

<b>West 17th St. &amp; Tenth Ave, Realty, LLC v The N.E.W. Corp.</b>
2015 NY Slip Op 30041(U)
January 20, 2015
Supreme Court, New York County
Docket Number: 159979/2014
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SHIRLEY WERNER KORNREICH  
J.S.C**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
WEST 17TH STREET AND TENTH AVENUE,  
REALTY, LLC,

Index No.: 159979/2014

Plaintiff,

**DECISION & ORDER**

-against-

THE N.E.W. CORP.,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Motion sequences numbers 002 and 003 are consolidated for disposition.

Plaintiff West 17th Street and Tenth Avenue Realty, LLC moves to compel defendant, The N.E.W Corp., to accept its reply to defendant’s counterclaim, or in the alternative, to extend its time to file a reply to defendant’s counterclaim, pursuant to CPLR 3012(d). Seq. 002. Defendant opposes and also moves for default judgment, pursuant to CPLR 3215, against plaintiff. Seq. 003. Plaintiff’s motion is granted and defendant’s motion is denied for the reasons that follow.

*I. Background and Procedural History*

This action arises from a contract dispute for the purchase of commercial property located at 116 Tenth Avenue and 453-455 West 17th Street in Manhattan (the Property). On November 21, 2013, plaintiff contracted with defendant to purchase the Property for \$32.5 million. *See* Dkt. 10.<sup>1</sup> Pursuant to the contract, both parties were required to satisfy preconditions before the closing. Plaintiff - purchaser alleges that defendant – seller failed to

---

<sup>1</sup> References to “Dkt” followed by a number refer to documents in this action filed in the New York State Courts Electronic Filing System.

comply with certain preconditions, in violation of the contract. Defendant claims that plaintiff refused to appear for the closing and, thereby, breached the contract.

On October 14, 2014, plaintiff filed this lawsuit seeking specific performance of the contract or, in the alternative, the return of \$2.25 million. Plaintiff made a \$1.5 million down payment to defendant, and placed an additional \$750,000 in escrow to extend the closing. Plaintiff also recorded a lis pendens on the property. On November 4, 2014, defendant filed an answer and counterclaims and moved by order to show cause to vacate the lis pendens on November 5, 2014. On November 7, 2014, the court ordered the plaintiff to produce documents within one business day demonstrating that plaintiff had the ability to close. Plaintiff subsequently produced documents showing that it had \$88 million in available assets and financing proposals if it chose to close using a mortgage loan.

On November 12, 2014, the court held another hearing and denied defendant's motion to vacate the lis pendens. The court then ordered plaintiff to engage in expedited discovery and to post a bond for \$100,000. Plaintiff erroneously tendered \$100,000 in cash to defendant (rather than tendering the bond), which defendant rejected. The court subsequently vacated the lis pendens. Plaintiff was to reply to defendant's counterclaim on or before November 24, 2014, within 20 days of service of defendant's answer and counterclaims, pursuant to CPLR 3012(a) and continue to produce documents to defendant according to the discovery schedule.

On December 11, 2014, plaintiff realized its failure to respond to defendant's counterclaim within the requisite 20 days. It contacted defendant on December 12, 2014 to request acceptance of its late reply. However, defendant refused to accept plaintiff's reply to the counterclaim.

On December 15, 2014, plaintiff filed this instant motion to compel the defendant to accept its reply to defendant's counterclaim. Defendant opposes the motion and cross-moves for default judgment, seeking a declaratory judgment terminating the contract.

## II. Legal Standard

Pursuant to CPLR 3012(d), this court possesses the discretion to permit late service of an answer. *Watson v Pollacchi*, 32 AD3d 565, 565 (3d Dept 2006). To avoid entry of default judgment, a party is required to provide a reasonable excuse for its default and a meritorious defense to the action. CPLR 5015(a). To determine a reasonable excuse, courts consider several factors including: (1) the reason for the delay; (2) the extent of the delay; (3) prejudice the delay may cause to the opposing party; and (4) public policy. *Zanelli v JMM Raceway, LLC*, 83 AD3d 697, 697 (2d Dept 2011); *Rickert v Chestara*, 56 AD3d 941, 942 (3d Dept 2008). A meritorious defense requires a showing that some factual support for a potential defense exists. *Torres v 1148 Bryant Ave., Inc.*, 81 AD3d 467 (1st Dept 2011).

## III. Discussion

The court may accept law office failure as a reasonable excuse for delay. *DeMarco v Wyndam, Int'l, Inc.*, 299 AD2d 209 (1st Dept 2002); *Parker v I.E.S.I. N.Y. Corp.*, 279 AD2d 395 (1st Dept 2001); *Green Apple Mgmt. Corp. v Aronis*, 55 AD3d 669, 865 (2d Dept 2008). Courts have even held that upon a showing of a lack of prejudice and a meritorious defense, a default judgment may be vacated and the action restored despite the existence of egregious law office failure because New York's public policy favors the resolution of cases on the merits. *Leary v Pou Pouné, Inc.*, 273 AD2d 8 (1st Dept 2000); *Martinez v New York City Transit Authority*, 183 AD2d 587 (1st Dept 1992).

Here, counsel for plaintiff alleges that its managing clerk resigned without docketing the date for the subject reply. Plaintiff, however, had been actively litigating the case under an expedited timetable and made three document productions to defendant, on November 10, November 26, and December 12, 2014. Thus, plaintiff's failure to respond to defendant's counterclaims was not intentional or a dilatory tactic. Furthermore, the delay only lasted 18 days, at which time plaintiff's counsel promptly notified defendant to acknowledge and remedy the oversight. Defendant contends that plaintiff's law office failure claim should have been supported by a more detailed and credible explanation. Be that as it may, this court finds the excuse sufficient, particularly, here where the delay was short and caused no prejudice to defendant. New York courts favor the resolution of cases on their merits. *Nason v Fisher*, 309 AD2d 526, 526 (1st Dept 2003); *Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 877 (2nd Dept 2005).

Moreover, plaintiff has provided evidence that defendant failed to satisfy preconditions to the closing. A meritorious defense requires a showing that a litigant offer some factual support for a potential defense. *Torres*, 81 AD3d 467 (1st Dept 2011). Defendant argues that plaintiff lacked the ability to close. Plaintiff submits records demonstrating the existence of environmental hazard to the Property. *See* Dkt. 55. It also provides testimony and records of its ability to close. Plaintiff's principal submitted bank records indicating that it had at least \$88 million available for the real estate acquisition, as well as access to viable financing proposals from reputable lenders who were prepared to finance the transaction. *See* Dkt. 29.

Accordingly, it is

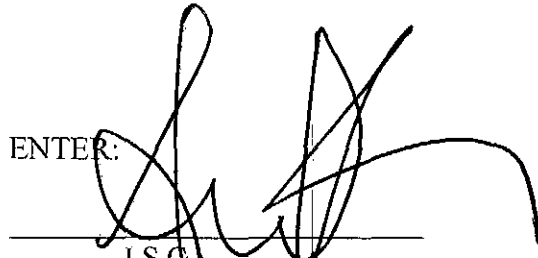
ORDERED that the motion by plaintiff West 17th Street and Tenth Avenue Realty LLC to compel defendant The N.E.W Corp. to accept plaintiff's reply to defendant's counterclaim is

granted, and defendant shall be deemed to have been served nunc pro tunc as of December 12, 2014; and it is further

ORDERED that the motion by defendant The N.E.W Corp. for a default judgment against plaintiff West 17th Street and Tenth Avenue Realty LLC is denied.

Dated: January 20, 2015

ENTER:

A handwritten signature in black ink, appearing to be 'Shirley Werner Kornreich', written over a horizontal line.

**SHIRLEY WERNER KORNREICH**  
J.S.C