

**New York Trans Harbor LLC v On Bd. Travel, Ltd.**

2016 NY Slip Op 30111(U)

January 21, 2016

Supreme Court, New York County

Docket Number: 650836/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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NEW YORK TRANS HARBOR LLC,  
d/b/a NEW YORK WATER TAXI and  
NYWT CIRCLE LINE LLC d/b/a CIRCLE  
LINE DOWNTOWN,

Plaintiffs,

- v -

ON BOARD TRAVEL, LTD, NEW YORK PARTY  
SHUTTLE LLC, PARTY SHUTTLE TOURS  
LLC, and ONBOARD NEW YORK TOURS,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

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**DECISION  
and ORDER**

Mot. Seq. #001

Plaintiffs, New York Trans Harbor LLC d/b/a New York Water Taxi (“New York Trans Harbor”), and NYWT Circle Line LLC d/b/a Circle Line Downtown (“NYWT”) (collectively, “Plaintiffs”) bring this action for breach of contract, account stated, quantum meruit, and unjust enrichment. Plaintiffs claim that in March 2009, “plaintiffs and defendants entered into an agreement whereby plaintiffs would permit defendants’ tourist customers to sail on plaintiffs’ Circle Line and New York Water Taxi vessels for a fee per person to be paid by defendants.”

Plaintiffs claim that they performed in accordance with the parties’ agreement and “permitted defendants’ customers to board their vessels and enjoy the transport that plaintiffs provided.” Plaintiffs claim that they submitted invoices and statements of account to Defendants in the amount of \$587,778.50 for the services provided to Defendants’ customers. Plaintiffs claim that despite their performance and due demand, Defendants have failed to pay any part of the outstanding balance due to Plaintiffs.

Plaintiffs commenced this action on March 17, 2015, by Summons and Verified Complaint. The Complaint is verified by Helena R. Durst, an officer of Plaintiffs.

Plaintiffs now move for an Order, pursuant to CPLR § 3215, granting judgment on default in favor of Plaintiffs and against defendants On Board Travel, Ltd. (“On Board Travel”), and New York Party Shuttle, LLC (“NYPS”) on the grounds that they have failed to appear.

With respect to both On Board Travel and NYPS, Plaintiffs claim that service of process was completed on them on March 19, 2015 when service of the Summons and Complaint was made on the Secretary of State, and that NYPS’ time to respond to the complaint expired in 30 days, on April 20, 2015.

Plaintiffs submit: the attorney affidavit of Joseph M. Burke, dated July 2, 2015; the Summons and Verified Complaint; New York Department of State’s Information (“NYDOS”) on NYPS and On Board Travel; affidavits of service of process on NYDOS for both defendants; proof of additional mailing; an Answer filed by NYPS and NYPS d/b/a On Board Tours s/h/a defendant On Board New York Tours on June 19, 2015; and a letter dated June 26, 2015 from Plaintiffs’ counsel to Defendants’ counsel which “returned” Defendants’ Answer “on the grounds that defendants are in default for failing to serve a response to the complaint in this action within the time mandated by NYCPLR Rule 320.”

NYPS opposes Plaintiffs’ motion for default judgment and cross moves for an Order pursuant to CPLR § 3012(d) compelling the acceptance of a pleading untimely served or extending time for NYPS to appear or answer the Complaint.

In opposition to Plaintiffs’ motion for default, C. Thomas Schmidt, the Chief Executive Officer and sole Manager of NYPS, and James M. Felix, Esq., NYPS’s attorney, submit supporting affidavits. NYPS contends that it has a meritorious defense, excusable delay, and there is no prejudice to Plaintiffs in permitting an answer to be filed to the Complaint.<sup>1</sup> With respect to On Board Travel, Schmidt avers, “I am not aware of any company named On Board Travel, Ltd. being in business similar to NYPS, nor am I aware of any business relationship between defendant NYPS and defendant On Board Travel, Ltd. There is no relationship between defendant NYPS and defendant On Board Travel, Ltd.”

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<sup>1</sup> NYPS also argue that Plaintiffs’ CPLR 3215(g) additional mailing is defective.

Concerning NYPS' purported excusable delay in failing to timely answer the Complaint, as set forth in Plaintiffs' Affidavit of Service, Plaintiffs served the Summons and Complaint on NYPS by serving same upon the New York Secretary of State on March 19, 2015. The address that NYPS had listed with Secretary of State to mail process to was c/o Schmidt at 3701 Kirby Drive, Ste. 845, Houston, Texas 77098. Schmidt states that on January 1, 2015, the NYPS Texas office was moved to 7880 San Felipe, Suite 210, Houston, Texas 77063. Schmidt states, "By an unintentional oversight, no change of address was filed with the New York Secretary of State." Schmidt states that he did not know that NYPS "had been served with process ... until I received a copy of the Summons and Complaint on or about June 18, 2015. I then immediately retained New York counsel on behalf of defendant NYPS who immediately filed an answer on June 19, 2015."

In his affidavit, Felix, NYPS' attorney, avers that he was contacted by NYPS on June 18, 2015 concerning this action. Felix states that he contacted Plaintiffs' counsel on June 19, 2015 to request an extension to answer, and that Plaintiffs' counsel "was not able to agree, at that time to an extension of time, without his clients' counsel." Felix states that, "Having not heard back from counsel by the end of the day, June 19, 2015, I filed an Answer on behalf of defendant NYPS."

As for a meritorious defense, Schmidt avers "NYPS (nor any other defendant herein) never entered into a written contract with the plaintiffs named in this suit," that he and other representatives of NYPS "objected to incorrect accounting for amounts allegedly owed by NYPS," and "much of the money purportedly owed by NYPS relates to a specific tour that was a joint venture of the parties known as the NY Freedom Tour" which "never happened."

In reply, Plaintiffs argue that NYPS has failed to establish both an excusable default and a meritorious defense and that Plaintiffs have been prejudiced by NYPS' delay. Plaintiffs submit the reply affirmation of Burke. Plaintiffs also submit the reply affidavit of Helena Durst, "the Co-Vice President of SRDA Manager, LLC, the Managing Member of The Durst Manager LLC, the manager of plaintiff New York Trans Harbor LLC, doing business as New York Water Taxi and NYWT Circle Line doing business as Circle Line Downtown" concerning the merits of Plaintiffs' claims.

CPLR § 3215 provides, in relevant part: "[o]n any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." (CPLR § 3215[f]).

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.” (CPLR § 3012[d]). In order to be permitted to serve an untimely answer as timely, a defendant must provide both a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep’t 2008]). Additionally, “[a]s a matter of general policy, disposition of controversies on the merits is favored.” (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep’t 1964]).

Wherefore, it is hereby,

ORDERED that Plaintiffs’ motion for default judgment as against defendant On Board Travel, Ltd., is granted without opposition; and it is further

ORDERED that an assessment of damages against defendant On Board Travel, Ltd., is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that Plaintiffs’ motion for default judgment against defendant New York Party Shuttle LLC is denied; and it is further

ORDERED that the Answer e-filed by defendant New York Party Shuttle LLC on June 19, 2015 is deemed timely nunc pro tunc.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: JANUARY 21, 2016

JAN 21 2016

  
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EILEEN A. RAKOWER, J.S.C.