

Flatlands & 107 Co., LLC v Tokar

2021 NY Slip Op 31504(U)

May 3, 2021

Supreme Court, New York County

Docket Number: 154398/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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FLATLANDS & 107 CO., LLC,
Plaintiff,

- v -

DMITRIY TOKAR,
Defendant.

INDEX NO. 154398/2020
MOTION DATE 02/08/2021, 04/06/2021
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, the motion of plaintiff for entry of a default judgment (motion seq 001) is denied and the motion of defendant to compel acceptance of his late-filed answer (motion seq 002) is granted, in accord with the following memorandum decision. The motions are consolidated here for decision.

Background

Plaintiff Flatlands & 107 Co., LLC ("Plaintiff") commenced this action to enforce defendant Dmitriy Tokar's ("Defendant") personal guaranty of a commercial lease. Plaintiff commenced the action by filing a summons and complaint on June 17, 2020. On September 15, 2020, Plaintiff filed an affidavit of service that avers Defendant was served with process on August 12, 2020 by substituted service on a "co-worker" at his place of business and mailing a

copy to his place of business thereafter. After Defendant did not timely answer the complaint or otherwise appear in the action, Plaintiff moved for entry of a default judgment on February 8, 2020.

Defendant did not oppose the motion for entry of a default judgment, but instead appeared in the action *pro se* on April 6, 2021, and filed its own motion seeking to compel acceptance of a late answer. In an affidavit supporting his motion, Defendant attests that the “co-worker” who purportedly received the substitute service “is not a person of suitable age and discretion and was never authorized to receive process or anything on his behalf” and that he did not receive a copy of the summons and complaint or the subsequent mailing (Tokar Aff. ¶¶ 3-4). Defendant also disputes the allegation that he failed to pay rent due, and attached what he asserts is one of “numerous canceled checks” demonstrating payment to Plaintiff.

Discussion

New York public policy strongly favors disposing of cases on their merits, (*see Berardo v Guillet*, 86 AD3d 459, 459 [1st Dept 2011]), and “toward that end a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that parties may have their day in court” (*Mate Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 [1st Dept 1986]). “In order to successfully oppose a motion for a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense” (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). However, “a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where, as here, no default order or judgment has been entered” (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]). Whether a reasonable excuse exists is a “discretionary, *sui generis* determination to be made by the court based on all relevant factors,” including, among

other things, whether there has been prejudice to the opposing party, whether there has been willfulness, and the policy in favor of resolving cases on the merits (*id.* at 465). “Moreover, courts have the inherent power to forgive even an unexplained default in the interest of justice” (*id.* [quotations omitted]). Pursuant to CPLR 3012 (d), “[u]pon the 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 a showing of reasonable excuse for delay or default.” In making a determination under CPLR 3012 (d), the court must take into account the excuse offered for the defendant’s delay in responding to the summons, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense (*see Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]; *Sippin v Gallardo*, 287 AD2d 703 [2nd Dept 2001]).

In light of New York’s public policy which overwhelmingly favors determinations of actions on their merits, and finding no undue prejudice to the Plaintiff, it is the determination of this court that a sufficient basis exists for this court to exercise its broad discretion to deny the motion for entry of a default judgment and to compel Plaintiff to accept Defendant’s answer. While not overwhelming, Defendant’s excuse that he did not receive copies of the summons and complaint is a sufficiently justifiable excuse to oppose the motion for a default judgment (*see Epstein Becker & Green, P.C. v Samson Mgt. LLC*, 188 AD3d 454, 454-455 [1st Dept 2020] [Failure to receive or misplacement of papers delivered to New York Secretary of State was reasonable excuse for six-month delay in filing an answer]; *Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept 2015] [confusion and inadvertence, while not particularly

compelling, held sufficient to oppose motion for default judgment]).¹ Defendant is not required to proffer a meritorious defense where, as here, no default judgment has been entered (*Jones*, 57 AD3d at 81).

Accordingly, it is

ORDERED that plaintiff’s motion for entry of a default judgment (motion seq 001) is denied, and defendant’s motion to compel acceptance of his late-filed answer (motion seq 002) is granted; and it is further

ORDERED that defendant’s answer, filed in support of his motion to compel, at NYSCEF Doc. No. 21, is deemed served upon entry of this order, and Plaintiff is compelled to accept same; and it is further

ORDERED that a preliminary conference will be held in this matter, by Microsoft Teams appearance arranged by the court, on June 9, 2021 at 2:00 p.m.

This will constitute the decision and order of the court.

ENTER:



<u>5/3/2021</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

¹ To the extent that Defendant contends that the “co-worker” was not a person of suitable age or discretion, such allegation may form the basis of a motion to dismiss for lack of personal jurisdiction. But said contention presently lacks the necessary factual support for such a motion to dismiss.