

535 Flushing Ave. Realty Corp. v Weinstein
2017 NY Slip Op 33378(U)
January 27, 2017
Supreme Court, Kings County
Docket Number: Index No. 500819/15
Judge: David B. Vaughan
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At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of January, 2017.

P R E S E N T:

HON. DAVID B. VAUGHAN,

Justice.

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535 FLUSHING AVE. REALTY CORP., MARIAN KOLSIN as Administrator of the Estate OF LENA GORMAN and MARILYN HAINES as EXECUTOR for the ESTATE OF JACOB WEINER, as individuals and derivatively under BCL § 626 as legal owners of two thirds of all outstanding shares of 535 FLUSHING AVE. REALTY CORP.,

Plaintiffs,

- against -

Index No. 500819/15

MADELINE WEINSTEIN, HERAB REALTY LLC, CHICAGO TITLE INSURANCE COMPANY, JOHN DOES #1-100 and JANE DOES #1-100, possible unknown heirs, issue, or spouses of MURRAY GORMAN and LENA GORMAN,

Defendants.

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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

<u>1-2</u>	<u>3-4</u>
<u>4, 6</u>	<u>5</u>
<u>5</u>	<u>6</u>

Upon the foregoing papers in this quiet title action, plaintiffs, 535 Flushing Ave. Realty Corp. (535 Flushing), Marian Kolsin as Administrator of the Estate of Lena Gorman (Kolsin) and Marilyn Haines as Executor for the Estate of Jacob Weiner (Haines), as

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individuals and derivatively under BCL §626 as legal owners of two-thirds of all outstanding shares of 535 Flushing (collectively, Plaintiffs), move for an order: (1) holding defendant, Madaleine Weinstein (s/h/a “Madeline Weinstein”; hereinafter, “Weinstein”), in default, pursuant to CPLR 3215 (b), “due to [her] failure to appear in this action despite being properly served with process[,]”¹ and (2) directing “the Clerk of the Court to enter a default judgment against Weinstein in the amount of \$852,000.00, together with interest thereon, from August 7, 2009, plus the costs and disbursements of this action.”

Weinstein cross-moves for an order, pursuant to CPLR 3012 (d),² extending her time within which to appear or plead and granting her leave to do so.

Background

Service Of The Pleadings Upon Weinstein

According to Plaintiffs’ June 30, 2015 affidavit of service,³ their process server served Plaintiffs’ June 11, 2015 Supplemental Summons and Amended Complaint upon Weinstein on June 25, 2015 by delivering the pleadings to Weinstein at her home at 100 Daly Blvd., Apartment 1008, in Oceanside, New York.

¹ See Plaintiffs’ July 14, 2016 Notice of Motion at page 1.

² While Weinstein’s October 19, 2016 Notice of Cross Motion states that the cross motion “to extend the time for the defendant Weinstein to appear or plead” is made pursuant to CPLR 3214 (d), which does not exist, the October 19, 2016 affirmation of her counsel, Slavko D. Katusa, Esq. (Katusa Cross-Moving Affirmation), specifically requests that Weinstein’s cross motion be granted pursuant to CPLR 3012 (d). Absent prejudice to Plaintiffs, the court, pursuant to CPLR 2001, disregards the typographical error in Weinstein’s notice of cross motion and deems Weinstein’s cross motion as having been filed pursuant to CPLR 3012 (d).

³ See Exhibit B to the June 14, 2016 affirmation of Andrew Blancato, Esq. submitted in support of Plaintiffs’ motion for a default judgment (Blancato Moving Affirmation).

According to Plaintiffs' counsel, "[t]hirty days following this date (July 27, 2015) Defendant [Weinstein] had not yet submitted a responsive pleading to the Amended Complaint, or motion."⁴

Plaintiffs' counsel mailed Weinstein an additional copy of the Supplemental Summons and the Amended Complaint by first-class mail to her home at 100 Daly Blvd., Apartment 1008, in Oceanside, New York on December 2, 2015, pursuant to CPLR 3215 (g).⁵

The Amended Complaint

Plaintiffs' Amended Complaint asserts three causes of action against Weinstein: (1) the second cause of action for conversion; (2) the third cause of action for fraud; and (3) the fourth cause of action for breach of fiduciary duty.

Plaintiffs' Amended Complaint alleges that 535 Flushing, which "was wholly owned in three equal parts by Lena Gorman, Murray Gorman and Jacob Weiner . . ." (all of whom are now deceased) "was dissolved by proclamation on or about June 27, 1979 pursuant to Tax Law § 203-A."⁶ The Amended Complaint alleges that "[535] Flushing took title to the Property [at 535 Flushing Avenue in Brooklyn] by means of a Deed, dated July 26, 1956 . . ."⁷

⁴ Blancato Moving Affirmation at ¶ 6.

⁵ See Blancato Moving Affirmation, Exhibit C.

⁶ See Blancato Moving Affirmation, Exhibit A (Amended Complaint at ¶ 2).

⁷ Amended Complaint at ¶ 10.

The Amended Complaint alleges that Plaintiffs, Kolsin and Haines, are the daughters of Lena Gorman and Jacob Weiner, respectively.⁸ The Amended Complaint alleges that Weinstein is the daughter of Murray Gorman.⁹

The Amended Complaint alleges that “[535] Flushing remained in title to the Property . . . until on or about August 7, 2009 at which time Weinstein executed a deed purporting to transfer ownership of the Property from [535] Flushing to Herab . . . for a sales price of \$852,000.00 . . .”¹⁰ The Amended Complaint alleges that “at the time of the Sale, nobody was in a position to demand that the Sale not occur, nor was there someone authorized to receive such a demand” and that “[t]he 2009 Deed contained no indication that Weinstein was authorized to act on behalf of the estate of any of the deceased shareholders of [535] Flushing.”¹¹

Essentially, Plaintiffs seek to quiet title to the real property previously owned by the corporate plaintiff, 535 Flushing, pursuant to RPAPL Article 15, and also seek an order setting aside the 2009 Deed as a fraudulent conveyance and restoring title to the rightful owners of the property in fee simple.¹²

⁸ Amended Complaint at ¶¶ 3 and 4.

⁹ Amended Complaint at ¶ 5.

¹⁰ *Id.* at ¶ 11.

¹¹ *Id.* at ¶¶ 12 and 14.

¹² *Id.* at ¶ 40.

Weinstein's Untimely Pre-Answer Motion To Dismiss

About three months later, on March 10, 2016, Weinstein filed an untimely pre-answer motion to dismiss Plaintiffs' Amended Complaint, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5), (a) (7) and (a) (8).¹³ Weinstein's dismissal motion was supported by Weinstein's December 10, 2015 affidavit (2015 Weinstein Affidavit), in which she attested that:

"4. [T]he entire basis of the complaint rests on the false premise that deponent fraudulently conveyed real property owned by the plaintiff corporation, 535 FLUSHING AVE. REALTY CORP., without the knowledge and consent of the plaintiffs.

....

"7. To the contrary, I consulted with every heir of the original three (3) deceased shareholders whether required to by law or not, to discuss and place them on notice of the need to wind down the affairs of the corporation, including a sale of the premises.

"8. In this respect, I spoke with the plaintiffs and caused consent and resolutions to be sent to all heirs, including plaintiffs, which plaintiffs confirmed in writing. In fact, plaintiffs obtained an attorney in New York . . . to handle their interests . . ."¹⁴

By a September 21, 2016 order, this court denied Weinstein's pre-answer dismissal motion as untimely "since it was not made within 20 days of service of plaintiffs' amended summons and complaint, and defendant failed to request an extension of time to make the

¹³ See Blancato Moving Affirmation, Exhibit D (Weinstein's Amended Notice of Motion).

¹⁴ See ¶¶ 4, 7 and 8 of the 2015 Weinstein Dismissal Affidavit, a copy of which is annexed as Exhibit B to the October 19, 2016 affirmation of Slavko D. Katusa, Esq. submitted in opposition to Plaintiff's motion for a default judgment and in support of Weinstein's cross motion (Katusa Cross-Moving Affirmation).

motion to dismiss pursuant to CPLR 2004.” The court further held that “[a] motion to dismiss made after a defendant’s time to answer has expired is untimely.”

Plaintiffs’ Instant Motion For A Default Judgment

Meanwhile, on July 14, 2016 Plaintiffs filed the instant motion, pursuant to CPLR 3215 (b), seeking an order granting them a default judgment against Weinstein. Plaintiffs’ motion is based only on the Blancato Moving Affirmation and four exhibits annexed thereto: (A) the Supplemental Summons and Amended Complaint; (B) Plaintiffs’ June 30, 2015 Affidavit of Service upon Weinstein; (C) Plaintiffs’ Affirmation of Service, pursuant to CPLR 3215; and (D) Weinstein’s March 10, 2016 Amended Notice of Motion to Dismiss.¹⁵

Weinstein’s Cross Motion For An Extension Of Time Within Which To Appear Or Plead

On October 20, 2016, Weinstein opposed Plaintiffs’ motion for a default judgment on the ground that such motion, pursuant to CPLR 3215 (b), is not supported by a fact affidavit from someone with personal knowledge, as required by CPLR 3215 (f), and cross-moved, pursuant to CPLR 2012 (d), for an order granting her an extension of time within which to appear or plead.

Weinstein’s cross motion is based on an affirmation submitted by defense counsel, who contends that Weinstein “has a reasonable excuse for . . . the late reply to the Summons and Complaint as there was law office failure by this office.”¹⁶ Attorney Katusa explains that “[m]y office moved to a different location shortly after [his] meeting with the defendant [in

¹⁵ See Blancato Moving Affirmation.

¹⁶ See Katusa Cross-Moving Affirmation at page 1.

July 2015], which caused this file to be misplaced and not properly followed up upon by my office.”¹⁷

Attorney Katusa further argues that Weinstein’s cross motion should be granted because Weinstein has a meritorious defense. Based on the 2015 Weinstein Affidavit, Attorney Katusa argues that Plaintiffs’ Amended Complaint fails to state a cause of action because Weinstein “did in fact notify the plaintiffs of an upcoming sale of the property and also obtained the signed resolutions from the heirs of the shareholder’s of the corporation.”¹⁸ Defense counsel also argues that “plaintiffs do not have standing in this matter as the plaintiff corporation was dissolved by proclamation in 1979 and therefore cannot maintain an action in this court” based on correspondence from the New York State Department of Taxation and Finance and controlling case law.¹⁹

The Katusa Cross-Moving Affirmation annexes three exhibits: (A) defense counsel’s July 15, 2015 email to Plaintiffs’ counsel advising that he was “just recently retained to represent Ms. Weinstein[,]” “request[ing] a[n] extension of . . . time to answer for 30 days[,]” and providing a stipulation for the extension; (B) a copy of the 2015 Weinstein Affidavit submitted in support of Weinstein’s untimely pre-answer dismissal motion; and (C) an October 29, 2007 letter from the New York State Department of Taxation and Finance and a Corporate Tax Search reflecting that 535 Flushing was dissolved by proclamation on June

¹⁷ *Id.* at page 3.

¹⁸ *Id.*

¹⁹ *Id.*

27, 1979 and confirming that “[t]here are no liens encumbered on the real property owned by the above corporation and clear title to the property can therefore be conveyed.”

Discussion

(1)

Plaintiff's Motion For A Default Judgment

CPLR 3215 (f) addresses the proof required on an application for a default judgment, which specifically provides that:

“[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice . . . and *proof of the facts constituting the claim, the default and the amount due by affidavit made by the party* . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. . . .” (emphasis added).

Where, as here, *the complaint was not verified*, Plaintiffs were required to submit a fact affidavit as evidentiary proof of: (1) the facts constituting Plaintiffs' causes of action asserted against Weinstein; (2) her alleged default in failing to timely appear or otherwise respond to the Supplemental Summons and Amended Complaint; and (3) the \$852,000.00 that is allegedly due and owing to Plaintiffs.

Plaintiffs' failure to submit “proof of the facts” in an “affidavit made by the party” requires denial of Plaintiffs' CPLR 3215 (b) motion for a default judgment, as a matter of law (*see Blam v Netcher*, 17 AD3d 495, 496 [2005] [denying motion for default judgment under CPLR 3215 because “plaintiff failed to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts”]; *Goodman v New York*

City Health & Hosps. Corp. 2 AD3d 581 [2003] [same]; *Hazim v Winter*, 234 AD2d 422, 422 [1996] [upholding denial of plaintiff's motion for default judgment because complaint verified by counsel was "insufficient to support entry of judgment pursuant to CPLR 3215"])). To prevail on a motion for a default judgment "[t]he proof must establish a prima facie case" (*Central Mtge. Co. v Acevedo*, 34 Misc 3d 213, 221 [Sup Ct, Kings County 2011]; see also *Green v. Dolphy Constr. Co.*, 187 AD2d 635, 636 [1992] [holding that "where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default"]; *Silberstein v Presbyterian Hosp. in City of N.Y.*, 95 AD2d 773, 773 [1983] [holding that "[a] plaintiff seeking a default judgment under subdivision (e) of CPLR 3215 must present prima facie proof of a cause of action"])).

Based on the foregoing, Plaintiffs have failed to establish their entitlement to a default judgment, as required by CPLR 3215 (f). Absent either an affidavit by the party seeking a default judgment or a complaint verified by the party, the entry of judgment by default is unwarranted.

(2)

Weinstein's Cross Motion Pursuant To CPLR 3012 (d)

CPLR 3012 (d) provides that "[u]pon the application of a party, 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." Thus, in support of Weinstein's cross motion for leave to appear or serve a late answer she was required to provide a reasonable excuse for her default in answering or otherwise

appearing, and a potentially meritorious defense to the action (*see Lipp v Port Auth. of N.Y. & N.J.*, 34 AD3d 649 [2006]; *Juseinoski v Board of Educ. of City of N.Y.*, 15 AD3d 353, 356 [2005]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the court (*Cooper v Cooper*, 55 AD3d 866, 866 [2008]).

Also relevant here is CPLR 2005, which provides that:

“[u]pon an application satisfying the requirements of subdivision (d) of section 3012 . . . the court shall not, as a matter of law, be precluded from exercising its discretion in the interest of justice to excuse delay or default resulting from law office failure.”

New York courts have held that an attorney affirmation “is sufficient to establish that the failure to submit a timely answer was not willful, but, rather, was due to law office failure” (*Herzog v Belizario*, 52 Misc 3d 583, 591 [Sup Ct, Kings County 2016] [citing CPLR 2005]; *see also Josovich v Ceylan*, 133 AD3d 570, 571 [2015] [“Here, the affirmation of the attorney representing the third-party defendant . . . was sufficient to establish that the failure to submit a timely answer was not willful, but rather, was due to law office failure”])).

Defense counsel adequately demonstrated a reasonable excuse for Weinstein’s default based on law office failure resulting from the fact that he is a sole practitioner who moved his office to a different location shortly after meeting with Weinstein in July 2015 to discuss her answer to the Amended Complaint. According to Attorney Katusa, “[m]y office moved to a different location shortly after the meeting with the defendant, which caused this file to be misplaced and not properly followed up upon by my office.”²⁰ While Attorney Katusa

²⁰ Katusa Cross-Moving Affirmation at page 3.

made a written request to Plaintiffs' counsel for additional time to answer in July 2015, he admittedly "never followed up on the request."²¹

Weinstein's cross motion sufficiently demonstrates that Weinstein has a meritorious defense to this quiet title action. The 2015 Weinstein Affidavit (*see* Katusa Cross-Moving Affirmation, Exhibit B) attests that Weinstein conveyed the property at issue in this litigation *after* she "consulted with every heir of the original three (3) deceased shareholders . . . to discuss and place them on notice of the need to wind down the affairs of the corporation, including a sale of the premises."²² According to Weinstein, Plaintiffs consented and executed written resolutions agreeing to the conveyance that they now contest.²³

Additionally, Attorney Katusa properly contends that 535 Flushing lacks capacity to sue, since it was admittedly "dissolved by proclamation in 1979 and therefore cannot maintain an action in this court[,]" as a matter of law, citing *Lorisa Capital Corp. v Gallo*, 119 AD2d 99 [1986]).²⁴ In *Lorisa Capital Corp.*, the Second Department held that "[i]t is apparent from the statutory scheme that the Legislature did not intend a delinquent corporation which has not sought reinstatement to enjoy the privileges of corporate existence, which include the right to . . . bring suit in the courts of this State (119 AD2d at 110). The appellate court further held that "[a] corporation dissolved under Tax Law section 203-a is legally dead and can no longer sue . . ." (*Id.* [citations omitted]; *see also Moran Enterprises, Inc. v Hurst*,

²¹ *Id.* at Exhibit A.

²² *Id.* at Exhibit B (2015 Weinstein Affidavit at ¶ 7).

²³ *Id.* at Exhibit B (2015 Weinstein Affidavit at ¶ 8).

²⁴ *Id.* at page 3.

66 AD3d 972, 975 [2009] [holding that “(a) dissolved corporation is prohibited from carrying on new business . . . and does not enjoy the right to bring suit in the courts of this state, except in the limited respects specifically permitted by statute”]).

Finally, there is a strong public policy “favoring the resolution of cases on the merits” especially where, as here, Weinstein’s filing of a late answer would not prejudice Plaintiffs, since they have been on notice of Weinstein’s defenses ever since she filed the 2015 Weinstein Affidavit with her untimely pre-answer motion to dismiss (*Buchholz v A.L.A.C. Contracting Corp.*, 122 AD3d 660, 661 [2014]). Accordingly, it is

ORDERED that Plaintiff’s motion for a default judgment against defendant Weinstein, pursuant to CPLR 3215 (b), is denied; and is further

ORDERED that defendant Weinstein’s cross motion for an extension of time within which to appear or plead, pursuant to CPLR 3012 (d), is granted, and Weinstein is hereby directed to serve her answer or to otherwise respond to the Amended Complaint within 30 (thirty) days after service of this decision and order with notice of entry.

This constitutes the decision and order of the court.

E N T E R,

J.S.C.

HON. DAVID B. VAUGHAN

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KINGS COUNTY CLERK
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