

<b>Farnell v Elizabeth St. Gallery</b>
2021 NY Slip Op 31894(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 653902/2020
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M**

*Justice*

-----X

BUREGA FARNELL,

Plaintiff,

- v -

ELIZABETH STREET GALLERY, ALAN REIVER

Defendants.

-----X

INDEX NO. 653902/2020

MOTION DATE 04/01/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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, 17, 18, 19

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

The following read on plaintiff's motion for a default judgment, CPLR 3215; and defendants' cross-motion to dismiss, CPLR 3211(a)(1): a defense is founded upon documentary evidence; and 3211(a)(7): the pleading fails to state a cause of action; and to serve an answer and counterclaim, per CPLR 3012(d).

Plaintiff filed a summons and complaint on August 18, 2020 with causes of action for i) breach of contract, ii) fraud, iii) unjust enrichment, and iv) conversion, in relation to certain furniture furnishings for the sum of \$150,000. Plaintiff then filed a default judgment with the Clerk of the court on December 30, 2020. Defendants appeared with a notice of cross-motion, affirmation in opposition, and a proposed answer on February 25, 2021.

Defendant Alan Reiver originally appeared pro se but has attained a lawyer. CPLR 321 states, "A party, other than one specified in section 1201 of this chapter, may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney." Michael J. Willner of Brill & Meisel law firm has submitted a reply on behalf of defendants Elizabeth Street Gallery and Allan Reiver.

Defendant Alan Reiver submits an affidavit stating in relevant part, “I am the sole owner and president of Elizabeth Street Gallery, Inc. I, nor ESG (Elizabeth Street Gallery) were given sufficient time to answer the action under the CPLR ... plaintiff rushed to seek a default and did not allow me, a medically infirm person, a proper opportunity to prepare an answer during a global pandemic.”

A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action (see *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., Inc.*, 67 N.Y.2d 138 [1986]).

Defendant Alan Reiver’s affidavit continues, “neither ESG or ‘Alan’ Reiver (improper spelling of my name) were properly served with the summons and complaint. [S]ince neither ESG nor I have delayed in answering this action, there would be absolutely no prejudice to plaintiff in allowing defendants to submit its attached answer. Plaintiff also fails to name Fang Chao, a necessary party to this action.” Pursuant to CPLR 1001(a), persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.

Defendants also indicates the caption of this case does not indicate whether this Elizabeth Street Gallery entity is a corporation or a limited liability company, both of which are valid New York businesses.

Defendant points out “plaintiff has also failed to provide valid proof of the facts constituting the claim, which is a necessary requirement when seeking a default (see CPLR 3215[f]).”

Defendant's affidavit states, "[p]laintiff and ESG entered into a contract for the sale of goods on or about March 8, 2018. Plaintiff acted as agent on behalf of an individual named Fang Chao, who is unnamed in this action, but, upon information and belief has a residence in Canada. Plaintiff, as agent for Fang Chao, was required to pay ESG the sum of \$150,000 for the goods, which was due immediately upon ESG's tender of its invoice to plaintiff on or about April 2, 2018. Plaintiff was also required to provide a Bill of Lading for the shipping of the goods out of the State of New York for Fang Chao as neither I nor ESG ever agreed to pay sales or additional taxes and costs for the shipping of these goods. Plaintiff failed to pay \$150,000 immediately upon receiving the invoice. Instead, plaintiff made two (2) partial payment on August 8, 2018 and August 28, 2018 and failed to pay the balance until November 14, 2018, more than 7 months after the invoice was provided. ESG requested that plaintiff provide a Bill of Lading prior to its delivery of the goods on many occasions, to ensure that ESG would not be responsible to pay any sales tax or shipping costs for sending the goods to Fang Chao's residence in Vancouver, Canada. Yet, plaintiff either ignored ESG's requests or refused to provide the Bill of Lading. Due to plaintiff's failure to provide a Bill of Lading, ESG was compelled to store the goods for several years at a considerable cost and expense to itself. Plaintiff finally provided a Bill of Lading on November 24, 2020, more than 2 years after the invoice was issued. At that point, ESG had already accumulated storage fees in the amount of approximately \$70,000. Although duly demanded, plaintiff has refused to pay the storage fees accrued by ESG and remains liable to ESG in the amount of \$70,000. As a result, plaintiff still remains in default of the contract between itself, as agent for Fang Chao, and ESG" (see NYSCEF Doc. No. 13 ¶ 47 – 57).

Upon 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 (see CPLR 3012 [d]).

Plaintiff's affirmation in opposition to the cross-motion affirms, "[o]n October 19, 2020, seventeen days after the defendants received plaintiff's summons and complaint, which they claimed was not properly served on them, defendants' counsel Brill & Meisel advised plaintiff's counsel that in fact the defendants 'recently received' the summons and complaint."

Plaintiff argues that, "[d]efenses offer two additional frivolous defenses, to wit: 1) that they never received a bill of lading from the plaintiff and 2) because of that they had storage charges in the amount of \$70,000. The absurdity of this defense is easily discernible just by looking at the photos of the actual items that plaintiff purchased. All of the items listed could be fitted in two to three boxes."

Plaintiff's motion submits a paid invoice with photographs (see NYSCEF Doc. No. 6). A review by this court shows photos of bronze lamps, a gothic vessel, and medium size urns just to name a few of the items. This court cannot see the size or the fragility of these items.

Defendant further submits a reply from previously mentioned attorney Michael J. Willner, from the law firm of Brill & Meisel. "Plaintiff's opposition papers do not adequately provide a basis for why defendants' answer was not submitted timely. Defendants' answer, which was submitted as part of its timely opposition to this motion, should be considered timely submitted."

"With respect to plaintiff's contention that the complaint as verified by plaintiff's counsel can be utilized to obtain a default judgment, the First Department has held that 'a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient

to support entry of judgment pursuant to CPLR 3215 (see *Joosten v. Gale*, 129 A.D.2d 531, 534). Notably, no individual with firsthand knowledge of the facts has submitted any supporting documents in this action whatsoever.”

Attorney Willner’s reply continues with, “plaintiffs opposition papers ... still completely fail to allege any real basis for personal liability against Allan Reiver. Allan Reiver was not a party to the contract for the sale of goods. Plaintiff completely ignores defendants’ argument that it has failed to name Fang Chao, a necessary party to this action, as a plaintiff.” The reply continues with the pleading requirements for fraud, and storage fees.

Where a party is seeking a default judgment, it is not necessary for a defendant to prove its defenses to avoid that judgment, but only to set forth facts sufficient to make out a prima facie showing of a meritorious defense (see *Aerovias De Mexico, S.A. De C.V. v. Malerba, Downes & Frankel*, 265 A.D.2d 214, 215 [1st Dept. 1999]). Strong public policy favors a court disposing of cases on their merits, rather than the granting of default judgments (see *Li Xian v. Tat Lee Supplies Co., Inc.*, 126 A.D.3d 424, 425 [1st Dept. 2015]).

ORDERED that plaintiff’s motion for a default judgment, CPLR 3215, is DENIED.

ORDERED that defendant’s cross-motion to dismiss, per CPLR 3211(a)(1) and CPLR 3211(a)(7), is DENIED.

ORDERED that defendant’s motion for this court accept the answer with counterclaims, per CPLR 3012(d), is GRANTED.

4/6/2021  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE