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| <b>Pivar v Kratz</b>                                                                                                                                                                                                           |
| 2021 NY Slip Op 30910(U)                                                                                                                                                                                                       |
| March 23, 2021                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 154794/2020                                                                                                                                                                                                     |
| Judge: Richard G. Latin                                                                                                                                                                                                        |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** HON. RICHARD G. LATIN **PART** **IAS MOTION 46**

*Justice*

-----X

STUART PIVAR,

Plaintiff,

- v -

DAVID KRATZ, ET AL.

Defendants.

-----X

**INDEX NO.** 154794/2020

**MOTION DATE** 03/11/2021

**MOTION SEQ. NO.** 001, 002

## DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 26, 27

were read on this motion to/for EXTEND – TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for MODIFY.

Upon the foregoing documents, defendants' motion for an order pursuant to CPLR 2004 and CPLR 3012(d) to extend their time to answer plaintiff's complaint and plaintiff's motion for an order pursuant to CPLR 2100 and 2101(f) to correct a defect in the complaint are determined as follows:

Plaintiff commenced this defamation action on June 29, 2020 and served the summons and complaint upon the defendants herein. On July 20, 2020, plaintiff served defendant The New York Academy of Art via Secretary of State. Then, on July 24, 2020, plaintiff served defendant David Kratz pursuant to CPLR 308(2) to a person of suitable age and discretion. The process server's affidavit provided a detailed description of Greg Unis who was served on behalf of David Kratz. Additionally, a copy of the summons and complaint was also mailed to David Kratz in an envelope bearing the legend "personal and confidential" on July 29, 2020, less than twenty days after service. On July 22, 2020, plaintiff served defendant The Trustees of the New York Academy of Art c/o Eileen Guggenheim, Trustee and Eileen Guggenheim, individually pursuant to CPLR 308(2) to a person of suitable age and discretion. The process server's affidavit provided a detailed description of the doorman who was served on behalf of The Trustees of the New York Academy of Art c/o Eileen Guggenheim, Trustee. Additionally, copies of the summons and complaint were also mailed to The Trustees of the New York Academy of Art c/o Eileen Guggenheim, Trustee and Eileen Guggenheim, individually in envelopes bearing the legend "personal and confidential" on July 24, 2020, less than twenty days after service. Plaintiff's counsel e-filed all the affidavits of service on July 27, 2020.

Thereafter, according to defendants' counsel, defendants were "forced" to make this motion on August 13, 2020, since plaintiff's counsel refused their initial request for an extension. On August 19, 2020, The New York Academy of Art interposed an answer. To date, they are the only defendant who has answered in this action.

Pursuant to CPLR 3012(d), "[u]pon 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 showing of a reasonable excuse for the delay or default." Additionally, pursuant to CPLR 2004, "...the court may extend the time fixed by any statute, or rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." In considering the motion, the court may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension, and, if so, the presence or absence of an affidavit of merit (*see Tewari v Tsoutsouras*, 75 NY2d 1 (1989)).

In support of the motion, defendants submit, inter alia, the affirmation of defendant David Kratz dated August 12, 2020.

David Kratz stated that he is the president of the New York Academy of Art and a Trustee of the Board of Trustees of the New York Academy of Art, both of which are defendants in this action. Kratz further stated that "given the nature of the complaint, it will be necessary to convene a meeting of the Board of Trustees of the New York Academy of Art and to consult with its defendant members to investigate the complaint's allegations (which concern events dating to the 1980s and/or 1994) and to frame the defendants' defenses. The Board has twenty-nine individual Trustees." Moreover, he averred that "due to logical difficulties presented by the current COVID-19 pandemic and unavailability of certain Trustees due to individual schedules, it is unlikely that all four defendants will be able to coordinate to investigate the allegations in the complaint and engage with counsel to answer, move, or respond until September 25, 2020."

Defendants have met their burdens pursuant to the above CPLR provisions. The extension initially requested of September 25, 2020 was not a lengthy delay considering the motion was made on August 13, 2020 and the remaining defendants were served on July 22, 2020 and July 24, 2020. Additionally, there would be no prejudice to the plaintiff. Moreover, considering defendant David Kratz's affirmation, the explanation for the delay is reasonable. Considering the meritorious nature of the defenses and public policy, the Court would prefer to render a decision on the merits as opposed to by default (*see Arteaga v Adom Rental Transp., Inc.*, 121 AD3d 931, 931 [2d Dept 2014]; *Kaiser v Delaney*, 255 AD2d 362, 362 [2d Dept 1998]). Thus, defendants' motion is granted in part as to permitting defendants The Trustees of the New York Academy of Art, David Kratz and Eileen Guggenheim an extension to file their answers.

As to plaintiff's unopposed motion pursuant to CPLR 2100 and 2101(f) to correct a defect in the form of the complaint was filed, is hereby granted. CPLR 2101(f) states that:

[a] defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections (CPLR 2101[f])

CPLR 2001 states that:

[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity...to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid (CPLR 2001).

Here, plaintiff's counsel states in his affirmation that the alleged defamatory statement made by defendant David Kratz on August 27, 2019, was not uploaded at the time that the complaint was electronically filed. However, plaintiff claims that the alleged defamatory statement was properly attached to the service copies which were served on each defendant. As stated above, all the defendants were served by July 24, 2020. Defendants did not return the complaint, but instead moved for an extension of time to answer. However, defendant The New York Academy of Art stated in their Answer dated August 18, 2020, that the alleged statement was not attached to the complaint. Since plaintiff's counsel attests that the defamatory statement was served with copies of the complaint that were mailed and considering that a substantial right of a party herein is not prejudiced, the court will permit the omission to be corrected.

Accordingly, it is

ORDERED that, defendants The Trustees of the New York Academy of Art, David Kratz and Eileen Guggenheim are granted extensions to interpose their answers on or before May 21, 2021. Defendants' motion is denied in all other respects; and it is further

ORDERED that, plaintiff's unopposed motion to correct a defect in the complaint is hereby granted.

Plaintiff shall serve a copy of this order upon all defendants within thirty (30) days of the date of this order, together with notice of entry.

This constitutes the decision and order of this Court.

Index No. 154794/20



RICHARD G. LATIN, J.S.C.

3/23/2021

DATE

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

☒

GRANTED IN PART

☒

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE