

City of New York v Tominovic
2021 NY Slip Op 31989(U)
February 19, 2021
Supreme Court, Kings County
Docket Number: 710662/19
Judge: Kevin J. Kerrigan
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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

FILED

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The City of New York,

Index
Number: 710662/19

**2/22/2021
9:03 AM**

Plaintiff,

- against -

**COUNTY CLERK
QUEENS COUNTY**

Motion
Date: 2/8/21

Elvis Tominovic, Romina Tominovic, Loretta
Tominovic, Franko Tominovic, Sania (a/k/a
Sanya) Colic, Suzana Colic, Dragon Mavra,
Neo Panayiotou, Ress Services Inc., 31-27
14 Street Realty LLC, 47-15 28 Avenue Realty
LLC, IstraJazz, Inc., R&S Living Inc., and
"John Doe" etal.,

Motion Seq. No.: 3

Defendants.

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The following papers numbered E184-E194, E208, E213-E261 and E263-E272, read on this motion by plaintiff for a default judgment against defendants, Loretta Tominovic, Franko Tominovic, Sania (a/k/a Sanya) Colic, Suzana Colic, Neo Panayiotou and 31-27 14 Street Realty LLC; cross-motion by defendant, Neo Panayiotou, for an order compelling plaintiff to accept their late answer nunc pro tunc; cross-motion by defendant, Suzana Colic, for an order compelling plaintiff to accept their late answer nunc pro tunc; cross-motion by defendant, Franko Tominovic, for an order compelling plaintiff to accept their late answer nunc pro tunc; and cross-motion by defendant, Loretta Tominovic, for an order compelling plaintiff to accept their late answer nunc pro tunc.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E184-194
Notice of Cross-Motion-Affirmation-Exhibits.....	E213-224
Notice of Cross-Motion-Affirmation-Exhibits.....	E225-238
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Notice of Cross-Motion-Affirmation-Exhibits.....	E246-258
Affirmation in Opposition-Exhibits.....	E259-261
Affirmation in Opposition-Exhibit.....	E263-264
Reply.....	E208
Reply.....	E267
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Reply.....	E272

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff for a default judgment against defendants, Tominovic, Colic, Panayiotou and 31-27 14 Street Realty LLC is granted. Cross-motions by Tominovic, Colic and Panayiotou for an order, pursuant to CPLR 3012(d), directing plaintiff to accept their late answers are denied. That branch of the cross-motion by Panayiotou to dismiss the complaint, pursuant to CPLR 3211(a)(1), based upon documentary evidence, is also denied.

Loreta and Franko Tominovic were served with the summons and complaint by substituted service on June 21, 2019. Colic and Panayiotou was served personally by in-hand delivery. Therefore, Tominovic were required to serve their answers not later than 30 days thereafter, July 21, 2019, and Colic and Panayiotou were required to interpose an answer no later than 20 days thereafter, July 11, 2019 (see CPLR 320[a]). The City served the instant motion for a default judgment on June 24, 2020. In response to the motion, Tominovic filed answers on July 22, 2020, Colic filed an answer on July 23, 2020 and Panayiotou filed an answer on October 12, 2020, and cross-move for an order compelling the City to accept their late answers. Plaintiff has demonstrated an entitlement to a default judgment by proffering undisputed evidence of defendants' default in answering and unrebutted evidence of a meritorious claim. Conversely, defendants have failed to proffer a reasonable excuse for their defaults and have failed to rebut the City's showing of a meritorious cause of action so as to merit relief under CPLR 3012(d).

Plaintiff City commenced this action against defendants alleging violation of the New York City Consumer Protection Law [Administrative Code of the City of New York §20-700 et seq], violation of Multiple Dwelling Law §§4(8)(a) and 121, and for an injunction. The City alleges that beginning in 2015 or earlier, defendants have advertised and rented 36 buildings as "Air B&B" accommodations for illegal, short-term periods. Pursuant to the order of this Court issued on January 17, 2020, the City's motion for a preliminary injunction prohibiting defendants from permitting the short-term use or occupancy of any of the dwelling units was granted. This Court held, inter alia, "The city made a sufficient evidentiary showing that the defendants are violating the Multiple Dwelling Law and the Administrative Code by illegally advertising permanent residential units within the subject buildings for short term rentals and then illegally renting those units on a short term basis. ... Although the defendants attempted to raise issues of fact, such issues do not in themselves preclude the issuance of

a preliminary injunction."

The City presented ample, and voluminous, evidence establishing meritorious causes of action against all defendants, and this Court has so determined in its order granting the City's preliminary injunction. Therefore, the City has demonstrated an entitlement to a default judgment against the non-answering defendants.

Tominovic, Colic and Panagiotou cross-move to compel plaintiff to accept their late answers. The Court, pursuant to CPLR 3012(d), may "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." Tominovic, Colic and Panagiotou have failed to set forth a reasonable excuse for their defaults in answering and have also failed to rebut the City's showing of a meritorious claim.

Loreta Tominovic's, Franco Tominovic's and Colic's excuse that they were under the "impression", due to their being pro se defendants "untutored in legal matters", that the action was stayed during settlement negotiations between the City and the other defendants is neither reasonable nor legally cognizable. Indeed, they admit that they were not involved in any settlement negotiations. Their offer of explanation that, notwithstanding that they did not participate in any settlement negotiations, it was the intention of co-defendants, with whom they have a "familial" relationship, to settle the matter "globally" and accept liability for all defendants except Mavra, does not constitute a reasonable excuse.

In this regard, defendant Romina Tominovic (who is not a subject of this motion) submits her pro se affidavit in opposition to the City's motion and in support of co-defendants' cross-motions to compel the City to accept their late answers. Romina Tominovic avers that Loreta and Franko Tominovic are her parents, that co-defendant Elvis Tominovic is her brother and that Colic is Elvis' domestic partner. She informs that she and Elvis, along with defendants Ress Services, 47-15 and R&S Living (which defendants also are not the subject of this motion) appeared in the action by their attorney, and that their attorney engaged in settlement negotiations with the City. During the negotiations, their counsel sent proposed settlement terms by letter to the City and stated, inter alia, "For the purposes of settlement, our clients are willing to take responsibility for all other defendants, with the exception of Dragan Marva. Accordingly, all offers below should be considered for full and final settlement of all claims for all defendants, except for Dragan Mavra." Loreta and Franko Tominovic and Colic explain that it was not until settlement negotiations with co-defendants failed that they realized that they would need

to retain counsel. However, although they spoke to attorneys, they were forced to appear pro se because of the legal costs associated with retaining counsel. Yet they fail to offer any explanation as to why they were not represented by the same counsel that was retained by Romina and Elvis, and Romina Tominovic is silent in her affidavit as to why she and her brother, who so graciously offered to accept responsibility for their parents and Elvis' domestic partner in their settlement negotiations with the City, retained counsel separately for themselves only and left their parents and Elvis, his domestic partner, to fend for themselves as pro se defendants. Their excuse, therefore, is rejected.

Panayiotou offers as his excuse for defaulting in answering the complaint that he did not have the money to retain an attorney until after the City filed the instant motion for a default judgment, that he is an immigrant who is ignorant of the legal system and did not understand that he could proceed pro se, and that even had he so known, he would have been uncomfortable doing so because English is his second language.

His appeal to ignorance of the law concerning his right to appear pro se does not constitute a cognizable excuse for his default. Moreover, that excuse is irrelevant in light of his further averment that he would not have proceeded pro se in any event because of his non-proficient English language skills. His perfunctory allegation that he did not have the money to hire an attorney until after the City had made its motion for a default judgment also does not constitute a reasonable excuse.

Loreta and Franko Tominovic and Colic also contend that they have a meritorious defense to the action but only state that they opposes the \$500 fine under the Consumer Protection Law imposed by the City because the City has failed to demonstrate by admissible proof that the violations alleged were knowingly committed and because its calculation included a period that was beyond the 3-year statute of limitations.

Whether the City was in error in assessing a \$500 fine for violation of the Consumer Protection Law or erroneously calculating the period of liability as including a period of time beyond the statute of limitations does not constitute a meritorious defense to the causes of action alleged in the complaint.

Panagiotou's bare, conclusory, denial of the City's allegations against him also does not support his contention of a meritorious defense to the action.

This Court does note, however, that an affidavit of merit is not required in support of a motion for leave to serve a late answer where, as is the case herein, no default order or judgment

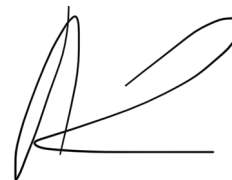
has been entered (see Cirillo v Macy's, Inc., 61 AD 3d 538 [1st Dept 2009]; Jones v 414 Equities, LLC, 57 AD 3d 65 [1st Dept 2008]). A showing of a meritorious defense is, thus, only required where the relief requested is to vacate a default judgment. This Court concludes, therefore, that defendants' offer of a meritorious defense may only be evaluated to determine if it conclusively disproves plaintiff's evidence of a meritorious cause of action. No evidence is presented by defendants that conclusively disproves the City's showing of a meritorious claim. In this regard, Panagiotou also cross-moves to dismiss the complaint against him based upon documentary evidence, pursuant to CPLR 3211(a)(1).

CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." "To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (AGCS Mar. Ins. Co. v Scottsdale Ins. Co., 102 AD3d 899, 900 [2d Dept 2013], quoting Nevin v Laclede Professional Prods., 273 AD2d 453 [2d Dept 2000]). Panagiotou has failed to submit any documentary evidence that conclusively disposes of the City's causes of action against him. He only submits five years' of his tax returns, arguing that they do not show that he received any payments from Air B&B. These documents do not conclusively prove that he did not receive any money from the illegal short-term rental of the subject properties, and that the City has no cause of action against him.

Accordingly, the motion is granted and the cross-motions are denied.

Submit order.

Dated: February 19, 2021



KEVIN J. KERRIGAN, J.S.C.

FILED

2/22/2021

9:03 AM

**COUNTY CLERK
QUEENS COUNTY**