

**Dio Fl. P. v Villani**

2021 NY Slip Op 32044(U)

March 4, 2021

Supreme Court, Bronx County

Docket Number: 23127/2020E

Judge: Wilma Guzman

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

Index No.: 23127/2020E  
Motion Sequence No. 1  
Motion Date: 12/21/2020

-----X  
DIO FL. P.,

Plaintiff(s),

-against-

ANTHONY VILLANI D/B/A ANTHONY'S PIZZA

Defendant(s).  
-----X

**DECISION/ ORDER**

**Present:**  
**Hon. Wilma Guzman**  
Justice of the Supreme Court

Recitation as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motions:

**Papers**

**Numbered**

<b>Notice of Motion, Affirmation and Affidavit in Support and Exhibits annexed thereto.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Notice of Cross Motion, Affirmation in Support and Exhibits Annexed thereto.....</b>	<b>3</b>
<b>Notice of Cross Motion, Affirmation in Support and Exhibits Annexed thereto.....</b>	<b>4</b>
<b>Affirmation in Reply.....</b>	<b>5</b>

Motion decided as follows: Upon deliberation of the application duly made by Defendant ANTHONY VILLANI D/B/A ANTHONY'S PIZZA (hereinafter "Defendant") herein by **Notice of Motion**, and all the papers in connection therewith for an Order pursuant to CPLR §3215, granting default judgment on Defendant's counterclaims against Plaintiff in favor of Defendant is heretofore denied.

Upon deliberation of the application duly made by Plaintiff DIO FL. P. (hereinafter "Plaintiff") herein by **Notice of Cross Motion**, and all the papers in connection therewith for an Order pursuant to CPLR § 3012(d), (1) denying Defendant's motion for default judgment on the counterclaims, (2) finding that Plaintiff's motion to dismiss is timely or otherwise accepting the late filing of Plaintiff's cross-motion to dismiss, (3) extending Plaintiff's time to reply to Defendant's counterclaims either by reply Answer or Motion to Dismiss is heretofore granted in its entirety.

Upon deliberation of the application duly made by Plaintiff herein by **Notice of Cross Motion**, and all the papers in connection therewith for an Order pursuant to CPLR § 3211(a) (1), (6), (7)

and (b), (1) denying Defendant's motion for default judgment, (2) finding that Plaintiff's motion to dismiss is timely or otherwise accepting the late filing of Plaintiff's cross-motion to dismiss, (3) finding that Defendant's Answer is untimely filed, (4) finding that Defendant's Counterclaims are not properly interposed, (5) finding that Plaintiff has a defense upon documentary evidence that renders Defendant's counterclaims insufficient as a matter of law, (6) finding that Defendant fails to plead or state a cause of action, and (7) dismissing Defendant's defenses should be dismissed is heretofore granted in part and denied in part.

The instant action was commenced by Plaintiff the filing of a Summons and Complaint on or about March 4, 2020 seeking to recover rent arrears or use and occupancy from Defendant. Plaintiff served Defendant with the Summons and Complaint on March 10, 2020. On March 20, 2020, Governor Cuomo signed several executive orders extending the deadline to reply to motions to November 3, 2020 in lieu of the COVID-19 Pandemic. On or about May 26, 2020, Defendant filed an Answer with Counterclaims to the Summons and Complaint, with Counterclaims alleging fraud and misrepresentations by Plaintiff. On October 2, 2020, Plaintiff filed an RJJ requesting a preliminary conference. Plaintiff did not file an Answer to Defendant's Counterclaims. Defendant now moves for default judgment against Plaintiff on Defendant's counterclaims.

In support of his motion, Defendant argues that Plaintiff was properly served with an Answer with Counterclaims on May 26, 2020, as reflected on the Affidavit of Service. Defendant alleges that, after the expiration of the original written contract on October 31, 2003, Defendant entered into an oral month to month contract with Mr. Joseph DeGuardia Sr., the owner of the building where Defendant's pizzeria was located. Defendant alleges that Plaintiff then acted in bad faith in its obligation to review prospective buyers that Defendant submitted for the purchase of the pizzeria business. In support of its motion Defendant submits a sworn affidavit of facts as to the validity of his claims. Following the service, by regular mail, of the Answer with Counterclaims, Plaintiff had 25 days to respond, thus the reply would have been required no later than June 19, 2020. Plaintiff has not responded. Defendant argues that he has submitted (1) proof of service of Answer with Counterclaims, (b) proof of facts constituting the claim and (3) proof of default as per the requirements of CPLR § 3215. For these reasons, Defendant requests that a default

judgment be entered against Plaintiff on Defendant's counterclaims and this matter be scheduled for an inquest on damages.

In opposition, Plaintiff argues that Defendant inaccurately stated the default date and failed to properly interpose its counterclaims. Plaintiff argues that, due to the executive orders issued by Governor Cuomo as a result of the COVID-19 Pandemic, Plaintiff had until November 3, 2020 to file an Answer to Defendant's counterclaims, as opposed to the June 19, 2020 date alleged by Defendant. Further, Plaintiff argues that Defendant has only submitted a self-serving affidavit in support of his claims, and offers no documentary evidence to prove the amount of rent paid or Plaintiff's duty to review prospective buyers. Plaintiff also argues that, due to this lack of evidence, Defendant's claims are unsubstantiated and they have not met the burden to establish fraud pursuant to CPLR § 3016. Plaintiff argues that Defendant failed to state an adequate basis for attorney's fees. For these reasons, Plaintiff urges the Court to deny Defendant's motion for default judgment.

Along with opposition papers, Plaintiff submits two cross-motions. Plaintiff cross-moves for an Order pursuant to CPLR § 3012(d), (1) denying Defendant's motion for default judgment, (2) finding that Plaintiff's motion to dismiss is timely or otherwise accepting the late filing of Plaintiff's cross-motion to dismiss, (3) extending Plaintiff's time to reply to Defendant's counterclaims either by reply Answer or Motion to Dismiss. In support of its cross motion, Plaintiff argues that it is entitled to request this relief due to law office failure and the intervening COVID-19 pandemic. Plaintiff argues that they are a solo practitioner, struggling to operate during the COVID-19 pandemic. Plaintiff argues that, due to a clerical error, the time limit to respond to Defendant's Counterclaims was never marked down, resulting in the default. Furthermore, Plaintiff argues that the delay was less than six months, there is no showing that Plaintiff willfully failed to reply, especially due to the intervening COVID-19 pandemic and law office failure, there is no prejudice to Defendant should the Court accept the late filing of Plaintiff's Answer and that there were several meritorious defenses raised in their opposition to Defendant's motion. For these reasons, Plaintiff requests that their cross motion for an Order pursuant to CPLR § 3012 be granted.

Plaintiff also cross-moves for an Order pursuant to CPLR § 3211(a) (1), (6), (7) and (b), (1) denying Defendant's motion for default judgment, (2) finding that Plaintiff's motion to dismiss is timely or otherwise accepting the late filing of Plaintiff's cross-motion to dismiss, (3) finding that Defendant's Answer is untimely filed, (4) finding that Defendant's Counter claims are not properly interposed, (5) finding that Plaintiff has a defense upon documentary evidence that renders Defendant's counterclaims insufficient as a matter of law, (6) finding that Defendant fails to plead or state a cause of action, and (7) dismissing Defendant's defenses should be dismissed is heretofore granted in part and denied in part. Plaintiff argues that, pursuant to CPLR § 3211 (a)(1), Defendant has not submitted sufficient evidence. Plaintiff further argues that, pursuant to § 3211 (a)(6), Defendant's Answer with Counterclaims was untimely, and should be a nullity, which would render Defendant's claims improperly interposed. Plaintiff argues that the Answer with Counterclaims should have been filed at the end of March, but was not filed until May 26, 2020. Plaintiff argues that, pursuant to CPLR § 3211 (a) (7), Defendant has failed to meet the burden required by CPLR § 3016 for claims of fraud, thereby failing to state a cause of action. Finally, Plaintiff argues that, pursuant to CPLR § 3211(b), if Defendant's Answer is determined to be late, then their Counterclaims and defenses should be dismissed. For these reasons, Plaintiff urges the Court to grant their cross-motion pursuant to CPLR § 3211(a) (1), (6), (7) and (b).

In reply to Plaintiff's opposition, Defendant argues that, by filing the RJI on October 2, 2020, Plaintiff essentially vitiated any COVID-19 stays and negated any claims of law office failure. Further, Defendant argues that Plaintiff claims to have meritorious defenses against Defendant's counterclaims, but failed to submit any affidavits from individuals with personal knowledge of the facts of this case. In opposition to both of Plaintiff's cross-motions, Defendant first argues that the first cross-motion should be denied due to the filing of the RJI. Defendant then argues that, pursuant to Plaintiff's claims to CPLR § 3211 (a)(1) and (6), Plaintiff had thirty days to respond to the counterclaims, and instead filed an RJI. More than 30 days have passed since the COVID-19 executive order deadline of November 3, 2020, and Plaintiff has still failed to Answer. Furthermore, Defendant argues that Plaintiff has submitted no proof or affidavits to refute Defendant's counterclaims. As to Plaintiff's claims pursuant to CPLR § 3211(a) (7) and (b), Defendant argues again that their Counterclaims are valid, and that Plaintiff submits no

affidavits to refute these claims. Defendant argues that the annexed affidavit by Defendant proves the misrepresentations and fraud by Plaintiff. Finally, Defendant argues that their Answer with Counterclaims were timely. Defendant was served with the original Summons and Complaint on March 10, 2020 and subsequently filed an Answer with Counterclaims on May 26, 2020. During this time, there was an executive order in place which extended the reply deadline for all motions to November 3, 2020, as a result of the COVID-19 pandemic. For these reasons, Defendant urges the Court to grant his motion for default judgment, and deny both of Plaintiff's cross motions.

Defendant's motion and Plaintiff's First Cross-motion

The interests of justice will best be served by compelling Defendant to accept service of the Plaintiff's late Answer *nunc pro tunc*. Plaintiff has offered a reasonable excuse for the delay in answering, to wit law office failure and the intervening COVID-19 pandemic. Defendant has not made any showing that the delay in answering was willful and has made no showing that they would be prejudiced should this Court extend Plaintiff's time to Answer pursuant to CPLR §3012(d). Due to the foregoing, Defendant's motion for an Order pursuant to CPLR §3215, granting default judgment in favor of Defendant is heretofore denied. Furthermore, Plaintiff's cross motion for an Order pursuant to CPLR §3012(d) is granted in its entirety.

Plaintiff's Second Cross-motion,

Plaintiff's request for an order pursuant to CPLR § 3211(a) (1) is hereby denied. "In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR § 3211 (1), the document relied upon must definitively dispose of [Defendant's] claim." Bronxville v. Webster Town Ctr. Pshp., 634 N.Y.S. 2d 62 (1<sup>st</sup> Dept. 1995). Plaintiff has only submitted documentary evidence in the form of the written agreement which had expired prior to the oral agreement which is the subject of Defendant's counterclaims and an Affidavit from Plaintiff, which is the exact same form of evidence submitted by Defendant. Plaintiff has not submitted documentary evidence sufficient to refute Defendant's counterclaims

Plaintiff's request for an Order pursuant to CPLR § 3211(a) (6) is also denied. CPLR § 3211(a) (6) states that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: with respect to a counterclaim, it may not properly be interposed

in the action.” Plaintiff argues that Defendant’s Counterclaims had been filed late, and should be considered a nullity, therefore not properly interposed. However, Defendant was served with the Summons and Complaint on March 10, 2020. On March 20, 2020, Governor Cuomo issued a number of executive orders as a result of the COVID-19 Pandemic, extending the deadline to reply to a motion to November 3, 2020. Defendant filed his Answer with Counterclaims on May 26, 2020. Therefore, Defendant’s Answer with Counterclaims was timely and properly interposed.

Plaintiff’s request for an Order pursuant to CPLR § 3211(a) (7) is also denied. “It is well settled that on a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR §3211 (7), the pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference.” Taverna v. Mircochip Technology, Inc., 268 A.D. 2d 520, 702 N.Y.S. 2d 104 (2<sup>nd</sup> Dept. 2000). “The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v Morone, 50 NY2d 481 (1980); Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997). Moreover, where the basis for the motion to dismiss is the purported failure to state a cause of action, the court’s attention “should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one.” Rovello v Orofino Realty Co., 40 NY2d 633, 634 (1976). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion. Leon v Martinez, 84 NY2d 83 (1994). Defendant has submitted a sworn affidavit in which he states that there had been an oral agreement between himself and Plaintiff which established the rent which he would pay per month for his pizzeria restaurant, and that Plaintiff would assess prospective buyers as presented by Defendant. Furthermore, Plaintiff argues that Defendant has not met the burden pursuant to CPLR § 3016, for his claims of fraud. However, “there is certainly no requirement of ‘unassailable proof’ at the pleading stage, the complaint must ‘allege the basic facts to establish the elements of the cause of action.’ We therefore held that CPLR § 3016(b) is satisfied when the facts suffice to permit a ‘reasonable inference’ of the alleged misconduct.” Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 883 N.Y.S.2d 147 (2009). Defendant has stated that there had been a misrepresentation by Plaintiff, regarding the assessment of prospective buyers, and that he relied upon this misrepresentation when he presented three

prospective buyers to Plaintiff. Therefore, Defendant has stated facts raising a “reasonable inference” of the alleged misconduct, as per the requirements of the statute.

Finally, Plaintiff’s request for an Order pursuant to CPLR § 3211(b) is also denied. CPLR § 3211(b) states that “a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” As previously determined above, Defendant’s Answer with Counterclaims had been properly interposed and therefore, the defenses raised therein should not be dismissed.

Accordingly, it is

ORDERED and ADJUDGED that Defendant ANTHONY VILLANI D/B/A ANTHONY’S PIZZA’s motion for an Order pursuant to CPLR §3215, granting default judgment in favor of Defendant is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff DIO FL. P.’s cross-motion for an Order pursuant to CPLR § 3012(d) is hereby granted in its entirety. It is further,

ORDERED and ADJUGED that Plaintiff DIO FL. P file an Answer to Defendant ANTHONY VILLANI D/B/A ANTHONY’S PIZZA’s Crossclaims within twenty (20) days of the service of this Decision and Order with Notice of Entry. It is further,

ORDERED and ADJDUGED that Defendant ANTHONY VILLANI D/B/A ANTHONY’S PIZZA accept Plaintiff DIO FL. P.’s answer to Defendant’s Counterclaims *nunc pro tunc*. It is further,

ORDERED and ADJUDGED that Plaintiff DIO FL. P. cross-motion for an Order finding that Defendant’s Answer is untimely is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff DIO FL. P. cross-motion for an Order pursuant to CPLR § 3211 (a) is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff DIO FL. P. cross-motion for an Order pursuant to CPLR § 3211 (a) (6) is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff DIO FL. P. cross-motion for an Order pursuant to CPLR § 3211 (a) (7) is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff DIO FL. P. cross-motion for an Order pursuant to CPLR § 3211 (b) is hereby denied. It is further,

ORDERED and ADJUDGED that Defendant ANTHONY VILLANI D/B/A ANTHONY'S PIZZA shall serve a copy of this Order with Notice of Entry upon the plaintiff within thirty (30) days from the date of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: March 4, 2021



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Hon. Wilma Guzman, J.S.C.