SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. O. PETER SHERWOOD** **PART** **IAS MOTION 49EFM**

Justice

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INDEX NO. 655187/2016

MOTION DATE 06/12/2018

MOTION SEQ. NO. 005

ICONIC HOME LLC

Plaintiff,

- v -

FRANCO, ELLIOT

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for LEAVE TO FILE.

Under Motion Sequence Number 005, defendant seeks leave to file an answer and third-party complaint pursuant to CPLR 2004 and 3012 (d). Plaintiff also seeks by cross-motion an order holding defendant in further contempt of court. Under Motion Sequence Number 004, defendant sought by order to show cause to vacate the preliminary injunction and contempt holding against him, to dismiss the case, to grant an award of attorney's fees for frivolous claims, and alternatively, for leave to file an answer. In an order dated April 5, 2018, the court denied the "portion of the motion seeking to file an answer without prejudice to defendant bringing a renewed motion pursuant CPLR 2004… and CPLR 3012 (d)…" (NYSCEF Doc. No. 88).

Defendant now argues that he should be permitted to file a late answer, as well as third-party complaint, because he has been a pro se litigant for much of this litigation, and because his former counsel withdrew from the case for health reasons and failed to file a timely answer or counterclaims (NYSCEF Doc. No. 91 [Kurzon affirmation] ¶¶ 18–23). Defendant was unable to afford an attorney until his current counsel agreed to a contingency fee (*id.* ¶ 22). Defendant therefore argues that "it is colorable to argue 'law office failure'" (*id.* ¶ 27). Defendant further puts forth that he was ill when he was originally served with the complaint and therefore was unable to answer it. Furthermore, because defendant believed that he would be able to settle the matter out of court, he did not understand that he needed to appear. (*id.* ¶ 34 (a), citing NYSCEF Doc. No. 64 at 6–8) Defendant further puts forth that this is his first experience with the court system, and that public policy in New York dictates that the case be determined "on the merits wherever possible" (NYSCEF Doc. No. 91 ¶¶ 23, 25, citing *Matter of Raichle, Moore, Banning & Weiss v Commonwealth Fin. Corp.*, 14 AD2d 830, 831 [4th Dept 1987]). Defendant also argues that his being found in contempt should not prevent him from answering the complaint and seeing his "day in court" (Kurzon affirmation ¶¶ 24–28).

In opposition, plaintiff contends that defendant's motion must be denied because he has failed to submit an affidavit of merit in support of the proposed pleadings, made by someone with personal knowledge of the facts. The answer and third-party complaint are instead submitted as attachments to the Affirmation of Jeffrey Kurzon, defendant's counsel. The affidavit submitted by defendant "seeks

primarily to excuse his contempt of court" instead of speaking to the facts put forth in the proposed pleadings, which are neither signed, nor verified. (NYSCEF Doc. No. 104 [opp] at 5–6). Furthermore, plaintiff argues that the proposed answer and third-party complaint contain allegations that the court has already "determined to be untimely, without support from the record, and contradicted by Defendant's own documents and admissions" (*id.* at 7, citing NYSCEF Doc. Nos. 88, 92, 93, 100). Furthermore, defendant lacks credibility, has intentionally delayed answering, and has not provided reasonable excuse, particularly failing to provide the level of detail required to rely on "law office failure" (NYSCEF Doc. No. 104 at 11–15). Finally, plaintiff argues that prior settlement offers are no excuse, and that defendant has caused significant prejudice to plaintiff by delaying his answer for more than 600 days, which helped to allow him to withdraw $64,450 from plaintiff's bank account in violation of the Preliminary Injunction (*id.* at 15–16).

Plaintiff also cross-moves to hold defendant in further contempt of court, arguing that defendant has failed to comply with a court order requiring him to pay $64,450 in restitution to plaintiff (*id.* at 16, citing NYSCEF Doc. Nos. 66–68). Plaintiff argues that defendant's filing of a one-page personal financial statement, along with a promissory note payable in five years with no interest, is insufficient to vitiate the contempt order (NYSCEF Doc. No. 104 at 16–17, citing NYSCEF Doc. Nos. 95–97). To make an allowance for defendant in this way "would not serve judicial economy, is against public policy… would dilute the dignity of the court and its orders" and would otherwise "open a Pandora's box" (NYSCEF Doc. No. 104 at 19). Plaintiff requests that if the court grants defendant's motion, that it be conditioned upon the payment of restitution.

In reply, defendant contends that plaintiff's argument regarding the affidavit of merit "elevates substance over form" (sic) (NYSCEF Doc. No. 106 [Kurzon reply affirmation] ¶ 6; NYSCEF Doc. No. 95). Defendant filed an affidavit with the motion (NYSCEF Doc. No. 95) and has since filed a second document amending its title to "Affidavit of Merit" (NYSCEF Doc. No 107). Defendant attempts to rebut the statements on the record against him (NYSCEF Doc. No. 106 ¶¶ 15–17), and reiterates his reasonable excuse arguments (*id.* ¶¶ 18–19). To the extent that defendant requests to consider in this motion arguments to renew Motion Seq. No. 004 (*see id.* ¶ 4), the court declines to do so here. In reply to plaintiff's cross-motion, defendant argues that he did not believe he was violating the judge's order when he withdrew the funds, that he is close to insolvency, and that he is the true, sole owner of the company from which the money was withdrawn (*id.* ¶¶ 21–24).

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 fault." CPLR 2004 allows the court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown." One way to demonstrate "good cause" is by making a factually detailed explanation of "law office failure" (CPLR 2005; *Tewari v Tsoutsouras,* 75 NY2d 1, 12–13 [1989]; *People's United Bank v. Latini Tuxedo Mgmt., LLC*, 95 AD3d 1285, 1286 [2d Dept 2012] ["Where a party asserts law office failure, it must provide a detailed and credible explanation of the default."] [internal quotation marks omitted]). While not every "law office failure" will satisfy the "good cause" requirement, a party should not be deprived of his or her day in court where "the delay is attributable to plaintiff's prior counsel" and "there is no prejudice" (*Pollack v Eskander*, 191 A.D.2d 1022, 1023 [4th Dept 1993]).

Defendant puts forth a number of excuses for his failure to file a timely answer and counterclaims, most notably that his former counsel failed to file a timely answer, and then withdrew for health reasons, leaving defendant no choice but to proceed as a pro se litigant due to his financial difficulties (NYSCEF Doc. No. 91 ¶¶ 18–23). Aside from referencing the length of the delay – 600 days – and defendant's withdrawal of funds in violation of the Preliminary Injunction, plaintiff offers little else to support its argument that it will be prejudiced if this motion is granted. While the delay suffered is not

insignificant, plaintiff will not be as prejudiced by the granting of this motion than defendant would be by its denial, particularly now that "it appears defendant is finally ready to proceed with the assistance of counsel" (*see* NYSCEF Doc. No. 88).

With respect to the procedural requirements raised by plaintiff, this Court notes that in the First Department, the absence of an affidavit of merit is not fatal to an application to file a late answer where a default judgment has not been entered (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008] ["[A] showing of a potential meritorious defense is not an essential component of a motion to serve a late answer, where, as here, no default order or judgment has been entered." (internal citations omitted)]). Caselaw cited by plaintiff, however, is exclusively from the Second Department, and imposes more stringent requirements (NYSCEF Doc. No. 104, citing *Stone v County of Nassau*, 272 AD2d 392 [2d Dept 2000]; *Klemm v Boscia*, 262 AD2d 534 [2d Dept 1999]). Despite counsel's reference to defendant's "default status" in the motion papers, presumably with respect to his failure to appear for oral argument on the Preliminary Injunction, a default judgment has not been entered in this case (*see* NYSCEF Doc. Nos. 25, 65 at 37, 102 ¶ 14). Therefore, the failure to include an affidavit of merit does not defeat defendant's application to file a late answer. As a third-party complaint cannot be filed before the answer, requirements with regards to the filing of late pleadings do not apply to the third-party complaint (*see* CPLR 1007).

Turning to plaintiff's cross-motion to find defendant in further contempt, on February 6, 2018, this court ordered

> that Defendant shall, within thirty (30) days of delivery of a copy of this Order with notice of entry thereof sent to him… make restitution to Plaintiff by personally delivering in hand to Plaintiff's counsel a Certified Check made payable to Plaintiff in the amount of $64,450.000, and; it is further ordered, that in the event Defendant does not comply with this Order, then, upon an affirmation by Plaintiff's counsel attesting to Defendant's failure to comply with the terms hereof, Defendant shall forthwith show cause before this Court as to why he should not be held in further contempt of Court and sanctioned for violation of this Order.

(NYSCEF Doc. No. 66). To date, defendant Franco has failed to comply with this order (NYSCEF Doc. No. 102 [Bondy affirmation] ¶ 83). During oral argument on the motion to hold defendant in contempt, defendant Franco already explained to the Court that the funds in question had been paid towards his personal expenses and that he was no longer in possession of the money (NYSCEF Doc. No. 64 at 30–36). The list of debts and expenses that defendant Franco now submits with his affidavit in an attempt to vitiate his contempt fails to provide the Court with any helpful information speaking to his ability to make restitution (*see* NYSCEF Doc. No. 96). Notably absent from the statement is any mention of Mr. Franco's income or assets (*see id.*). Defendant's offer of a promissory note for the amount in question, payable in five years, does not satisfy this Court's order (*see* NYSCEF Doc. No. 66).

Mr. Franco therefore continues to be in contempt of court. Judiciary Law 753 provides, in relevant part, that "[a] court of record has power to punish by fine and imprisonment… [a] party to the action… for the non-payment of a sum of money, ordered or adjudged by the court to be paid" (Judiciary Law 753). "Any penalty imposed [for civil contempt] is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both (*Dep't of Envtl. Prot. of City of New York v Dep't of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987], citing *State of New York v Unique Ideas,* 44 NY2d 345 [1978]). Although the court agrees that defendant remains in contempt, plaintiff has not sought to find defendant in criminal contempt, and the proposed remedy – that is, of conditioning the result of defendant's motion on payment of restitution – is thus inappropriate.

Upon the foregoing, it is hereby **ORDRED** that defendant's motion to file a late answer and third-party complaint is **GRANTED**; and it is further

ORDERED that plaintiff's cross-motion to hold defendant in further contempt is **GRANTED** to the extent that it seeks a declaration that defendant remains in contempt of court, and is otherwise **DENIED** without prejudice to seek an appropriate remedy for defendant's continued contempt.

This constitutes the decision and order of the court.

10/10/2018
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**		**GRANTED IN PART**	X **OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**