

**D. Penguin Bros. Ltd. v City Natl. Bank**

2020 NY Slip Op 31905(U)

May 18, 2020

Supreme Court, New York County

Docket Number: 158949/2014

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 42

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D. PENGUIN BROTHERS LTD., H.T.A. EQUITIES,  
INC., CFH ASSOCIATES, LLC, AMBASSADOR  
INVESTORS GROUP INC., RED, WHITE & BLUE  
PROPERTIES INC., 64 GREEN STREET LLC, BDLAK  
EQUITIES, INC., SHPITZ EQUITIES, INC., 2000  
HOMES INC., MAZAL 57, LLC, BEACH 96TH  
STREET LLC, FIVE FIVE'S PROPERTIES,  
INC., PETE JACOV, AVRAHAM GLATTMAN

DECISION AND ORDER

Index No. 158949/2014

MOT SEQ 008

Plaintiffs,

- v -

CITY NATIONAL BANK, NBUF DEVELOPMENT, LTD.,  
BLACK UNITED FUND OF NEW YORK, INC., FIRST  
PRO GROUP, INC., INNER CITY STRATEGIES,  
JAMES WILLIAMS, DAVID SPIEGELMAN, NATIONAL  
BLACK UNITED FUND, INC.,

Defendants.

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D. PENGUIN BROTHERS LTD., H.T.A. EQUITIES,  
INC., CFH ASSOCIATES, LLC, AMBASSADOR  
INVESTORS GROUP INC., RED, WHITE & BLUE  
PROPERTIES INC., 64 GREEN STREET LLC, BDLAK  
EQUITIES, INC., SHPITZ EQUITIES, INC., 2000  
HOMES INC., MAZAL 57, LLC, BEACH 96TH  
STREET LLC, FIVE FIVE'S PROPERTIES,  
INC., PETE JACOV, AVRAHAM GLATTMAN

DECISION AND ORDER

Index No. 153494/2015

MOT SEQ 005, 007

Plaintiffs,

- v -

CITY NATIONAL BANK, NBUF DEVELOPMENT, LTD.,  
BLACK UNITED FUND OF NEW YORK, INC., FIRST  
PRO GROUP, INC., INNER-CITY STRATEGIES,  
INC. D/B/A INNER CITY STRATEGIES, JAMES  
WILLIAMS, DAVID SPIEGELMAN,

Defendants.

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**NANCY M. BANNON, J.:**

In these consolidated actions<sup>1</sup> to recover damages for fraud and conversion, *inter alia*, the plaintiffs move pursuant to CPLR 3215 and 3211(f) for a default judgment against defendant David Spiegelman as to liability and setting the matter down for an inquest on damages (MOT SEQ 005 - Index No. 153494/2015).

Under Index No.158949/2014, MOT SEQ 008, the plaintiffs move for leave to extend their time to move for summary judgment against Spiegelman until 30 days after this court decides their motion for default judgment against Spiegelman in that action.

The motion for a default judgment is granted, the motion to amend the complaint is denied, and the motion for leave to extend time to move for summary judgment is denied as moot.

In May 2016, prior to these actions being consolidated, the plaintiffs filed a motion for leave to enter a default judgment against Spiegelman based on his failure to appear or timely serve an answer. (MOT SEQ 002 - Index No. 153494/2015). On July 19, 2016, the plaintiffs and Spiegelman executed a stipulation whereby Spiegelman acknowledged effective service of

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<sup>1</sup> These consolidated actions consist of two actions brought by the same plaintiffs seeking virtually the same relief against the same defendants, that were both filed separately in the Supreme Court, New York County: (i) D. Penguin Bros. Ltd. v City National Bank, Index No. 158949/2014 and (ii) D. Penguin Bros. Ltd. v City National Bank, Index No. 153494/2015. By order dated August 13, 2018, the two actions were consolidated for the purpose of discovery, trial, and disposition under Index No. 158949/2014 (NYSCEF Doc. No. 154).

the summons with notice, waiving any defenses based on defect in process, service of process, or absence of personal jurisdiction, and the plaintiffs withdrew their motion for a default judgment against him.

Spiegelman thereafter moved pursuant to CPLR 3211(a)(5) to dismiss the amended complaint insofar as asserted against him (MOT SEQ 003 - Index No. 153494/2015). In this court's decision and order, dated September 8, 2017, Spiegelman's motion to dismiss was granted in part and denied in part. On October 3, 2017, plaintiffs served a Notice of Entry on Spiegelman by e-filing a copy of such notice with the September 8, 2017 order annexed thereto.

On October 17, 2017, plaintiffs moved for a default judgment against Spiegelman (MOT SEQ 005 - Index No. 153494/2015) on the ground that Spiegelman had failed to serve an answer to the portions of the complaint that had not been dismissed within 10 days of service of the notice of entry of the order determining his motion to dismiss. See CPLR 3211 (f) ("Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order").

"A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action in order to avoid the entry of a default judgment." Gershman v Ahmad, 131 AD3d 1104, 1105 (2<sup>nd</sup> Dept. 2015). On November 6, 2017, Spiegelman filed opposition papers to which he attached an answer with cross claims. In opposing plaintiffs' instant motion, Spiegelman contends only that the inordinately long complaint, which he had already moved to dismiss, and his "inability to finish in time," should excuse his failure to serve an answer within the 10-day time frame. Spiegelman's opposition states that plaintiffs moved for leave to reargue a portion of the September 8, 2017 order.

However, Spiegelman never requested that the court grant additional time to serve an answer and does not offer a reasonable excuse for his default. See CPLR 3012 (d). Furthermore, "Only a motion to dismiss an action or a defense, in accordance with CPLR 3211 (a) or (b), serves to so extend the time to serve and file an answer. A motion for leave to reargue pursuant to CPLR 2221 does not." See Vigo v 501 Second St. Holding Corp., 100 AD3d 871, 872 (2<sup>nd</sup> Dept. 2012). Thus, the plaintiffs' application for an order granting it a default judgment as to liability against Spiegelman is granted. See CPLR 3215 (a).

In the "absence of a reasonable excuse for the defendants' default" "it unnecessary to determine whether they demonstrated the existence of a potentially meritorious defense." Glanz v Parkway Kosher Caterers, 176 AD3d 686, 689 (2<sup>nd</sup> Dept. 2019). "The determination of what constitutes a reasonable excuse lies within the discretion of the trial court." Id. at 688.

In light of the foregoing, plaintiffs' motion for leave to extend their time to move for summary judgment against Siegelman until 30 days after their default motion is decided is denied as academic.

Accordingly, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 3215 and 3211(f) for a default judgment against defendant David Spiegelman is granted and an inquest on damages will be held at the time of trial (MOT SEQ 005 - Index No. 153494/2015); and it is further,

ORDERED that plaintiffs' motion for leave to extend their time to move for summary judgment against defendant David Spiegelman until 30 days after this court decides their motion for a default judgment against him is denied as academic (MOT SEQ 008 - Index No. 158949/2014).

This constitutes the Decision and Order of the court.

Dated: MAY 18, 2020

ENTER:

  
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NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON