York City Transit Authority (NYCTA) demanded a copy of the complaint. (Shufer Affirm., Ex B.) Lastly, by a notice of appearance and demand dated March 25, 2010, defendant 139 East 57<sup>th</sup> Street, LLC demanded a copy of the complaint. (Frank Affirm., Ex B.)

Defendants all claim that plaintiffs did not timely serve them with the complaint as demanded, in accordance with CPLR 3012. According to 139 East 57<sup>th</sup> Street, LLC, it was served with the complaint on November 26, 2010. (Frank Affirm ¶ 5). NYCTA received the complaint on December 1, 2010. (Shufer Affirm., Ex C.) The City claims that it was served with the complaint in late December 2010. (Bila Affirm., Ex E.) Both NYCTA and the City sent letters to plaintiffs' counsel rejecting the complaint on the ground that it was not timely served within 20 days of service

of their demands. (Shufer Affirm., Ex D; Bila Affirm., Ex E.)

NYCTA, the City, and 139 East 57<sup>th</sup> Street, LLC each move to dismiss the action, on the ground that the complaint was not timely served in accordance with CPLR 3012 (b). (Motion Seq. Nos. 001, 002, & 003.) Plaintiffs cross-move for a default judgment against all defendants, or in the alternative, for an order compelling defendants to accept the complaint.<sup>1</sup>

This decision addresses the three motions and plaintiffs' cross motion.

### DISCUSSION

"Under CPLR 3012(b), a plaintiff who has commenced an action by service of a summons without complaint and upon whom a demand has been made for service of the complaint has 20 days in which to comply with that demand. A plaintiff who wishes to serve a complaint after the 20 days has expired must demonstrate the merits of the cause of action as well as a reasonable excuse for the delay."

(*Wess v Olympia & York Realty Corp.*, 201 AD2d 365 [1st Dept 1994].)

Here, plaintiffs submit an affidavit from Sonia Altman, and the affidavit essentially tracks the allegations of the verified complaint that defendants rejected as untimely. (*Compare* Schacht Affirm., Ex 6 *with* Schacht Affirm., Ex 1.) Altman allegedly tripped and fell on a misleveled trap door in the sidewalk abutting premises located at 139 East 57<sup>th</sup> Street on August 4, 2008. Plaintiffs submit black and white copies of photographs taken of the area where Altman allegedly tripped and fell. Altman's factually detailed affidavit and the photographs suffice to demonstrate the merit of her claims. (*See Chiaffarano v Winston*, 234 AD2d 329, 330 [2d Dept 1996].)

As to plaintiffs' reasonable excuse,

"The determination of what constitutes a reasonable excuse for a default lies within

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<sup>1</sup> NYCTA objected to plaintiffs' cross motion as untimely served. By order dated May 18, 2011, this Court granted defendants additional time and an opportunity to respond to plaintiffs' cross motion.

the sound discretion of the Supreme Court. When exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action.”

(*Grace v Follini*, 80 AD3d 560, 560-561 [2d Dept 2011][citations and quotation marks omitted].)

Here, the Court exercises its discretion to accept law office failure as a reasonable excuse. As plaintiffs’ counsel indicates, defendants have not demonstrated prejudice resulting from the delay in pleading. According to plaintiffs’ counsel, Altman appeared at a statutory hearing for NYCTA on February 26, 2009. Contrary to the City’s argument, the sidewalk condition alleged as dangerous in this case is not transitory in nature. There is no indication that plaintiffs themselves intended to abandon their claims. The Court is satisfied that law office failure was not offered as a perfunctory excuse. Therefore, the Court grants the branch of plaintiffs’ cross motion to compel defendants to accept late service of the complaint, pursuant to CPLR 3012(d). (*Gazes v Bennett*, 70 AD3d 579 [1<sup>st</sup> Dept 2010].)

Therefore, the branch of plaintiffs’ cross motion to compel defendants to accept the late pleading is granted. Defendants’ motions to dismiss the action on the ground that the complaint was not timely served is denied.

As a condition of granting plaintiffs’ cross motion, and denying defendants’ motions, plaintiffs’ attorney must personally pay to each moving defendant \$500 within 35 days after service upon plaintiffs’ attorneys of a copy of this with notice of entry thereof. (*Hefte v Bellin*, 88 AD2d 872 [1st Dept 1982][“while the failure to timely serve a complaint resulted from the complexity of facts, it was an abuse of discretion by Special Term not to condition the granting of relief to plaintiff upon the payment by her counsel of an appropriate sum for their dereliction”]; *M. D. Z. Corp. v Jefferson Ins. Co. of New York*, 74 AD2d 599 [2d Dept 1980][“ where the failure to timely serve a complaint

resulted from 'law office failure', it was an abuse of discretion by Special Term not to condition the granting of relief to plaintiff upon the payment by its counsel of an appropriate sum for their dereliction"].) For the purpose of calculating payment to each moving defendant, defendants New York City Transit Authority and Metropolitan Transportation Authority are considered one moving defendant.

In addition, defendants are granted an extension of their time to answer the late-served complaint. Defendants shall serve an answer to the complaint within 45 days of service of a copy of this decision and order with notice of entry. In light of the extension of the time to answer the complaint, the branch of plaintiffs' cross motion for a default judgment against defendants is denied.

If plaintiff's attorney does not comply with the condition, then plaintiffs' cross motion is deemed denied, and defendants may move for an order dismissing the action, upon proof of plaintiff's attorney's failure to make payment as directed.

### CONCLUSION

Accordingly, it is hereby

ORDERED that the motions by defendants New York City Transit Authority, the City of New York, and 139 East 57<sup>th</sup> Street, LLC to dismiss the action (Motion Seq. Nos. 001, 002 & 003) are denied, and plaintiffs' cross motion is granted, on the condition that plaintiffs' attorney personally pay to each moving defendant \$500 within 35 days after service upon plaintiffs' attorneys of a copy of this with notice of entry thereof; and it is further

ORDERED that if plaintiffs' attorney does not comply with the condition, then plaintiffs' cross motion is deemed denied, and defendants may move for an order dismissing the action, upon proof of plaintiff's attorney's failure to make payment as directed; and it is further


ORDERED that defendants are granted an extension of time to answer the complaint, and defendants shall serve an answer to the complaint within 45 days of service of a copy of this decision and order with notice of entry upon plaintiffs' counsel.

**FILED**

Copies to counsel.

**AUG 17 2011**

**Dated: August 15, 2011**  
**New York, New York**

**ENTER:**   
NEW YORK COUNTY CLERK'S OFFICE  
\_\_\_\_\_  
J.S.C.

**HON. MICHAEL D. STALLMAN**

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C. Justice

PART 8

Index Number : 103565/2011  
MR HO CHARTER SERVICE  
vs.  
HO, EDWARD G.  
SEQUENCE NUMBER : 006  
VACATE DEFAULT JUDGMENT

INDEX NO. 103565/11  
MOTION DATE 8/11/11  
MOTION SEQ. NO. 006

vacate default judgment  
is 1-8 No(s).  
9-16 No(s).  
No Reply papers submitted

upon the foregoing papers, it is ordered that this motion is

Defendant's motion to vacate this Court's decision and order dated June 30, 2011, is denied. This Court finds that defendant willfully failed to appear for the scheduled preliminary conference which lead to the striking of defendant's answer and an order directing an inquest. Accordingly, it is ORDERED that defendant's motion, is denied.

FILED

AUG 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: August 14, 2011

Joan M. Kenney, J.S.C.  
JOAN M. KENNEY  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

