

**Cantave v 170 W. 85 St. Hous. Dev. Fund Corp.**

2018 NY Slip Op 31779(U)

April 4, 2018

Supreme Court, New York County

Docket Number: 160758/2016

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

ZULEMA CANTAVE and  
MARIE CANTAVE,

Plaintiffs,

-against-

170 WEST 85 STREET HOUSING DEVELOPMENT  
FUND CORPORATION,

Defendant.

Index No.: 160758/2016  
**DECISION/ORDER**  
Motion Seq. No. 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' motion to enter a default judgment against defendant pursuant to CPLR 3215.

<b>Papers</b>	<b>NYSCEF Documents Numbered</b>
Plaintiffs' Notice of Motion, August 31, 2017 .....	12-17
Defendant's Cross-Motion Papers, October 31, 2017 .....	18-22
Defendants' Affirmation in Reply, November 4, 2017 .....	23

*Thomas J. Hillgardner, Esq.*, New York, for plaintiffs Zulema Cantave and Marie Cantave.  
*Thomas S. Fleishell & Associates, P.C.*, New York, for defendant 170 West 85 Street Housing Development Fund Corporation.

Gerald Lebovits, J.

Plaintiffs, Zulema and Marie Cantave, move for a default judgment against defendant, 170 West 85 Street Housing Development Fund Corporation (HDFC). (Plaintiffs' Motion Papers, NYSCEF Doc. #12-17.) The HDFC opposes plaintiffs' motion and cross-moves to compel plaintiffs to accept defendant's late answer. (Defendant's Cross-Motion Papers, NYSCEF Doc. #18.) Plaintiffs oppose defendant's cross-motion (Plaintiffs' Opposition Papers, NYSCEF Doc. #19-22.), and the HDFC replied to this opposition. (Defendant's Reply, NYSCEF Doc. #23.) This decision addresses both motions.

**BACKGROUND**

On December 22, 2016, plaintiffs commenced this action by electronic filing against defendant, the HDFC. (NYSCEF Doc.#1.) In their complaint, plaintiffs allege that plaintiffs are joint tenants of Apartment 2ER located at 170 West 85th Street in New York City (Subject Premises). Plaintiffs ask this court to declare that they are joint owners of 250 shares of stock in the HDFC and joint tenants of record of the Subject Premises and that this court directs the

HDFC to reissue to plaintiffs, as joint shareholders/tenants, a proprietary lease to the subject premises.

On April 10, 2017, the HDFC was served with the Summons and Complaint. (Exhibits 2 & 4 of Plaintiffs' Motion Papers, NYSCEF Doc. #15 & 17.) After the HDFC did not timely file an answer, plaintiffs moved for a default judgment, on September 1, 2017.

On November 11, 2017, defendant filed its opposition to plaintiffs' motion and its cross-motion, seeking an extension of the time within which defendant may serve and file an answer or move with respect to the complaint and/or compelling plaintiff to accept the HDFC's late answer.

**DISCUSSION**

The question is whether the HDFC has a justifiable excuse for its default and a meritorious defense.

1. Justifiable Excuse

Defendant argues that its failure to submit its answer timely is due to an unintentional law office failure. (Affirmation of Stevens, October 31, 2017, at ¶ 21, NYSCEF Doc. #18.) Defendant does not allege that it did not receive the Summons and Complaint or that any error regarding the service of the papers occurred. Defendant states that it did not file an answer because it thought that plaintiffs had abandoned their action after filing another action – *Zulema Cantave and Maria Cantave v HDFC*, Index No. 155830/2017 (Second Action), pending in this court – on June 27, 2017. (Affirmation of Stevens, October 31, 2017, at ¶ 22 and 23, NYSCEF Doc. #18.) The HDFC alleges that the relief plaintiffs sought in this Second Action “is contingent upon them first obtaining the relief sought in the instant action.” (Affirmation of Stevens, October 31, 2017, at ¶ 22, NYSCEF Doc. #18.) Therefore, defendant thought that plaintiffs' conduct filing the Second Action rather than amending this one meant that plaintiffs abandoned this action. Moreover, defendant alleges that it asked plaintiffs' counsel on August 31, 2017, for a mutual extension of the time to answer the complaint in this action. (Affirmation of Stevens, October 31, 2017, at ¶ 11, NYSCEF Doc. #18.) Plaintiffs' counsel allegedly denied defendant's request and filed this motion only a couple of hours later, on September 1, 2017, at 12:09 a.m.

Plaintiffs oppose defendant's cross-motion, arguing that defendant lacks a reasonable excuse for its default. According to plaintiffs, defendant claims a law office failure but does not explain what happened. (Affirmation of Hillgardner, November 13, 2017, at ¶ 6, NYSCEF Doc. #19.) Plaintiffs state that defendant's argument that plaintiffs abandoned this case because they filed the Second Action is without merit as defendant's answer was due on May 10, 2017, long before the Second Action was filed. (Affirmation of Hillgardner, November 13, 2017, at ¶ 7, NYSCEF Doc. #19.) Plaintiffs argue that defendant did not provide any explanation why it failed to file its answer before May 10, 2017. Furthermore, plaintiffs argue that the affirmation of Stevens is not enough and that defendant failed to submit any affirmation of someone with knowledge of the facts.

In its reply, defendant argues that its “reasonable excuse cited in the Defendant’s cross-motion is law office failure.” (Affirmation in Reply, November 4, 2017, at ¶ 1, NYSCEF Doc. #23.) Defendant states that plaintiffs would not have filed their motion for a default judgment on September 1, 2017, if defendant’s counsel had not called plaintiffs’ counsel the day before to ask for an extension of the time to file its answer.

The HDFC did not explain why it did not file its answer on time, before May 10, 2017, but only said its delay was due to law office failure. Such a failure can be a reasonable excuse for a party’s failure, but there must be some information about the law office failure other than simply saying that the delay was caused by law office failure. The HDFC had some reason to believe that plaintiffs abandoned this case after they filed the Second Action. But this Second Action was filed long after defendant’s answer was due and so the court does not agree with this argument. Plaintiffs’ argument that plaintiff Zulema Cantave, born in 1914, might die before the lawsuit ends is contradicted by their own behaviour not asking for a default judgment right away but only after defendant raised this issue. Furthermore, defendant’s delay was brief and did not lead to any delay in this action.

2. Meritorious Defense

The HDFC alleges that plaintiffs are not entitled to a default judgment because their motion fails to comply with CPLR 3215 as plaintiffs do not prove facts constituting the claim. (Affirmation of Stevens, October 31, 2017, at ¶ 16, NYSCEF Doc. #18.) Defendant raises several affirmative defenses in its answer (Exhibit H of the motion papers, NYSCEF Doc. #18), which includes meritorious defenses. (Affirmation of Stevens, October 31, 2017, at ¶ 16, NYSCEF Doc. #29.) According to defendant, plaintiffs’ second claim for relief – seeking re-issuance of their proprietary lease and certificate of stock – is not based on any legal authority.

Plaintiffs oppose the HDFC’s claim stating that its defenses are inadequately pleaded as they lack sufficient particularity. (Affirmation of Hillgardner, November 13, 2017, at ¶ 7, NYSCEF Doc. #19.)

In its reply to plaintiffs’ opposition papers, defendant opines that plaintiffs want to mislead the court. (Affirmation in Reply, November 4, 2017, at ¶ 15, NYSCEF Doc. #23.)

The allegations made by the HDFC that plaintiffs’ first claim for relief is moot is a meritorious defense. The mere statement that the plaintiffs lack standing to sue (Answer, Exhibit H of the defendant’s cross-motion papers, at ¶ 10, NYSCEF Doc. #18) or failed to mitigate damages (Answer, Exhibit H of the defendant’s cross-motion papers, at ¶ 11, NYSCEF Doc. #18.) might not have pleaded well enough. But as several actions are pending between the parties, not only in this court but also at the New York City Civil Court (under Index Numbers 73049/2016 and 68719/17), all in connection with the Subject Premises and plaintiffs’ rights thereto, granting this default judgment is not the just way to resolve the issues between the parties.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for a default judgment against defendant, 170 West 85 Street Housing Development Fund Corporation, is denied; and it is further

ORDERD that defendant's cross-motion to compel the acceptance of its answer is granted, and the answer of defendant, annexed as Exhibit H to the cross-motion papers (NYSCEF Doc #18), is deemed timely served nunc pro tunc; and it is further

ORDERED that parties shall appear at Part 7 located at 60 Centre Street, Room 345, on June 27, 2018 at 11:00 a.m. for a preliminary conference.

Dated: April 4, 2018



J.S.C.  
**HON. GERALD LEBOVITS**  
J.S.C.