

<b>Loren v Church St. Apt. Corp.</b>
2017 NY Slip Op 30942(U)
May 5, 2017
Supreme Court, New York County
Docket Number: 152558/13
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 57

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 BONNIE LOREN and PROCESS STUDIO THEATRE INC.,

Plaintiffs,

DECISION AND ORDER  
 Index No. 152558/13

-against-

CHURCH STREEP APARTMENT CORP., ASHKENAZY  
 ACQUISITION CORP., 257 CHURCH RETAIL, LLC,

Defendants,

-----x  
 JENNIFER G. SCHECTER, J.:

Plaintiffs Bonnie Loren and Process Studio Theatre Inc. move for an order holding defendants Church Street Apartment Corp. (CSA), Ashkenazy Acquisition Corp. and 257 Church Retail, LLC (collectively Defendants) in civil and criminal contempt. Plaintiffs further seek renewal of their motion for a default judgment against former defendant Lisa Liebert. Finally, plaintiffs seek to amend the summons and complaint to add proposed defendants Ming Lu and Uscha Pohl.

Defendants oppose the motion.

Contempt, Sanctions and Judgments Against Defendants

October 8, 2015 Temporary Restraining Order

In an order dated October 8, 2015 (Oct TRO), this court restrained CSA and its contractors from urinating and defecating in the demised premises pending a hearing for injunctive relief (Affirmation in Support [Supp], Ex D). Plaintiffs allege that CSA violated the Oct TRO "when they encouraged and allowed additional urination and feces to be

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deposited in the Plaintiffs' demised premises in October 2015" (Supp at ¶ 28). Ms. Loren swears that on October 16, 2015, she captured images of a worker using a non-toilet area of her premises to relieve himself (Loren Aff at ¶ 6[a], Ex W). The images accompanying plaintiffs' motion, however, do not establish by clear and convincing evidence that the October TRO was violated.

#### Other Bases for Relief

Plaintiffs allege that CSA should be punished for contempt based on occasions that plaintiffs observed the building doors left unlocked and, among other things, on assertions that Ming Lu trespassed on the premises on March 23, 2016. They also contend, for example, that contempt is justified based on the elevator not being properly programmed, which resulted in four people being stranded in the cellar and 911 being called to rescue them. Plaintiffs urge the court to incarcerate Ming Lu (though it is unclear that he was ever served with this motion and no proceeding was commenced to hold him personally in contempt). Plaintiffs assert that defendants failed to install "automatic closing and locking exterior doors to the building" (Boatti Aff at ¶¶ 9, 26) and that contempt is warranted based on inconsistent statements made under oath by Mr. Lu. In addition to Lu's incarceration

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and damages for contempt, plaintiffs seek relief against defendants pursuant to CPLR 3126 and seek sanctions.

Putting aside basic procedural defects in plaintiffs' motion and the fact that many of the remedies sought are inappropriate or unavailable,<sup>1</sup> this motion makes clear that the so-ordered stipulation placed on the record in March 2016 is unworkable. It was never the court's intention to police the opening, closing and locking of the doors or the operation of the elevator in the building. CSA agreed that building doors would be locked as a general policy and the elevator would be programmed to avoid the cellar.

In so-ordering that agreement, the court did not intend for CSA to be punished whenever the building door was found open<sup>2</sup> or based on elevator malfunction. That would not only be unwarranted and unjust, it would be unworkable for the court.

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<sup>1</sup> For example, procedural defects include omission of statutory language required for seeking contempt. Unavailable remedies include punishment of Mr. Lu who was not personally ordered to do anything nor was he served with these papers or properly made subject to punishment for contempt. Nor is it clear that defendants were required to install self closing or locking doors.

<sup>2</sup> It is unclear who left the door open on occasions cited by plaintiffs.

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Plaintiffs never established that anyone's safety is at risk or that they would suffer irreparable harm as a result of defendants' conduct that cannot be remedied through monetary damages. Thus, the court withdraws its endorsement of the March 30, 2016 stipulation and makes clear that to the extent that defendants breach the lease or violate the law, plaintiffs' remedy shall be assertion of proper causes of action and damages if plaintiffs prevail (see e.g. motion to amend as to Lu *infra*).

Renewed Motion For A Default Judgment Against Lisa Liebert

Plaintiffs' motion to renew its motion for a default judgment against Lisa Liebert is denied. It is undisputed that plaintiffs' motion for a default judgment was made well over a year after the default. Sufficient cause for missing the one-year deadline was not established in the underlying motion nor has it been shown here.

At oral argument on the underlying motion, Lisa Liebert was present. Plaintiffs were offered the opportunity to accept Liebert's late answer, which had been filed after the motion for a default judgment was made but was rejected by plaintiffs. Plaintiffs refused to accept the answer, insisting on a default judgment.

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Almost a full year after the motion was denied--virtually the same amount of time as plaintiffs had to move for a default judgment and as the statute of limitations for assault and false imprisonment--plaintiffs made this motion to renew. Plaintiffs urge that the motion for a default judgment was untimely because their original attorney, who has since been replaced, erred.<sup>3</sup> They submit an affidavit from him, which sets forth:

1. "Lisa Liebert did not answer or appear in this action after being served with the summons and complaint."
2. "I should have moved for [a] default judgment . . . within a year but I did not do so because of law office failure on my part in that I had too much on

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<sup>3</sup> Plaintiffs' unverified assertion that Liebert served a "draft answer" on prior counsel, which was not rejected, and that she therefore had a duty to attend the preliminary conference (Boatti Aff at ¶ 17) contradicts (1) their February 2015 position that Liebert had been in default for "almost two years" (NYSCEF Doc No 54), (2) their entitlement to a default judgment and (3) Yellen's statement that Liebert did not appear or answer. Regardless, at the preliminary conference, the judge did not note any default on the record or enter an order against Liebert (see 22 NYCRR 202.27) most likely because no one requested it because the parties' position was that she had not answered. Plaintiffs also maintain without verification--based on hearsay and Ms. Loren's observations when she "was on the phone with him [and] he began exhibiting symptoms of a stroke" (Loren Aff at ¶ 9)--that Yellen did not timely move for a default judgment because he had a stroke "sometime between 2010 and 2013 that impaired his ability to keep track of deadlines" (*id.*). Yellen himself, however, made no mention whatsoever of illness as a reason for failure to timely move and there is no actual proof that he missed the deadline because of sickness (*cf. Cynan Sheetmetal Products, Inc. v B.R. Fries & Assocs., Inc.*, 83 AD3d 645, 646 [2d Dept 2011] ["plaintiff failed to submit any medical proof documenting its former attorney's alleged illness"]).

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my plate and got distracted from the instant case” (Yellen Aff at ¶¶ 4-5).

Though law-office failure can constitute a valid excuse for plaintiffs’ default (see CPLR 2005), under the circumstances the excuse is insufficient (see *U.S. Bank Nat. Assn v Dorvelus*, 140 AD3d 850, 852 [2d Dept 2016]; *Memorial Hosp. v Wilkins*, 143 AD2d 494, 495 [3d Dept 1988]).<sup>4</sup> Mr. Yellen’s bare-bones statement that he was “distracted” from this case is conclusory and it is hard to imagine that during the entire year available for relief, he was so distracted that he was unable to make the straightforward motion (see *Nieves v 331 East 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985]; *Winslow v Pyramid Co./Aviation Mall*, 248 AD2d 922 [3d Dept 1998] [affidavit failed to set forth any documentary facts pertaining to his excuse of personal, financial and health problems]). Thus, renewal of the motion for a default judgment is denied.

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<sup>4</sup> The excuse is unreasonable particularly when considered with plaintiffs’ repeated refusal to accept Liebert’s answer so that the case could be resolved on the merits, the almost year-long delay in moving to renew and the passage of several years since the default.

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Renewed Motion to Amend to Add Defendants

In February 2015, plaintiffs moved to amend the complaint to add, among others, Ushca Pohl and Ming Lu as defendants. Nothing specific was stated or pled as to Pohl or Lu. In denying the motion, the court explained:

"In the proposed amended complaint, plaintiffs allege in a conclusory manner that '[v]arious owners, employees and agents of defendants and/or landlord and the [CSA Defendants and AAC Defendants] have been repeatedly illegally trespassing upon the premises, in tort and in violation of the lease.' Without naming who or how, plaintiffs generally further assert that the individuals exercised dominion of the organizational defendants . . . Plaintiffs also assert that there can be personal liability based on 'deposits of urine and feces in the . . . demised premises.' . .

. . .

Because plaintiffs do not plead any facts demonstrating what any particular individual defendant did for which there could be personal liability or how any of them purportedly abused the organizational form, there is no 'just basis' upon which to add them as parties"

(Supp, Ex C at 8-9).

Plaintiffs do not disagree with that analysis. They now seek to amend the complaint to include allegations that Uscha Pohl "trespassed into the Plaintiffs' demised premises on

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March 5, 2014 and ordered three men to dismantle the . . . security equipment and they did so" (see Proposed Second Amended Complaint [NYSCEF Doc. No. 403] at ¶ 60) and to plead that Ming Lu trespassed in the demised premises in December 2015 and March 2016.

As justification for the failure to include these allegations, plaintiffs' counsel states that he was unaware that he had to attribute any conduct to particular individuals before asserting causes of action against them (Boatti Aff at ¶ 24). Plaintiffs further point out that, as to Lu, the trespass raised here had not even occurred at the time of the underlying motion.

Pohl

Renewal must be denied as to Pohl. Even if the "reasonable justification" requirement did not apply (see CPLR 2221[e][3]) and the court treated this motion purely as one to amend, the amendment would be improper. Trespass claims based on March 2014 conduct are barred by the applicable three-year statute of limitations and plaintiffs have not shown that they relate back (*Royce v DIG EH Hotels, LLC*, 139 AD3d 567, 568-569 [1st Dept 2016]; *Crawford v City of New York*, 129 AD3d 554,

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555 [1st Dept 2015]; *Garcia v New York Presbyterian Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]).

Lu

To the extent that plaintiffs seek to assert new causes of action against Ming Lu that were not existent at the time of the underlying motion, plaintiffs are not really seeking renewal as the causes of action did not even exist when the original motion was made. They are really moving to amend. Amendment is granted to include the trespass claims against Lu because they are not palpably insufficient or patently devoid of merit (see *Sterling Natl. Bank v American Elite Props. Inc.*, 91 AD3d 581 [1st Dept 2012]; *Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]). To the extent that Lu believes the claim is unfounded, he may assert any applicable defenses. Within 14 days, plaintiffs must e-file an amended summons and the second amended complaint and plaintiffs must serve Lu within 30 days of the e-filing of this decision and order. An affidavit of service must be e-filed within 35 days of the e-filing of this decision.

The second amended complaint shall conform to the one submitted (NYSCEF Doc. No. 403) except that it shall EXCLUDE

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all causes of action that have either been dismissed or have not been approved. For example, Lisa Liebert and Ushca Pohl shall not be included in the caption and any claims against them shall be removed (see e.g., ¶¶ 7-8, 13, 15-16, 18, 60-62, 92-100). To be clear, nothing may be added to what was e-filed as the proposed second amended complaint, which, of course, is subject to the court's January 8, 2016 decision and order (148 AD3d 516 [1st Dept 2017]).

Accordingly it is

ORDERED that plaintiffs' motion for contempt is denied; it is further;

ORDERED that plaintiffs' motion to renew its motion for a default judgment against Lisa Liebert is denied; it is further

ORDERED that plaintiffs' motion to renew its motion to amend is deemed a motion to amend and is granted as to Ming Lu and denied as to Uscha Pohl. Plaintiffs must serve Lu with an amended Summons and Complaint consistent with the requirements set forth above in this decision. It is further

ORDERED that plaintiffs' motion is denied in all other respects; it is further

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ORDERED that the parties are to appear for a status conference on July 19, 2017 at 10:00 a.m. (if Lu has not answered by then, the court will provide a short adjournment).

This constitutes the decision and order of the court.

Dated: May 5, 2017

  
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HON. JENNIFER G. SCHECTER