

<b>Amerimax Capital, LLC v Lotovsky</b>
2021 NY Slip Op 30444(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 153449/2020
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 14**

*Justice*

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**INDEX NO. 153449/2020**

AMERIMAX CAPITAL, LLC,  
  
Plaintiff,

**MOTION DATE 02/11/2021**

**MOTION SEQ. NO. 004**

- v -

LEONID LOTOVSKY, NINEL LOTOVSKY  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The motion by defendants, via order to show cause, to vacate the Court’s decision awarding a default judgment is denied.

**Background**

This case is about a brokerage commission in connection with a loan for the refinancing of an investment condo in Brooklyn owned by defendants. Plaintiff claims that defendants closed on a loan transaction but did not pay the commission as required under the terms of the parties’ agreement (which plaintiff claims is \$9,600). Plaintiff maintains that it had entered into an exclusive agreement with defendants whereby defendants were prohibited from securing a loan with another entity for a certain period. It claims that five weeks after signing the agreement, defendants procured a loan from a different lender.

Defendants previously filed an answer that was labeled as verified but did not contain a verification and plaintiff properly rejected it. For some reason, defendants did not move to compel acceptance of this answer or even bother to oppose the subsequent motion for a default

judgment. Now defendants move to vacate the Court's decision awarding plaintiff a default judgment.

Defendants explain that plaintiff did not perform based on the contract and plaintiff cannot recover based on an exclusive mortgage agreement for residential mortgages. Their counsel explains that he did not oppose the motion for a default judgment because of law office failure. He blames the ongoing pandemic for disrupting his practice between April 2020 and December 2020. Counsel for defendants claims that he is busy with a separate divorce case. Defendants assert that they have meritorious defenses, including that mortgage brokers cannot prevent borrowers from seeking loans with another broker or lender.

In opposition, plaintiff points out that an agreement was reached to extend defendants' time to answer the complaint and defendants then filed a "verified" answer that turned out not to be verified by either defendant. Plaintiff argues that all defendants had to do was file the required verification, but they have not since the answer was filed in September 2020 (not even in connection with this motion).

### **Discussion**

The Court denies the motion. While defendants are correct that cases should be decided on their merits, defendants failed to raise a reasonable excuse or a meritorious defense.

The Court understands that the pandemic has forced attorneys to adapt to working remotely and places a greater emphasis on using technology to practice law. But the facts here show that counsel for defendants simply ignored the case. The parties reached an agreement to extend defendants' time to answer (NYSCEF Doc. No. 20). Then defendants filed a verified answer that did not contain a verification (NYSCEF Doc. No. 22).

Plaintiff then rejected the answer (NYSCEF Doc. No. 23) and NYSCEF records confirm that counsel for defendants received an email about this rejection. He also received an email notification when plaintiff moved for a default judgment. In fact, defendants simply ignored the case until after plaintiff was awarded a default judgment. This is not a case where a single email was missed; it evidences a pattern of ignoring the case until after the Court awarded a default judgment to plaintiff. That counsel for defendant was working another matter is of no moment. Adjournments could have been requested. And, as plaintiff points out, defendants simply had to verify the answer in order to avoid a default. Strangely, that relief is not sought here; instead, the order to show cause seeks to restore the motion for a default judgment.

Even if there were a reasonable excuse, defendants did not allege a meritorious defense. As plaintiff points out, the regulation cited by defendants (3 NYCRR38.3) for the proposition that exclusive mortgage broker agreements are prohibited does not contain the language cited by defendants. In fact, plaintiff attached the cited regulation in full and it does not say anything about barring a broker from having an exclusivity provision (NYSCEF Doc. No. 96). Simply put, defendants did not cite any binding regulation or case law that would invalidate the agreement at issue here.

And the affidavit from Ninel Lotovksy demonstrates that she and her husband signed an agreement where plaintiff was supposed to secure a loan for them and, instead, they secured a loan from another entity (NYSCEF Doc. No. 67). Unfortunately, the agreement with plaintiff barred defendants from seeking a loan with someone else for a period of 60 months. Defendants cited no basis by which the Court could ignore an agreement that defendants admit they signed.

Accordingly, it is hereby

ORDERED that the motion by defendants to vacate is denied.

2/16/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: