

Bertoli v Harrison Prop. Group 1 LLC

2021 NY Slip Op 33794(U)

June 23, 2021

Supreme Court, Westchester County

Docket Number: Index No. 56491/2020

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
RICHARD BERTOLI and CATHERINE BERTOLI,

Plaintiffs,

-against-

HARRISON PROPERTY GROUP 1 LLC, MICHAEL
DICOSTANZO, and SAL ATTINA

Defendants.

-----X

DECISION & ORDER

**Index No.: 56491/2020
Sequence Nos. 1&2**

WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 5-33 were read in connection with plaintiffs’ pro se motion (Seq 1), for a default judgment pursuant to CPLR 3215; and defendants’ motion by order to show cause (Seq 2), pursuant to CPLR 3211(a)(1) and (7), to dismiss the Complaint for failure to state a cause of action; or alternatively, if the Court does not grant the instant application, that defendants’ time to serve an Answer to the Complaint be extended.

Based upon the foregoing, the motions are decided as follows:

As for plaintiff’s motion for default, a plaintiff seeking leave to enter a default judgment must file proof of proper service of the summons and the complaint, the defendant’s default, and the facts constituting the claim (*see* CPLR 3215[f]; Glob. Liberty Ins. Co. v Surgery Ctr. of Oradell, LLC, 153 AD3d 606 [2d Dept 2017]). 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 “to avoid the entering of a default judgment or to extend the

time to answer” (Mellon v Izmirligil, 88 AD3d 930, 931 [2d Dept 2011]). There is a strong public policy in favor of resolving cases on their merits whenever possible (Espinal v New York City Health & Hospitals Corp., 115 AD3d 641[2d Dept 2014]). But, “[l]itigation cannot be conducted efficiently if deadlines are not taken seriously...[and] that disregard of deadlines should not and will not be tolerated” (Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C., 5 NY3d 514, 521 [2005]).

Pursuant to CPLR 2004, “(e)xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” Similarly, CPLR 3012(d) states that upon a motion by 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.”

It is within the discretion of the Supreme Court whether to grant such an extension of time (Oliver v Town of Hempstead, 68 AD3d 1079, 1080 [2d Dept 2009]).

In view of the public policy in favor of resolving cases on the merits, the court may excuse a defendant's failure to timely answer where the delay in answering is relatively short, there is no showing of prejudice to plaintiff, a potential meritorious defense exists, and no willfulness on the part of the defendant has been shown (Finkelstein v Sunshine, 47 AD3d 882 [2d Dept 2008]).

Here, there has been no demonstration that plaintiffs have been severely prejudiced by allowing defendants to interpose an answer.

Additionally, defendants contend that Executive Order 202.72 and related Executive Orders tolled any deadlines or time limit with respect to the service of an answer in this proceeding from on or about March 20, 2020 through November 4, 2020. Defendants' pre-answer motion to dismiss raises meritorious defenses that Defendants have to the instant action.

During the Covid-19 pandemic, New York State Executive Order 202.8 was issued, which tolled specific procedural time limits set forth for the commencement, filing and service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state. However, it is silent as to staying the time period to file an answer to a complaint.

Nonetheless, these circumstances occurred during the pandemic, and this state's strong public policy to resolve disputes on their merits, militates against plaintiffs' motion for default judgment and in favor of granting of the defendants' the opportunity to contest this matter on the merits. Defendants' submissions were also sufficient to establish a potentially meritorious defense.

Turning to defendants' pre-answer motion to dismiss, it is well settled that pursuant to CPLR 3211(a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any

cognizable legal theory”¹ (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v. Leader, 74 A.D.3d 1180, [2d Dept 2010]); (Bua v Purcell & Ingraio, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Evtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

¹Internal citations omitted.

Under CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (Leon v Martinez, 84 NY2d 83, 88 [1994]; 730 J&J LLC v Fillmore Agency, Inc., 303 AD2d 486 [2d Dept 2003]; Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]). The documentary evidence offered must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable (Rabos v R&R Bagels & Bakery, Inc., 100 AD3d 849 [2d Dept 2012]). “Judicial records, as well as documents reflecting out-of-court transactions such as mortgage, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]).

Here, on or about April 26, 2017, defendant, Harrison Property Group 1, LLC, as landlord, and plaintiffs, as tenants, entered into a written three (3) year lease, effective from May 15, 2017, until May 31, 2020, for a home located at 150A Woodside Avenue in West Harrison, for a monthly rent of \$4,600 for the first year increasing to \$4,700 in the second year and \$4,800 the 3rd year ending May 31, 2020.

The first of two causes of action in the Complaint sounds in unjust enrichment based in part, on "excessive rent", and that plaintiffs were unjustly enriched by the promotion and advertising premises to have a gourmet kitchen and marble baths, in order to charge excessive rent. Plaintiffs also contend that defendants were unjustly enriched as plaintiffs spent over \$5,000 installing shades, bath shower rod and door which would not have been done had plaintiffs known the house had many defects. Plaintiffs continue that defendants have breached their warranty of habitability and were unjustly enriched by the excess of monthly rent paid over the estimated value of the house without the essential service of garage parking, proper kitchen

and bathroom fixtures, plus the inability to enjoy sound free living, which plaintiffs believe exceeded \$2,000 a month.

For a claim for unjust enrichment, it must be shown that the other party was enriched, at that party's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Old Republic Natl. Tit. Ins. Co. v Luft, 52 AD3d 491 [2d Dept 2008]). The existence of a valid and enforceable written contract covering a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter (Hamlet at Willow Creek Dev. Co., LLC v Ne. Land Dev. Corp., 64 AD3d 85, 102, [2d Dept 2009]). It follows that plaintiffs' unjust enrichment claim-the warranty of habitability arises from the subject lease, which is a written contract and cannot form the basis of a quasi-contract, unjust enrichment cause of action (Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 572 [2005]).

The second cause of action is for the failure to return the security deposit and failure to notify plaintiffs of the location of the security deposit. Plaintiffs believe that their deposit of \$9,200 was not deposited in an account as required by New York law, and, Defendants, after a number of requests and written demand refused to inform plaintiffs who, if anyone held the deposit and where it was located in violation of New York law. The court finds that plaintiffs stated a cause of action, and defendants' motion to dismiss this cause of action is denied.

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision. This constitutes the decision and order of the court.

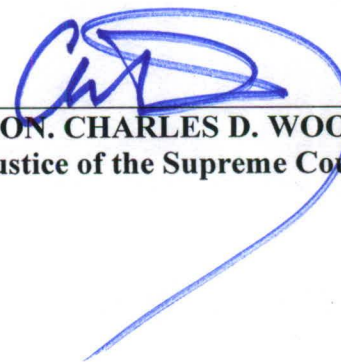
Accordingly, it is hereby

ORDERED, that plaintiffs' motion for a default judgment (Seq 1) is **denied**, and defendants are directed to serve an Answer or otherwise respond to the complaint within 30 days of entry of this order, and plaintiffs are directed to accept same as timely interposed, and plaintiffs may respond to said answer in accordance with the mandates of the CPLR; and it is further

ORDERED, that defendants' motion to dismiss (Seq 2) is granted to the extent that plaintiffs' cause of action for unjust enrichment is dismissed; and denied otherwise.

The Clerk shall mark his records accordingly.

Dated: June 23, 2021
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF