

**Continental Capital Group, LLC v Leah Roebling,
LLC**

2021 NY Slip Op 32160(U)

October 29, 2021

Supreme Court, Kings County

Docket Number: Index No. 503363/21

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-6, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of October 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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CONTINENTAL CAPITAL GROUP, LLC,

Plaintiff

-against-

Index No. 503363/21

LEAH ROEBLING, LLC, KASING CHENG,
ROEBLING LIQUORS, INC., NYC ENVIRONMENTAL
CONTROL BOARD, NYS DEPARTMENT OF
FINANCE, and "JOHN DOES" 1 through 10.

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	9-10, 15-16 _____
_____ Opposing Affidavits (Affirmations) _____	29 _____
_____ Affidavits/ Affirmations in Reply _____	25 _____
Other Papers: <u>Affirmation in support</u> _____	20 _____

Upon the foregoing papers, defendant Roebling Liquors, Inc. (Roebling) moves for an order, pursuant to CPLR 3012 (d), 2004 and 2005, extending the time for Roebling to answer the complaint and compelling plaintiff Continental Capital Group, LLC to accept Roebling's late answer. Plaintiff cross-moves for an order (1) pursuant to CPLR 3215, entering a default judgment against all non-appearing/non-answering defendants in favor

of plaintiff, and (2) appointing a referee to compute the sum due and owing to plaintiff, including attorney's fees.

Plaintiff commenced this action to foreclose a commercial mortgage encumbering the property at 311 Roebling Street in Brooklyn. The mortgage was executed by defendant Leah Roebling, LLC (Leah) on November 25, 2019 to secure a \$499,000 note in favor of plaintiff. According to the complaint, filed on February 10, 2021, Leah defaulted under the mortgage by failing to pay the balance of principal and interest due on the maturity date of May 20, 2020. Plaintiff filed an affidavit of service indicating that Roebling was served with the summons and complaint in this action on March 8, 2021. Roebling filed an answer with counterclaims on June 14, 2021, which was rejected by plaintiff as untimely. Consequently, Roebling brought the instant motion to compel plaintiff to accept its late answer. Plaintiff thereafter cross-moved for a default judgment against Roebling and the other named defendants who failed to timely appear or answer, as well as an order appointing a referee to compute.

“In order to avoid the entry of a default judgment, a defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action” (*Jong Gwon Kim v Strippoli*, 144 AD3d 982, 983 [2d Dept 2016]). Similarly, “[a] defendant who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action” (*Green Tree Servicing, LLC v Weiss*, 180 AD3d 654, 655 [2d Dept 2020] [internal quotation marks omitted]). “The determination of what constitutes a reasonable excuse

lies within the Supreme Court's discretion" (*Gershman v Ahmad*, 131 AD3d 1104, 1105 [2d Dept 2015]). "In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Moore v Day*, 55 AD3d 803, 804 [2d Dept 2008]).

Roebing contends that the delay in answering is excusable because no copy of process was personally served on an officer of Roebing and it was unable to determine if it were permitted to file a responsive pleading during the COVID-19 foreclosure moratorium. In its reply affirmation (NYSCEF Doc No. 25), Roebing references a notice included with the summons and complaint which states "DURING THE CORONAVIRUS EMERGENCY, YOU MIGHT BE ENTITLED BY LAW TO TAKE ADDITIONAL DAYS OR WEEKS TO FILE AN ANSWER TO THIS COMPLAINT." Roebing argues that the language in the notice, combined with "the confusion of an emerging pandemic and the plethora of restrictions on evictions and foreclosures it spawned," led counsel to believe that the statutory time to answer was tolled.

However, even if the court accepts the foregoing as a reasonable excuse for the delay in answering, Roebing has not set forth a potentially meritorious defense to the instant foreclosure action. Roebing argues, in essence, that the lease it entered into with the prior owner on April 19, 2014 is superior to the subject 2019 mortgage and, therefore, plaintiff has no cause of action for foreclosure against Roebing's leasehold interest. However, this contention is belied by section 23.01 of the lease, which provides, in relevant part:

“This Lease and all rights of Tenant hereunder are subject and subordinate in all respect to . . . all mortgages and building loan agreements, including leasehold mortgages and spreader and consolidation agreements, which may now *or hereafter* affect the Land, the Buildings, the Premises . . .” (Emphasis added).

Other than its priority argument rejected herein, Roebing has not demonstrated any other potentially meritorious defense to plaintiff’s action, including the affirmative defense of unclean hands asserted in its answer. Accordingly, Roebing’s motion for leave to file a late answer is denied.

A plaintiff demonstrates its entitlement to a default judgment by submitting proof of service of a copy of the summons and complaint, proof of the facts constituting the causes of action, and proof that the defendant(s) did not appear or answer the complaint within the time allowed (*see* RPAPL 1321 [1]; CPLR 3215 [f]; *HSBC Bank USA v Angeles*, 143 AD3d 671 [2d Dept 2016]; *HSBC Bank USA, N.A. v Traore*, 139 AD3d 1009 [2d Dept 2016]; *Loancare v Carter*, 139 AD3d 817 [2d Dept 2016]; *TCIF REO GCM, LLC v Walker*, 139 AD3d 704 [2d Dept 2016]; *U.S. Bank N.A. v Gulley*, 137 AD3d 1008 [2d Dept 2016]). “Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party’s attorney” (CPLR 3215 [f]). Here, plaintiff established entitlement to a default judgment by submission of the complaint verified by plaintiff’s managing member, Wolf Landau, the supporting affirmation of Wolf Landau, the affidavits of service and the affirmation of plaintiff’s

counsel attesting to the defaults of defendants. Aside from Roebing, none of the named defendants have filed opposition to plaintiff's motion for a default judgment.

Accordingly, plaintiff's cross motion for a default judgment against non-appearing/non-answering defendants and for an order appointing of a referee to compute the amount due under the mortgage, including reasonable attorneys' fees, is granted. Plaintiff is ordered to submit to the court's chambers a proposed long-form order for a default judgment against non-appearing/non-answering defendants, and for an order of reference.

The foregoing constitutes the decision and order of the court.

ENTER.



J. S. C.
ADMINISTRATIVE JUDGE