

**2001 Real Estate Space Catalyst, Inc. v Stone Land  
Capital, Inc.**

2020 NY Slip Op 30835(U)

March 20, 2020

Supreme Court, New York County

Docket Number: 653398/2015

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
2001 REAL ESTATE SPACE CATALYST,  
INC.,

Plaintiff,

Index No.  
653398/2015

STONE LAND CAPITAL, INC. and URBAN  
PROPERTY GROUP INC.,

Defendants.

-----X  
**Crane, J.:**

In this dispute between real estate brokers over the alleged nonpayment of commissions for two properties in Manhattan, plaintiff moves for an order, pursuant to CPLR 3215, granting it a default judgment. Defendants oppose and cross-move for an order extending their time to answer the first amended complaint *nunc pro tunc* through April 11, 2019.

**BACKGROUND**

***Facts***

According to the first amended complaint, plaintiff is a real estate brokerage firm licensed in New York (NYSCEF Doc. No. 52, first amended compl [FAC], ¶¶ 1, 6).

Defendant Stone Land Capital, Inc. (Stone Land) also is a licensed real estate brokerage firm and Benjamin Landy (Landy) is its owner and representative licensed broker.

Defendant Urban Property Group Inc. (Urban Property) was a licensed brokerage Landy created in March 2014 as a successor company to Stone Land. Landy is its principal (*id.*,

¶¶ 2-5). Stone Land was the listing broker for two adjacent buildings known as 85 Delancy Street and 95 Delancy Street, that nonparties 85 Delancy Street Corp. and 95 Delancy Street LLC owned (*id.*, ¶¶ 9-10, 12).

In 2012, plaintiff, through its real estate agent Lloyd Putter (Putter), allegedly introduced Stone Land to potential tenants for the two subject ground floor leaseholds (*id.*, ¶ 16). Plaintiff submits numerous emails evidencing its work in securing those tenants for the leaseholds (NYSCEF Doc. No. 114, affidavit of Lloyd Putter in opposition to cross motion [Putter opp], ¶¶ 4-23 and exhibits A-G annexed thereto). Plaintiff asserts that Stone Land had agreed to pay plaintiff a 50% share of the commissions earned on the two leaseholds, and that it would list plaintiff as the broker on those leases (*id.*, ¶¶ 20-24, 29). Those tenants, Paul and Mangesh Shah of East Village Grocers and Sol Moscot, Inc. and/or Dr. Harvey Moscot (operating as Sol Moscot Opticians), then executed leases for the leaseholds (*id.*, ¶¶ 16, 34-35; *see* NYSCEF Doc. No. 105, affidavit of Lloyd Putter in support of default [Putter supp], ¶ 7), but Stone Land refused to abide by the parties' agreement and pay plaintiff its share of the commissions. Plaintiff alleges that in March 2014, Landy drained Stone Capital of its assets and created Urban Property as a mere continuation of Stone Capital in order to avoid paying the commissions owed to plaintiff (NYSCEF Doc. No. 52, FAC, ¶ 39-40).

### ***Procedural History***

On October 12, 2015, plaintiff commenced this action for breach of express contract, unjust enrichment, breach of implied contract, conversion, in quantum meruit, and fraud (NYSCEF Doc. No. 103, affirmation of Merrill O'Brien in support [O'Brien

supp], ¶ 3 and exhibit A annexed thereto). After plaintiff served process on both defendants, on November 23, 2015, defendant Stone Land filed a notice of appearance by counsel (*id.*, ¶ 5 and exhibit C annexed thereto).

On February 21, 2016, Stone Land made a motion challenging service of process, that the court denied on August 3, 2016, and which granted plaintiff a 60-day extension to complete service on Stone Land (*id.*, ¶ 6, and exhibit D annexed thereto). Plaintiff completed this service (*id.*, ¶ 7).

On September 6, 2016, defendants moved to dismiss the complaint for failure to state a claim. They no longer challenged service of process or jurisdiction (*id.*, ¶ 8). By decision and order, dated September 13, 2017, defendants' second motion to dismiss was partially granted. Plaintiff's claims for fraud, punitive damages, and seeking attorneys' fees were dismissed without prejudice and with leave to replead, and the complaint as against defendant Landy individually was dismissed without prejudice (*id.*, ¶ 9 and exhibit G annexed thereto).

On November 10, 2017, plaintiff amended its complaint as of right by filing the first amended complaint before the defendants answered (*id.*, ¶ 10 and exhibit H annexed thereto). This first amended complaint was served on defendants Landy and Stone Capital by service pursuant to the court's e-filing system, by email, and by regular mail to defendants' counsel of record (*id.*, ¶ 11 and exhibit I annexed thereto). The first amended complaint asserted new claims against Landy and added Urban Property as a new party defendant (NYSCEF Doc. No. 52). Plaintiff served Urban Property by personal delivery

to Landy as its officer and agent, and by service on the New York Secretary of State (NYSCEF Doc. 104, O'Brien supp, exhibit L).

On November 20, 2017, defendants, including Urban Property, filed a motion to dismiss the amended complaint for failure to state a claim, and challenging plaintiff's right to amend (NYSCEF Doc. No. 54). By Order entered on January 16, 2019 (Order), this Court held that the complaint was appropriately amended as of right and granted the motion to dismiss only to the extent of dismissing the complaint as against Landy, and the fourth cause of action against all defendants (NYSCEF Doc. No. 79). Defendants were ordered to serve an answer to the first amended complaint within 20 days after service of a copy of the Order with Notice of Entry (*id.* at 13).

On February 14, 2019, plaintiff served a Notice of Entry on Stone Capital and Urban Property by e-filing a copy of such notice with the Order annexed thereto (NYSCEF Doc. No. 104, exhibit M). Defendants failed to answer the first amended complaint within 20 days as ordered.

On April 11, 2019, plaintiff filed a Request for Clerk to Enter Default Judgment (CPLR 3215[a]) with supporting certifications (NYSCEF Doc. No. 87). The Clerk notified plaintiff that this application needed to be made to this Court.

On that same day, defendants filed a motion to extend their time to answer (motion seq. no. 004), annexing their answer to be filed nunc pro tunc (NYSCEF Doc. No. 89). Defendants submitted only an affirmation by counsel and their proposed answer (NYSCEF Doc. No. 90). By Order entered on May 7, 2019, this Court denied the defendants' motion (NYSCEF Doc. No. 92).

Plaintiff now moves for entry of a default judgment against Stone Capital and Urban Property based on their failure to file an answer in accordance with the Order by the March 6, 2019 deadline, which this Court refused to extend further in denying defendants' April 11, 2019 motion (motion seq. no. 004). It submits the first amended complaint and an affidavit from Mr. Putter establishing the co-brokerage agreement on which its claim is based, along with emails demonstrating plaintiff's performance and defendants' breach, the calculation of plaintiff's share of the commissions, and proof that defendants were paid for the commissions (NYSCEF Doc. Nos. 52, 105, 106; *see also* NYSCEF Doc. No. 114, Putter opp).

Defendants cross move for an order extending their time to answer (NYSCEF Doc. No. 109). In support, they submit their attorney's affirmation in which he states that:

“[u]nfortunately, due to an oversight, the undersigned overlooked the notice of entry e-filed by the plaintiff. February 14, 2019 was an extremely busy day for the undersigned. I received hundreds of emails that day, including dozens of e-filing notices, and I was out of the office attending a deposition in a complex bankruptcy matter. In the thick of things, I did not see the e-filed notice of entry arrive by email”

(NYSCEF Doc. No. 110, affirmation of Robert J. Tolchin, dated June 28, 2019 [Tolchin aff], ¶ 4). Defendants' counsel also attaches a copy of the deposition of Landy, referring to several responses by Landy as proof of a meritorious defense. Defendants contend that discovery has been completed in this case, a note of issue has been filed, and defendants never intended to abandon the case. They urge that there is no prejudice to the plaintiff if

the defendants' answer is permitted to be filed nunc pro tunc, which would render plaintiff's default motion moot.

### DISCUSSION

The plaintiff's motion for a default judgment is granted, and the defendants' cross motion for an order extending their time to answer is denied.

Plaintiff has provided sufficient proof for a default judgment (CPLR 3215[f]). Because defendants had already appeared in this action through counsel, plaintiff submitted proof of service of the first amended complaint on that counsel by proof of service via the NYSCEF e-filing system, via counsel's email, and by regular mail to counsel's law office address (NYSCEF Doc. No. 104, exhibits I and L, affidavits of service). Plaintiff also demonstrated service on defendants, on February 14, 2019, of the Notice of Entry for this Court's Order by e-filing a copy of that notice with the Order annexed thereto (NYSCEF Doc. No. 104, exhibit M). The Order directed defendants to serve their answer within 20 days, which expired on March 6, 2019. Defendants admittedly failed to do so (NYSCEF Doc. No. 110, Tolchin aff, ¶ 3). The Court notes that two attorneys from defendants' counsel's office received notice of the e-filing, and neither responded to it within the time frame required. This satisfies the procedural requirements under CPLR 3215.

Substantively, plaintiff's submission of both the first amended complaint which was verified by Mr. Putter and Mr. Putter's affidavit in support (NYSCEF Doc. No. 105) establishes the merits of its claims. To establish a claim for breach of contract, plaintiff

must demonstrate the existence of an agreement between the parties, the plaintiff's performance thereunder, the defendant's breach, and damages caused by the breach (*Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891, 893 [2d Dept 2017]; *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1<sup>st</sup> Dept 2013]). Mr. Putter, based on his personal knowledge, recounted the terms of the parties' co-brokerage agreement, the plaintiff's performance, and the defendants' breach by failing to pay the amounts it received for commissions (*id.*, ¶¶ 3-9). His affidavit is further supported by emails between himself and defendants regarding the leasing of the two Delancy Street properties by the Shahs and by Sol Moscot Opticians, whom plaintiff introduced to defendants (*see* NYSCEF Doc. No. 114, Putter opp and exhibits annexed thereto). He submits proof of the payment of commissions on these properties to defendants, in the form of checks and calculates the 50% payment due to plaintiff (NYSCEF Doc. No. 105, Putter aff, ¶¶ 10-13 and exhibits A through C annexed thereto). This clearly satisfies the requirements for a default judgment under CPLR 3215(f).

To oppose this proof, defendants must demonstrate a reasonable excuse for their delay in answering and the existence of a meritorious defense (*see* CPLR 5015 [a] [1]; *Moriano v Provident N.Y. Bancorp*, 71 AD3d 747, 747 [2d Dept 2010]; *Lipp v Port Auth. of N.Y. and N.J.*, 34 AD3d 649, 649 [2d Dept 2006] [when opposing default and moving to extend time to answer, defendant must show reasonable excuse and meritorious defense]; *S & R Med., P.C. v Allstate Prop. & Cas. Ins. Co.*, 55 Misc 3d 139[A], \* 1, 2017 NY Slip Op 50551[U] [App Term 2d Dept 2017]; *see also Neely v Felicetti*, 177

AD3d 484, 484 [1<sup>st</sup> Dept 2019] [failure to demonstrate a reasonable excuse alone warrants denial of motion to vacate]). It lies in the trial court's discretion to determine what constitutes a reasonable excuse (*Nationstar Mortgage, LLC v Sobel*, 179 AD3d 710, 710 [2d Dept 2020]).

Here, in opposition and in support of their cross motion for an extension of time (*see* CPLR 3012[d]), defendants submit the same excuse they submitted on their prior application for the identical relief (NYSCEF Doc. No. 89)--that they were too busy to notice the e-filing notification they admittedly received. This fails as a reasonable excuse (*see John Wiley & Sons, Inc. v Grossman*, 132 AD3d 559, 559 [1<sup>st</sup> Dept 2015] [vacatur of default denied where no reasonable excuse demonstrated]; *see also Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407, 407 [1<sup>st</sup> Dept 2020] [same]). Many attorneys, particularly those practicing in New York County, are "extremely busy," receive "hundreds of emails," and are out of their office attending depositions at any point in time. If this were a sufficient excuse there would be no point to the requirement (*see Capital One, NA v Amid*, 174 AD3d 494, 495 [2d Dept 2019] [while law office failure may constitute reasonable excuse where supported by credible and detailed evidence, mere neglect is not a reasonable excuse]). Moreover, as plaintiff aptly points out, there are two attorneys in defendants' counsel's office representing defendants in connection with this case—Robert Tolchin and Abe Lederer. Nowhere do defendants explain why Mr. Lederer could not have taken the necessary steps to answer the complaint (*see Johnson-Roberts v Ira Judelson Bail Bonds*, 140 AD3d 509, 509-510 [1<sup>st</sup> Dept 2016]).

This alone is sufficient to deny the cross motion (*see Neely v Felicetti*, 177 AD3d at 484; *U.S. Bank N.A. v Crawford*, 174 AD3d 762, 763 [2d Dept 2019] [neither law office failure nor pro se defendant's lack of understanding about legal process is reasonable excuse]; *Antiohos v Morrison*, 144 AD3d 427, 428 [1<sup>st</sup> Dept 2016]; *Deutsche Bank Natl. Trust Co. v Kuldip*, 136 AD3d 969, 969-970 [2d Dept 2016]; *Colony Ins. Co. v Danica Group, LLC*, 115 AD3d 453, 454 [1<sup>st</sup> Dept 2014] [absent reasonable excuse no need to decide if defendant demonstrated meritorious defense]; *Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 618 [1<sup>st</sup> Dept 2012] [reasonable excuse for default must occur before the deadline for appearing]).

As to the second prong, defendants seek to submit a copy of Mr. Landy's deposition as proof of a meritorious defense. Defendants' attempt to get a "second bite of the apple," however, is rejected. The denial of defendants' prior motion to extend their time to answer (motion seq. no. 004, NYSCEF Doc. No. 89) is law of the case and bars consideration of their present opposition and cross motion. The purpose of the law of the case doctrine is to prevent relitigation of legal issues that have already been determined at an earlier stage of the proceeding (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Delgado v City of New York*, 144 AD3d 46, 47 [1<sup>st</sup> Dept 2016]; *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721 [2d Dept 2006]). Thus, where a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation of that issue (*see Perini v City of New York*, 122 AD3d 528, 528-529 [1<sup>st</sup> Dept 2014]; *Holloway v Cha Cha Laundry*, 97

AD2d 385, 386 [1<sup>st</sup> Dept 1983] [“once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of coordinate jurisdiction in the course of the same litigation”]). Defendants’ present motion is identical to their prior one, even using the same insufficient excuse.

Defendants have not made their cross motion as a motion to reargue—likely because the present cross motion was made beyond the thirty-day limit set forth in CPLR 2221(d)(3). On May 9, 2019, plaintiff served and filed a Notice of Entry of the May 6, 2019 Order from defendants’ prior motion to extend (NYSCEF Doc. No. 93), and, thus, any motion to reargue needed to be made by June 9, 2019. This cross motion was not filed until June 28, 2019. Moreover, a motion to reargue cannot include new facts not offered on the prior motion (CPLR 2221[d][2]). The cross motion also could not be construed as a motion to renew because defendants fail to present any reasonable justification for their failure to present such evidence—in this case, their own client’s deposition—on the prior motion (CPLR 2221[e][3]), nor is the evidence new. The Court notes that the requirement of presenting a meritorious defense is well-established, and plaintiff argued such ground in its opposition to the prior motion (NYSCEF Doc. No. 91, affirmation of Merrill O’Brien, dated April 24, 2019, ¶ 9), and defendants chose not to reply. They will not be permitted to do so by bringing this cross motion.

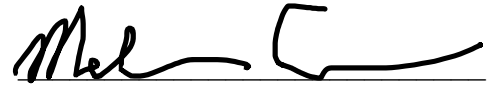
Accordingly, it is

ORDERED that the plaintiff’s motion for a default judgment is granted and the matter shall be set down for an assessment of damages; and it is further

ORDERED that, upon the filing by the plaintiff with the Trial Support Office (Room 158) of a copy of this order with notice of entry and a note of issue, and the payment of the fee thereof by the plaintiff, the Clerk shall place this matter upon the trial calendar for an assessment of damages.

Dated: March 20, 2020

ENTER:

A handwritten signature in black ink, appearing to be 'Mel' followed by a stylized flourish, positioned above a horizontal line.

J.S.C.