

Djurasevic v Boucher
2019 NY Slip Op 31638(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 850143/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X INDEX NO. 850143/2018

MARY DJURASEVIC, as EXECUTOR of the ESTATE of STANLEY WALKER, deceased MOTION DATE N/A

Plaintiff, MOTION SEQ. NO. 004

- v -

MARCY ELLIN BOUCHER, I C BUSINESS MANAGMENT, LLC
A/K/A I.C. BUSINESS MANAGMENT LLC, CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF
FINANCE, JOHN DOE 1 THROUGH JOHN DOE 100,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 219, 220, 221, 223, 224, 225, 226, 227, 228, 229, 230, 242, 243

were read on this motion to/for COMPEL ACCEPTANCE OF ANSWER

The motion by defendants Boucher and I.C. Business Management, LLC (“Defendants”) to compel plaintiff to accept the verified answer to the complaint is granted. The motion by plaintiff to strike that answer and affirmative defenses, and for partial summary judgment on its foreclosure cause of action is granted in part and denied in part denied.

Background

In this commercial foreclosure action, plaintiff seeks to recover based on a series of balloon notes secured by a property located at 406 West 25th Street in Manhattan. Starting in 1999 and continuing until 2015, defendant Boucher and Stanley Walker formed a “unique personal relationship.” Part of that relationship included a series of loans from Walker to Boucher for \$280,000, \$499,900, \$400,100 and \$644,800 (the later loans went to defendant I.C.

Business Management, LLC). Plaintiff claims that the loans were never paid and seeks to foreclosure on the mortgage secured on the property. Plaintiff also claims that Walker suffered a stroke in Fall 2012 and that Boucher traveled to Florida in 2013 (where Walker was staying) and fraudulently extended the loans. Plaintiff complains that Boucher was supposed to communicate with Walker's attorney (Mr. Joseph Fox) and that Boucher ignored this demand.

Defendants deny that there was any fraud. They claim that when the fourth loan was entered into (in April 2013), the first three loans were redrafted so that all the loans were between Mr. Walker and defendant I.C. Business Management. Mr. Walker passed away in September 2015. Defendants contend that the rider to each mortgage and note requires that no default could occur until 180 days had passed from the mailing of a written notice detailing an event of default. Defendants claim that no such notice was ever sent.

Defendants point to an April 15, 2013 loan extension agreement where the prior three loans were extended and new loan was entered into (NYSCEF Doc. No. 200). The agreement made the four transactions payable on May 16, 2016 unless extended (*id.* at 2). Defendant Boucher claims that the loans automatically renewed unless Mr. Walker sent a written notice not to extend the loan pursuant to paragraph 30 of the rider to the mortgages.

In reply to her cross-motion, plaintiff reasserts that Defendants cannot raise jurisdictional defenses because they did not assert them in a timely answer. Plaintiff emphasizes that its new complaint did not add new injuries or seek new damages. Plaintiff, however, does not address Defendants' claim (raised in opposition to plaintiff's cross-motion) that they did not default on the loan.

Compel Acceptance of the Answer

The Court grants Defendants' motion to compel acceptance of its answer. Plaintiff commenced this action in May 2018 and subsequently sought an ex-parte order to appoint a receiver. Plaintiff then moved for a default judgment and to appoint a referee to compute (MS #002) but withdrew that motion (*see* NYSCEF Doc. No. 148). Defendants made a motion to dismiss (MS #003) that was later withdrawn as well (NYSCEF Doc. No. 149). On January 17, 2019, Plaintiff filed a document it titled "Verified Amended Complaint" (NYSCEF Doc. No. 125) and Defendants filed an answer to that complaint on February 4, 2019 (NYSCEF Doc. No. 150). While there is no doubt that Defendants did not file an answer to plaintiff's *initial* complaint, there is no prejudice to plaintiff in allowing Defendants to answer.

The fact is that plaintiff filed an *amended* complaint-- although she now characterizes it as a "supplemental" complaint, she titled it a "Verified Amended Complaint" on e-filing (NYSCEF Doc. No. 125)—and Defendants timely responded. Even though filing an amended complaint did not automatically grant Defendants the right to answer, the Court sees no reason to bar Defendants from answering. Plaintiff admits that it filed the amended complaint to address newly discovered information from Defendants (NYSCEF Doc. No. 163 at 18-19). Plaintiff cannot have it both ways—she cannot rely on new information contained in Defendants' motion papers to add two new causes of action and then insist that Defendants are in default and are not permitted to answer. The Court also observes that plaintiff filed an amended complaint without permission (*see* CPLR 3025 [a] – [b]).

This case should be decided on the merits rather than on procedural technicalities. The Court sees no basis to find that Defendants intentionally defaulted and, therefore, the Court does not find that they are deemed to have accepted the facts alleged in the amended complaint.

Defendants should have answered sooner, given that they allegedly opposed plaintiff's ex-parte receiver application in October 2018, but plaintiff decided to withdraw its motion for a default judgment and amend its complaint rather than pursue its default judgment.

Second Affirmative Defense: Lack of Personal Jurisdiction

The Court strikes Defendants' second affirmative defense of lack of personal jurisdiction. Counsel for Defendants admits that he appeared for defendant on October 30, 2018 and that he later moved to dismiss the complaint in December 2018 based, in part, on lack of service (a motion which was later withdrawn) (NYSCEF Doc. No. 223 at 3-4). Although Defendants claim that "the parties agreed to withdraw the pending motions in light of filing the Amended Complaint" (*id.* at 4), no stipulation is attached memorializing such an agreement.

There was no reason for Defendants to withdraw a motion that relied, at least in part, on defective service (*see* NYSCEF Doc. No. 77 at 14-15 [Boucher's motion to dismiss]). Plaintiff's amended complaint added causes of action but had nothing to do with proper service. While this Court granted Defendants' instant motion to compel acceptance of the answer, the Court finds that Defendants may not raise a jurisdictional defense so late after participating in this action. The Court prefers cases to be decided on the merits and the fact is that Defendants knew about this case starting in October 2018 and are now complaining about service after months of litigation.

Third Affirmative Defense

Plaintiff contends that the third affirmative defense (alleged bar based on contractual obligations and lack of default notice) should be dismissed because Defendants admitted their liability by intentionally defaulting. The Court declines to dismiss this affirmative defense

because the Court has not found that Defendants intentionally defaulted. And clearly, that is Defendants' position—that plaintiff did not properly declare a default.

Fourth Affirmative Defense

The Court severs and dismisses the fourth affirmative defense which alleges that the amended complaint lacks the specificity required for a fraud claim. The Court finds that plaintiff properly pled her claims with respect to fraud (*see* NYSCEF Doc. No. 159, at 8-14, 17-18). Plaintiff alleges that Boucher took advantage of Walker while he had a stroke and ignored requests to speak with Walker's attorney in order to enter into agreements that indefinitely extended the terms of the loans.

Fifth Affirmative Defense

For similar reasons, the Court also severs and dismisses the fifth affirmative defense, which claims that the fraud claims are “untenable” because the parties' conduct was governed by the various agreements. The Court fails to see how this is an affirmative defense. Plaintiff may (and has) alleged that certain agreements should be rendered void due to fraud. The allegations relating to fraud are not vitiated because there were other agreements.

Sixth Affirmative Defense

The Court severs and dismisses the sixth affirmative defense, which appears to claim that this action was commenced under false pretenses. The fact is that plaintiff alleges that it is owed money and Defendants do not dispute that there were a series of loans from Walker to Boucher. The question is whether the loans are due—that does not support an affirmative defense that plaintiff started this case under false pretenses.

Seventh Affirmative Defense

The Court also severs and dismisses the seventh affirmative defense, which seeks the right to modify and supplement the affirmative defenses. Of course, Defendants may seek leave from the Court to amend their answer but they may not seek this relief as an affirmative defense.

Summary Judgment

The Court also denies plaintiff's motion for summary judgment on its foreclosure cause of action (the third cause of action). There are issues of fact with respect to whether the loans came due. Boucher claims that Walker entered into various agreements in 2013 because of issues relating to non-paying tenants and the potential renovation of the premises (NYSCEF Doc. No. 224, ¶¶ 15, 18). Boucher contends that the indefinite time frame to repay the loans was on purpose because it allowed Boucher the time to fix up the building in order to generate maximum sale value (*id.* ¶ 19). She also insists that the loans required one year's notice if Walker wanted the money and that the loans automatically renewed unless Walker sent the notice declaring the payments due (*id.* ¶¶ 18, 20).

Plaintiff does not offer a substantive response on this point. Instead, plaintiff's reply claims that Defendants intentionally defaulted and waived their defenses. As described above, the Court declines to find that Defendants intentionally defaulted and, therefore, did not admit the allegations in the amended complaint.

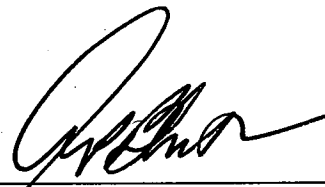
Accordingly, it is hereby

ORDERED that the motion by defendants Marcy Ellin Boucher and I.C. Business Management, LLC to compel acceptance of the answer is granted; and it is further

ORDERED that the cross-motion by plaintiff is granted only to the extent that the second, fourth, fifth, sixth and seventh affirmative defenses asserted by defendants Marcy Ellin Boucher and I.C. Business Management, LLC are severed and dismissed and denied as to the remaining branches of the motion.

Preliminary Conference: July 30, 2019 at 2:15 p.m.

6/7/19
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINANCIAL DISPUTE

APPLICATION:

GRANTED

DENIED

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

HON. ARLENE P. BLUTH