

Goodman v Leschins
2022 NY Slip Op 31309(U)
April 21, 2022
Supreme Court, New York County
Docket Number: Index No. 157204/2021
Judge: Douglas E. Hoffman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DOUGLAS HOFFMAN PART 44

Justice

-----X

LAWRENCE GOODMAN,

Plaintiff,

- v -

BENJAMIN LESCHINS, SAMUEL LESCHINS, JOHN DOE,
JANE DOE,

Defendant.

-----X

INDEX NO. 157204/2021

MOTION DATE 01/12/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this ejectment action, defendant Benjamin Leschins¹ moves for an order vacating any default and permitting him to file an answer. This motion follows on the heels of plaintiff-

¹ The moving papers are not clear as to the actual movant as the notice of motion states that, upon the affidavit of defendant Benjamin Leschins, “undersigned will move before the HON. DOUGLAS E. HOFFMAN of the Supreme Court of State of New York for the County of New York in Motion Submissions Part of said court located at 60 Centre Street, Room 130, New York, New York 10007 on the 19th day of January, 2022 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order vacating any default hereunder and granting leave to interpose a verified answer in this action...” The undersigned is Ralph Silverman, Esq., attorney for defendants Benjamin Leschins and Samuel Leschins. Of course, Benjamin Leschins’s alleged excusable default is not applicable to Samuel Leschins, who did not submit any affidavit in support of what appears to be his brother’s motion. In any case, Samuel Leschins’s time to answer has not expired, as he has at least ten days from April 20, 2022, the date on which his pre-answer motion to dismiss certain causes of action was denied, to file his answer. See CPLR 3211(f) “Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.” The Commentary appears to support the ten-day extension even where movant does not seek to dismiss the entire complaint, but rather certain causes of action: McKinney C3211:68. Time to Respond Where Only Part of Pleading Attacked.

“Assume that the plaintiff has pleaded multiple causes of action in the complaint. The defendant moves to dismiss the first one only. Must the defendant serve an answer to the others within the original responding time? No, because a CPLR 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it. Siegel, New York Practice § 277, n.3 (Connors 5th ed.), citing United Equity Services, Inc. v. First Amer. Title Ins. Co. of N.Y., 75 Misc.2d 254, 347 N.Y.S.2d 377 (Sup. Ct., Nassau County 1973); see Chagnon v. Tyson, 11 A.D.3d 325, 783 N.Y.S.2d 29 (1st Dep’t 2004). Thus, where the defendant moves to dismiss claim #1, she should be able to rely on subdivision (f) and its extension of time to serve her answer to the other claims (which answer would of course respond to the first claim, too, if the CPLR 3211 motion to dismiss it is denied).

receiver Lawrence Goodman's motion (sequence 002) for an order entering a default judgment against defendant Benjamin Leschins and for other relief. Plaintiff opposes the instant motion and cross moves for an order sanctioning Mr. Leschins and directing that neither Benjamin Leschins nor Samuel Leschins be permitted to file any future motions without the prior permission of the court based upon frivolous conduct. Benjamin Leschins opposed the cross motion.

The context of the instant motion and cross motion is important. This plenary action arises from a matrimonial action pending in this Court, Index 304677/2013, titled *Eileen Leschins v Preston Leschins*, in which plaintiff therein Eileen Leschins sought to sell the subject condominium unit. Ms. Leschins' efforts to sell the condominium came after many years of litigation and numerous motions, wherein Preston Leschins (who is a matrimonial law attorney)², extensively delayed discovery in the matrimonial action³ and caused the condominium unit to fall into default despite multiple orders for him to contribute to carrying charges for the condominium unit. In the matrimonial action, upon a lengthy and detailed record, this court appointed Lawrence B. Goodman, Esq. as receiver to sell the condominium unit. After it became known that, apparently, Preston Leschins installed his adult son Benjamin Leschins, and now his 18-year-old son Samuel Leschins, in the condominium unit, effectively preventing its sale, this court issued a March 22, 2021 supplemental order authorizing the Receiver to "undertake any

² The matrimonial action was referred to the undersigned after the prior presiding Justice recused herself as Preston Leschins was appearing before her both in his capacity as an attorney representing other litigants and as a matrimonial litigant himself.

³ The delays caused by Preston Leschins's litigation tactics formed the predicate for this court appointing a Special Master for discovery in the matrimonial action. Despite orders being issued to engage meaningfully in discovery following the recommendations of the Special Master, Mr. Leschins failed to do so, resulting in an order dated November 30, 2020, in which, *inter alia*, this court partially precluded Preston Leschins from presenting evidence in the matrimonial action concerning equitable distribution, spousal maintenance and attorney's fees. *See Nov. 30, 2020 order (pre-NYSCEF) p. 19.*

and all efforts, including but not limited to the commencement of an action or proceeding (including, but not limited to, an ejectment action) to remove any and all occupants from the condo”. The receiver retained counsel to commence the instant ejectment action.

Plaintiff commenced the instant action by filing the summons and complaint on August 3, 2021. Service was effectuated on August 12, 2021. At the time of the filing of the instant motion, no defendant had filed an answer. In addition to the cause of action for ejectment, the complaint asserts causes of action for injunctive relief to prevent defendants from encumbering the premises, use and occupancy and slander of title.

During numerous court conferences in the underlying matrimonial action, Preston Leschins represented at one point that his son Benjamin Leschins was residing in the subject condominium unit and that his other son, Samuel Leschins, resided with Preston Leschins in Florida. As the condominium unit was supposed to be sold, the court asked Benjamin Leschins to appear in the matrimonial action to discuss his occupancy of the condominium unit. During the February 11, 2021 court appearance, Benjamin Leschins stated that he had retained Sharon Tritto, Esq. as his attorney. On the next court date, Benjamin Leschins did not appear, although he was invited to do so. His father, Preston Leschins, spoke on behalf of the son and claimed that Benjamin Leschins was willing to work with the receiver’s broker as long as Benjamin Leschins could be present *in* the apartment when the broker brought in a prospective buyer, citing COVID concerns, although the logic of that assertion was not readily apparent. As Preston Leschins indicated that he allegedly was attempting to find a buyer or sublessee for the condominium unit, action not authorized by the court, the court issued an order that day directing Husband not to enter into any agreement to sublet, list or show the apartment. The court directed Husband to take down any website or listing of the condominium and not to permit any

additional individual to move into the apartment. These orders came after the court issued a November 30, 2020 preclusion order against Husband based upon extreme dilatory tactics and failure to obey numerous court orders regarding discovery over a period of many years. In that decision and order this court noted,

Here, as in *St. Angelo* and *Stratton*, the Condo is in imminent danger of foreclosure. Similarly, Defendant [Preston Leschins] concedes that he is able to secure the funds to make the payments necessary in order to avoid foreclosure of this asset (although he states he would offer to do so only under certain conditions), and defendant has not offered any impediment to him making such a payment for the apartment he has lived in all these intervening years.

Additionally, *Husband's counsel admitted that Husband and their son are no longer in the Condo*, and Husband's counsel also stated that Husband would consent to Wife moving back into the Condo (which she stated she does not wish to do). See *Angiolillo v. Christie's, Inc.*, 1 AD3d at 442. *Consequently, the Condo is not only at risk of foreclosure, but also, now empty.* Dec. and Order Nov. 30, 2020, p. 14 (emphasis added).

Further, this court stated in that order at p. 16:

...it is beyond question that defendant, a member of the bar, represented by several law firms throughout this litigation, has, through the seven years of litigation, continuously and repeatedly refused to comply with numerous court orders. This dilatory and obstructive conduct can only be construed as willful and contumacious. Defendant has repeatedly been warned by the court and his blatant disregard of the court's rules and procedures cannot be treated as without consequence.

This order provides great detail concerning the underlying matrimonial action relevant to the instant motion and the court will take judicial notice of its own order.

On the following court date, March 3, 2021, Ms. Tritto appeared for Benjamin Leschins, who had been invited to the appearance, but did not attend. Ms. Tritto represented that her client was unable to move from the condominium unit for a variety of reasons. As Ms. Leschins was the sole owner of the condominium unit and the unit was facing foreclosure, the court ordered the sale of the premises. Benjamin Leschins appeared without his attorney at the following court

date, April 26, 2021. At that hearing, there was much discussion concerning the sale of the condominium unit and the appointment of the receiver.

According to the affidavit of service in the instant plenary action, Benjamin Leschins was served with the summons and complaint on August 11, 2021. NYSCEF Doc. 2. Neither named defendant has ever filed an answer to the complaint. The receiver filed a motion, *inter alia*, for a default judgment (mot. Seq. 002, NYSCEF doc. 16) on November 2, 2021. Thirty-eight days later, on December 10, 2021, Benjamin Leschins, represented by counsel, filed the instant notice of motion to vacate his default, making it returnable 40 days later, January 19, 2022.

To vacate his default, movant had to show an excusable default and a meritorious defense. He has not made a sufficient showing of either prong. In support of his motion, Benjamin Leschins asserts that he did not file an answer because he was waiting for his brother Samuel's motion to dismiss certain causes of action in motion sequence 001 to be decided and that he thought that his brother's motion was filed on his behalf as well. As noted in this court's decision in motion seq. 001, NYSCEF Doc. 57:

movant, a non-attorney, cannot represent his brother, defendant Benjamin Leschins. *Judiciary Law sec. 478; Lanzuter Benevolent Assn. v Altman*, 160 AD3d 575, 576 [1st Dept 2018]. This is a non-waivable defect. *Id.*, citing *Salt Aire Trading LLC v Sidley Austin Brown & Wood*, 93 AD3d 452, 453 [1st Dept 2012]. That branch of the motion that seeks relief on behalf of any defendant other than movant is stricken. *Id.*

Thus, there was no legal basis for movant herein, represented by counsel, to believe that Samuel Leschins's motion was filed on his behalf. In addition, Samuel Leschins made clear in open court with Benjamin Leschins present that his motion was filed only on his own behalf. Furthermore, it appears that 18 year-old Samuel Leschins's motion 001 was filed with the assistance of an attorney, although no such attorney assistance is disclosed. *See, e.g. Citibank (S. Dakota) N.A. v. Howley*, 31 Misc 3d 1216(A) [Civ. Ct., Richmond Cnty 2011] (addressing


concerns with undisclosed “ghostwriting” by counsel); *see also* NYSBA Op. 613 (1990) and NYC Bar Op. 1987-2 (requiring disclosure before counsel ghostwriting); *c.f.*, NYCLA Op. 742 (April 16, 2010). During the November 19, 2021 court appearance, counsel for Benjamin Leschins noted that he had been in contact with defendants’ father, Preston Leschins, about this matter. Any objective observer of the underlying matrimonial action and this ejectment action would know that the failure of Benjamin Leschins to answer and then to file a notice of motion in violation of court rules 38 days later, returnable 40 days after that, falls squarely within Preston Leschins’s strategy to delay continuously the resolution of the matrimonial matter and to interfere with the sale of Ms. Leschins’s solely owned condominium, which faces a foreclosure action. Under the circumstances presented, there is no excusable default. Thus, the court need not address movant’s claim of a meritorious defense. *Wilson v Wilson*, 201 AD3d 581 [1st Dept 2022]; *Matter of Jayden J.*, 184 AD3d 527 [1st Dept 2020] [citation omitted]; *Neely v. Felicetti*, 177 AD3d 484 [1st Dept 2019].

Were the court to address movant’s claim of a meritorious defense, the court would find that movant did not set forth a sufficient showing of a meritorious defense. Benjamin Leschins claims that his parents promised him that he would never become homeless and that his brother would not have to live alone without him in their apartment during his senior year of high school. The court addresses here only Benjamin Leschins’s claimed meritorious defense. This undocumented single claim with no detail is squarely contradicted by the written notice to quit served upon Mr. Leschins on July 29, 2021. NYSCEF doc. 24. In addition, such a claim would be violative of the statute of frauds. “The statute of frauds bars oral agreements which, by their terms, cannot be performed within one year from their making unless there is some note or memorandum in writing, subscribed by the party to be charged therewith (*see* General

Obligations Law § 5-701[a][1]).” *Bent v. St. John’s Univ. N.Y.*, 189 Ad3d 973, 974 [2d Dept 2020]. This alleged meritorious defense will be addressed further in this court’s decision in motion sequence 002, to be rendered shortly.

Based upon the record adduced herein, defendant Benjamin Leschins’s motion to vacate his default is without merit and is denied. The court denies the cross-motion for sanctions in the form of attorney’s fees and costs *without prejudice* to renewal at the conclusion of this action. Based on the record thus far, it is not clear that the motion to vacate the default is frivolous; however, this defendant’s actions must be viewed in the context of the greater case. Therefore, at the conclusion of the case, plaintiff may renew his motion for sanctions if appropriate and so advised. Any relief not granted is denied. This constitutes the decision and order of the court.

04/21/2022
DATE


 HON. DOUGLAS E. HOFFMAN, J.S.C.

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