

Iken-Murphy v Kling
2017 NY Slip Op 31898(U)
September 6, 2017
Supreme Court, New York County
Docket Number: 156255/15
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13

MONICA IKEN-MURPHY and ROBERT MURPHY,

Plaintiffs,

-against-

ARNOLD P. KLING and CELINA WELCH KLING;
444 EAST 86TH OWNERS CORP.,

Defendants.

INDEX NO.	<u>156255/15</u>
MOTION DATE	<u>08-09-2017</u>
MOTION SEQ. NO.	<u>002</u>
MOTION CAL. NO.	<u></u>

The following papers, numbered 1 to 11, were read on this motion pursuant to CPLR §3215 for a default judgment and cross-motion pursuant §3012 [d] to enlarge the time to answer the complaint:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 7, 8 - 9, 10 - 11</u>
Replying Affidavits _____	<u></u>

Cross-Motion: ☒ Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion pursuant to CPLR §3215 [b] for a default judgment is denied. Defendant, 444 East 86th Owners Corp.'s cross-motion pursuant to CPLR §3012[d], to enlarge the time to answer the complaint, and pursuant to 22 N.Y.C.R.R. 130-1.1 for an award of costs and expenses, including reasonable attorneys fees, is granted only as to the relief sought pursuant to CPLR §3012[d]. The remainder of the relief sought in the cross-motion is denied. 444 East 86th Owners Corp.'s motion filed under Motion Sequence 003 pursuant to CPLR §3211[a], [1],[5] and [7] to dismiss plaintiff's Amended Complaint and the co-defendants Arnold P. Kling and Celina Welch Kling's, cross-claims is granted.

On June 22, 2015, plaintiffs commenced this action for water damage to their co-operative apartment # 37 F at 444 East 86th Street, New York, New York (hereinafter "the apartment"), allegedly caused by leaks in the bathroom ceiling emanating from the penthouse apartment above that was owned by Arnold P. Kling and Celina Welch Kling (hereinafter "co-defendants"). On August 12, 2015 co-defendants filed their Verified Answer (NYSCEF Docket No. 4). Plaintiffs retained new counsel and on February 1, 2017 plaintiffs and the co-defendants entered into a stipulation amending the summons and complaint which was uploaded on the same day (NYSCEF Docket Nos. 44-46). The amended complaint asserts causes of action for trespass and property damage, breach of contract, and negligence against all of the defendants. It is alleged that 444 East 86th Owners Corp.'s lax behavior caused the leak to worsen over time causing substantial damage to plaintiffs' apartment.

On April 17, 2017 co-defendants answered the amended complaint and asserted cross-claims against 444 East 86th Owners Corp. for indemnification and contribution (See Verified Answer to Amended Complaint, NYSCEF Docket 51). On February 7, 2017 plaintiffs served the Amended Summons and Amended Complaint on 444 East 86th Owner's Corp. (Mot. Exh. 2).

Plaintiffs' motion seeks an Order pursuant to CPLR §3215[a] and [b] for a default judgment against 444 East 86th Owners Corp., because the statutory time period to do so has expired.

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

444 East 86th Owners Corp. opposes the motion and cross-moves pursuant to CPLR §3012[a], to enlarge the time to appear in this action and 22 N.Y.C.R.R. 130-1.1 for an award of costs and expenses, including reasonable attorneys fees.

It is within the Court's discretion to determine whether a motion for a default judgment pursuant to CPLR §3215, should be granted. A motion for default judgment can be denied on the defendant's demonstration of a reasonable excuse for failure to serve a timely answer (*Higgins v. Bellet Constr. Co.*, 287 A.D. 2d 377, 731 N.Y.S. 2d 446 [1st Dept.1990] and *M & E 73-75 LLC v. 57 Fusion LLC*, 121 A.D. 3d 528, 995 N.Y.S. 2d 4 [1st Dept., 2014]). "The determination whether a reasonable excuse has been offered is sui generis and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced and, whether the default was willful" (*Chevalier v. 368 E. 148th St. Assoc., LLC*, 80 A.D. 3d 411, 914 N.Y.S. 2d 130 [1st Dept. 2011]).

Pursuant to CPLR §3012 [d], a court may compel plaintiff to accept the defendant's late answer if there was no prejudice due to a relatively short delay attributable to law office failure, or if the delay was reasonable due to an investigation of the obligation to defend (*Nason v. Fisher*, 309 A.D. 2d 526, 765 N.Y.S. 2d 32 [1st Dept., 2003] and *Hirsch v. New York City Department of Education*, 105 A.D.3d 522, 961 N.Y.S. 2d 923 [1st Dept. 2013]). If a default judgment or Order has not been obtained the defendant does not need to serve an affidavit of merit in support of its application to compel acceptance of its answer (*Terrones v. Morera*, 295 A.D. 2d 254, 743 N.Y.S. 2d 860 [1st Dept. 2002]).

444 East 86th Owners Corp. has stated a reasonable excuse for the delay in answering as a result of a stipulation of settlement and general releases signed in a related case on the same claims, and in reliance on plaintiffs' counsel's e-mail dated April 7, 2017 stating in relevant part; "I have no problem extending your time to answer and I give you my word that I will not hold you in default until we speak again but I need to explore the matter" (Cross-Mot. Exh. 13). Plaintiff's counsel was substituted for prior counsel and was unaware of the related action or the releases. On May 15, 2015 plaintiffs' counsel filed this motion for a default judgment without speaking to 444 East 86th Owners Corp.'s attorney and then refused to withdraw the motion.

In any case, plaintiffs in opposition to the cross-motion state they are seeking an Answer to the Amended Complaint so that the issue of release of claims can be litigated. They argue the cross-motion is moot because plaintiffs would permit 444 East 86th Owners Corp. to interpose an Answer to the Amended Complaint (See Aff. in Opp. to Cross-Mot. para. 10). Plaintiff's willingness to extend the defendant's time to interpose an Answer renders the relief sought in the underlying motion for a default judgment and the cross-motion moot.

22 NYCRR 130-1.1 permits a court in its discretion to award costs when conduct is continued after the lack of a legal or factual basis should have been apparent. The imposition of sanctions requires a pattern of frivolous behavior (*Sarkar v. Pathak*, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [1st Dept. 2009]). Plaintiffs' counsel zealousness in defense of his clients "was not so egregious as to constitute 'frivolous conduct' within the meaning of 22 NYCRR 130-1.1"(*Gordon Group Investments, LLC v. Kugler*, 127 A.D. 3d 592, 8 N.Y.S. 3d 115 [1st Dept., 2015] citing to *Carson v. Hutch Metro Center, LLC*, 110 A.D. 3d 468, 974 N.Y.S. 2d 346 [1st Dept. 2013]). Defendant's counsel did not try to contact plaintiff's counsel for a month and could have acted to avoid motion practice. The subsequent withdrawal of CPLR §3215 relief permitting 448 East 86th Owners Corp. to Answer warrants the denial of sanctions.

444 East 86th Owners Corp.'s motion filed under Motion Sequence 003 pursuant to CPLR §3211[a], [1],[5] and [7] seeks to dismiss plaintiff's Amended Complaint and the co-defendants Arnold P. Kling and Celina Welch Kling's, cross-claims, alternatively pursuant to CPLR §3012 [d] to extend the time to answer.

444 East 86th Owners Corp. filed Motion Sequence 003 before the cross-motion seeking relief pursuant to CPLR §3012 [d] under Motion Sequence 002 was granted, and seeks the same relief as alternative relief. The extension of time to Answer will permit Motion Sequence 003 to be determined on the merits.

On February 14, 2012 plaintiffs brought a separate action in Supreme Court New County, filed under index no. 150211/2012 against 444 East 86th Owner's Corp., the building owner, alleging water damage to the apartment exterior walls resulting in mold growth and asserting personal injury claims. On July 26, 2016 the parties to the action filed under index no. 150211/2012 signed a stipulation of discontinuance with prejudice that was uploaded to the the NYSCEF website (See Index # 150211/ 2012, NYSCEF Docket 28). On July 26, 2016 plaintiff and 444 East 86th Owner's Corp. also entered into and executed a Stipulation of Settlement that incorporated General Releases in the action filed under index no. 150211/2012 (Mot. Seq. 003, Exh. 12). The language of the general release incorporates all of plaintiffs' claims asserted against 444 East 86th Owners Corp., and applies, "from the beginning of the world until the date of this Agreement" (Mot. Seq. 003, Exh. 12, Release pg. 13).

Plaintiffs' allege that the claims were asserted against 444 East 86th Owners Corp. in this action after they were fraudulently induced into settlement and because they "felt that they had been duped into signing the release based on information withheld from [them]" by the prior attorneys (Cros-Mot. Exhs. 14 and 15). In this action plaintiffs are seeking to rescind the Stipulation of Settlement and General Releases from the action filed under index number 150211/2012, and proceed on their claims.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Fortis Fin. Servs. v. Fimat Futures, USA, 290 A.D. 2d 383, 737 N.Y.S. 2d 40 [1st Dept., 2002] and Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). CPLR §3211[a][5] states that a cause of action may not be maintained because of a release.

444 East 86th Owner's Corp. has shown that the Stipulation of Settlement and General Releases in the action filed under index no. 150211/2012 is documentary evidence that utterly refutes plaintiff's allegations and the release is a complete bar to the claims asserted in the amended complaint.

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action has to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are "either inherently incredible or flatly contradicted by evidence" will not be presumed to be true and are susceptible to dismissal (Ullman v. Norma Kamali, Inc., 207 A.D. 2d 691, 616 N.Y.S. 2d 583 [1st Dept., 1994] and Dragon Head LLC v. Elkman, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [1st Dept., 2013]).

Plaintiffs are not alleging new claims resulting from the co-defendants' leak. They filed complaints through their prior attorney as early as January 8, 2015, more than a year before the settlement was entered into (Mot. Seq. 003, Exhs. 4-7).

A valid signed release is a complete bar on a claim that is the subject of the release, absent a showing of "duress, illegality, fraud, or mutual mistake." (Centro Empresarial Cembresa S.A. v. Americal Movil, S.A.B. de C.V., 17 N.Y. 3d 269, 952 N.E. 2d 995, 929 N.Y.S. 2d 3 [2011]). Plaintiffs' allegation that they were fraudulently induced must specifically state the basic elements of fraud. Conclusory allegations are insufficient to sustain a claim of fraud and unilateral mistake alone will not act as a predicate for relief (Angel v. Bank of Tokyo- Mitsubishi, Ltd., 39 A.D. 3d 368, 835 N.Y.S. 2d 57 [1st Dept. 2007]).

Plaintiffs rely on the Superintendent Report showing an earlier inspection of the co-defendants' apartment as proof that there was fraud because information was withheld. 444 East 86th Owners showed that the Superintendent Report states that a water test was performed "but did not find where it was coming from" and that there was no intentional misrepresentation (Reply Mot. Seq. 003, Exh. 1). The conclusory statements made by plaintiffs do not state the basic elements of fraud required to set aside the Stipulation of Settlement and General Release, or to sustain the claims asserted against 444 East 86th Owner's Corp..

Co-defendants arguments that discovery is needed to establish their claims for indemnification and contribution is not a reason to sustain those cross-claims. Co-defendants have not shown that they would be free from liability such that the claims for common law indemnification could proceed.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3215 [b] for a default judgment is denied, and it is further,

ORDERED that defendant, 444 East 86th Owners Corp.'s cross-motion pursuant to CPLR §3012[d], to enlarge the time to answer the complaint, and pursuant to 22 N.Y.C.R.R. 130-1.1 for an award of costs and expenses, including reasonable attorneys fees, is granted only as to the relief sought pursuant to CPLR §3012[d], and it is further,

ORDERED that the remainder of the relief sought in the cross-motion pursuant to 22 N.Y.C.R.R. 130-1.1 is denied, and it is further,

ORDERED that 444 East 86th Owners Corp.'s motion filed under Motion Sequence 003 pursuant to CPLR §3211[a], [1],[5] and [7] to dismiss plaintiff's Amended Complaint and the co-defendants Arnold P. Kling and Celina Welch Kling's cross-claims asserted in their Verified Answer to the Amended Complaint, is granted and it is further,

ORDERED that the causes of action asserted against 444 East 86th Owners Corp. in the Amended Complaint are severed and dismissed, and it is further,

ORDERED that co-defendants, Arnold P. Kling and Celina Welch Kling's cross-claims asserted against defendant 444 East 86th Street Owners Corp. in their Verified Answer to the Amended Complaint are dismissed, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly, and it is further,

ORDERED that within twenty (20) days from the date of entry of this Order the movant serve a copy of this Order with Notice of Entry on the Clerk of the Trial Support Office in the General Clerk's Office (Room 119), and the Clerk of the Court (Room 141B), who are directed to amend the caption by removing 444 East 86th Street Owners Corp. as a defendant, and it is further,

ORDERED that the clerk is directed to amend the caption to read as follows:

MONICA IKEN-MURPHY and ROBERT MURPHY,

Plaintiffs,

-against-

ARNOLD P. KLING and CELINA WELCH KLING,

Defendants.

and it is further,

ORDERED that this action will continue on the claims asserted against **Arnold P. Kling and Celina Welch Kling**, and it is further,

ORDERED, that the remaining parties are directed to appear for a Status Conference in IAS Part 13, at 71 Thomas Street, on November 15, 2017 at 9:30a.m..

ENTER:

Dated: September 6, 2017



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**