

Grzesik v Sanchez

2021 NY Slip Op 31869(U)

June 3, 2021

Supreme Court, New York County

Docket Number: 155128/2020

Judge: David Benjamin Cohen

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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. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 155128/2020

ALEXANDRA GRZESIK,

Plaintiff,

MOTION SEQ. NO. 001

- v -

MARYALICE SANCHEZ,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for

DEFAULT

In this tort action, plaintiff Alexandra Grzesik moves, in effect, pursuant to CPLR 3215, for a default judgment against defendant Maryalice Sanchez. Defendant opposes the cross motion and moves, in effect, pursuant to CPLR 3211(a)(5) and (a)(7), to dismiss the complaint based on res judicata and/or failure to state a cause of action or, in the alternative, for leave to serve a late answer pursuant to CPLR 3012(d). Plaintiff opposes the cross motion. After a review of the motion papers, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 2019, Grzesik and Sanchez, who lived in the same apartment building (“the building”) and had “several [prior] disputes”, were in an elevator together when Sanchez’s dog brushed up against Grzesik. Doc. 1. When Grzesik asked Sanchez to control her dog, the latter allegedly asked Grzesik “why are you hitting me?” despite the fact that Grzesik had not touched Sanchez. Doc. 1. Four days later, Sanchez filed a complaint against Grzesik with the

NYPD reflecting that the two were “in the elevator when [Grzesik] kicked [Sanchez] in her left leg leaving bruising and pain.” Doc. 1. Sanchez allegedly repeated this false allegation in “Supporting Depositions” dated December 31, 2019 and January 24, 2020, in which she stated that Grzesik “kicked her in her left leg, leaving bruising and pain.” Doc. 1. As a result of Sanchez’s complaint, Grzesik was arrested on November 20, 2019, charged with five separate crimes, handcuffed, fingerprinted, photographed, and placed in a cell.¹ Doc. 1. On March 11, 2020, the charges were “terminated by the District Attorney’s office” when Grzesik agreed to an adjournment in contemplation of dismissal (“ACD”).

Grzesik thereafter commenced the captioned action by filing a summons and personally verified complaint on July 17, 2020. Doc. 1. In her complaint, Grzesik set forth causes of action for libel and malicious prosecution, as well as a negligence claim based on Sanchez’s alleged lack of care in reporting the incident to the NYPD. Doc. 1. Sanchez was personally served with process on August 11, 2020. Doc. 3.

On March 4, 2021, Grzesik moved, in effect, pursuant to CPLR 3215, for a default judgment against Sanchez. Doc. 7. In support of the motion, Grzesik submits an affidavit attesting to the fact that Sanchez failed to answer the complaint, despite being mailed a follow-up letter by Grzesik’s attorney dated September 21, 2020 asking her to do so. Ex. 5 to Doc. 11.

On March 16, 2021, Sanchez cross-moved to dismiss the complaint, in effect, pursuant to CPLR 3211(a)(5), on the ground that Grzesik’s claims were barred by res judicata since the criminal charges against Sanchez were resolved by ACD. Doc. 13. Sanchez further asserts that the complaint must be dismissed pursuant to CPLR 3211(a)(7) since none of Grzesik’s claims

¹ Although not specified in the complaint, Grzesik was charged with two counts of assault in the third degree; aggravated harassment in the second degree; attempted assault in the third degree; and harassment in the second degree. Ex. 4 to Doc. 1.

have any merit asserting, inter alia, that Grzesik failed to allege her libel claim with sufficient particularity as required by CPLR 3016 and failed to name the NYPD as a necessary party pursuant to CPLR 1001. Doc. 13.

In the alternative, Sanchez requests that, if any of Grzesik's claims survive this motion, then she should be entitled to submit a late answer pursuant to CPLR 3012(d) "due to the pandemic" and "extenuating circumstances", including that she has a disability.² Doc. 13. Sanchez submits a personally verified proposed answer to the complaint. Doc. 15.

In an affirmation in opposition to Sanchez's motion, Grzesik's attorney argues, inter alia, that his client would be prejudiced if Sanchez were permitted to vacate her default since "two critical witnesses" are no longer employed at the building.³ Counsel maintains that, although he sent Sanchez a letter on September 21, 2020 urging her to retain counsel, she did not do so until six months later and thus her failure to answer was willful. Doc. 17. Further, counsel asserts that, although Grzesik's ACD may affect her malicious prosecution claim, it does not affect her other causes of action. Doc. 17. Finally, counsel maintains that Grzesik's libel claim is properly pleaded. Doc. 17.

In reply, Sanchez's attorney argues, inter alia, that his client had a reasonable excuse for her delay in answering, i.e., the Covid-19 pandemic, as well as her inability to obtain assistance from the court, which was closed during the pandemic. Doc. 20. Counsel further asserts that Sanchez has meritorious defenses to Grzesik's claims. Doc. 20.

² Although Sanchez states in an affidavit that she has a learning disability, which, she claims, prevented her from appreciating the import of the summons and complaint, she also admits that she is a healthcare worker. Doc. 14.

LEGAL CONCLUSIONS

Grzesik's Motion for Default

It is well settled that a party seeking default judgment must establish proof of the summons and complaint, defendant's default, and the facts constituting the claim (See 3215[f]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 [1st Dept 2016]). Here, Sanchez was personally served with the summons and complaint on August 11, 2020. Doc. 3. Therefore, Sanchez was required to serve her answer within twenty days, or by August 31, 2020, pursuant to CPLR 3012(a). As of that time, however, the Governor's Executive Order 202.8, as modified and extended in subsequent Executive Orders, remained in effect, thereby tolling all time limits for the filing and service of legal papers. Pursuant to Executive Order 202.67, this toll was extended until November 3, 2020. Although Sanchez had until November 23, 2020 (20 days after the expiration of the toll) to serve her answer, she failed to do so. Doc. 8. Additionally, Grzesik's personally verified complaint sets forth the facts constituting the claim. Doc. 1. Thus, Grzesik has established her entitlement to a default judgment against Sanchez.

Despite plaintiff's showing, however, this Court, in its broad discretion, denies the motion for default given Sanchez's reasonable excuses for her delay in answering (*See Peg Bandwith, LLC v Optical Communications*, 150 AD3d 625 [1st Dept 2017]). As noted previously, Sanchez stated in her affidavit that she has a learning disability and that circumstances relating to the Covid-19 pandemic, including the fact that she was unable to obtain assistance from the court, prevented her from answering in a timely fashion. Doc. 14. Even where, as here, a "proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits" (*Delgado v City of New York*, 47 AD3d 550 [1st

Dept 2008] quoting *Caterine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 1999]; see also *Gluck v. McDonough*, 139 A.D.3d 628, 629 [1st Dept 2016] [citation omitted]). Therefore, this Court finds that Sanchez must be “granted an opportunity to defend [Grzesik’s] claims” rather than allowing them be resolved on default (*Naber Elec. v Triton Structural Concrete, Inc.*, 160 AD3d 507, 508 [1st Dept 2018]) and, as discussed immediately below, also determines that Grzesik must be compelled to accept late service of Sanchez’s answer pursuant to CPLR 3012(d).

Sanchez’s Cross Motion To Compel Grzesik To Accept Her Untimely Answer

In considering whether to grant relief pursuant to CPLR 3012(d), a court should take into account "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense" (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472-473 [1st Dept 2017].)

Here, as noted above, Sanchez’s time to answer expired on November 23, 2020 and she still had not answered by the time Grzesik filed her motion for default on March 4, 2021. Doc. 7. Thus, the delay was approximately 3 ½ months. However, despite Grzesik’s contention to the contrary, there is no indication that Sanchez’s delay was willful. Nor is there any indication that Grzesik was prejudiced by this delay. Grzesik claims that she was prejudiced because Kathy Santana, the former property manager, now lives out of state and that Stan Gratchin, the former superintendent, lives in “an unknown apartment” in the building, and that efforts to locate the said individuals were “ongoing”. Doc. 17. However, Grzesik does not explain how or why Sanchez’s delay in answering affected her ability to contact and/or search for Santana and Gratchin or why they are key witnesses in this litigation. Thus, Grzesik has not identified any prejudice resulting from Sanchez’s delay.

As noted, Sanchez's excuses for her delay in answering are not exemplary. Nevertheless, although the excuses are "less than compelling", they are acceptable on this cross motion pursuant to CPLR 3012(d) given the "strong preference in our law that matters be decided on their merits in the absence of demonstrable prejudice" (*Elemery Corp. v 773 Assoc.*, 168 AD2d 246, 247 [1st Dept 1990]). In light of this policy, as well as the fact that Sanchez is represented by counsel and clearly wishes to participate in this litigation and that, by opposing Grzesik's motion for default, Sanchez demonstrated that she did not intend to abandon the case, the branch of her motion seeking to compel Grzesik to accept her untimely answer is granted (*see Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]).⁴

Grzesik's Cross Motion To Dismiss

CPLR 3211(e) provides, in pertinent part, that "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted." Sanchez's time to serve her responsive pleading expired on November 23, 2020. Therefore, the branch of her cross motion seeking dismissal of the complaint pursuant to CPLR 3211(a)(5) and (a)(7), filed March 16, 2021 (Doc. 12), is clearly untimely (*see Rosenzweig v Gubner*, ___AD3d___, 2021 NY Slip Op 03342 [2d Dept, May 26, 2021] citing *Ultimate One Distrib. Corp. v 2900 Stillwell Ave., LLC*, 140 AD3d 1054, 1055 [2d Dept 2016]).

Accordingly, it is hereby:

⁴ To the extent that Sanchez's affidavit addresses the merits of Grzesik's claim, this Court notes that an affidavit of merit is "not essential to the relief sought" by Sanchez since neither an order nor judgment of default has been entered against her (*Naber Elec. v Triton Structural Concrete, Inc.*, 160 AD3d at 508 [citations omitted]).

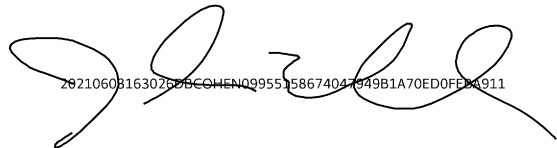
ORDERED that the motion by plaintiff Alexandra Grzesik seeking a default judgment against defendant Maryalice Sanchez is denied; and it is further

ORDERED that the branch of the cross motion by defendant Maryalice Sanchez seeking to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7) is denied; and it is further

ORDERED that the branch of the cross motion by defendant Maryalice Sanchez seeking to compel plaintiff Alexandra Grzesik to accept her untimely answer pursuant to CPLR 3012(d) is granted; and it is further

ORDERED that the parties are to participate in a preliminary conference on August 9, 2021 at 3:30 p.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk) and return the same to Part 58 by email at SFC-Part58-Clerk@nycourts.gov at least two business days prior to the scheduled conference; and it is further

ORDERED that defendant Maryalice Sanchez is to serve all parties with a copy of this order, with notice of entry, and file proof of such service with this Court.



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DAVID BENJAMIN COHEN, J.S.C.

6/3/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE