

Kang v Kang
2022 NY Slip Op 31807(U)
June 6, 2022
Supreme Court, New York County
Docket Number: Index No. 159533/2020
Judge: Debra James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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DAMIEN KANG,

Petitioner,

- v -

CHRISTIAN KANG, KANG CORRECTIVE CHIROPRACTIC,
P.C.,

Respondent.

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INDEX NO. 159533/2020

MOTION DATE 05/11/2022

MOTION SEQ. NO. 003

**ORDER - AMENDED +
RESETTLED (MOTION
RELATED)**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for

DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the Order of June 3, 2022 resolving motion sequence 003 in this action is VACATED, RESETTLED AND CORRECTED, pursuant to CPLR § 5019(a) as follows:

ORDERED that, to the extent that it seeks to dismiss the petition on the grounds of abandonment, the motion of respondents is denied; and it is further

ORDERED that, within fifteen (15) days of service of a copy of this Order with notice of entry, petitioner shall post on NYSCEF a notice of appearance; and it is further

ORDERED that should petitioner need assistance with filing such notice of appearance, he shall contact the New York County

Supreme Court Help Center for Unrepresented Persons, 60 Centre Street, Room 116 (646-386-3120 or SFC-HelpCenterNY@nycourts.gov for help with electronic filing only); and it is further

ORDERED that, to the extent that it seeks to sever the counterclaims, the motion of respondents is denied; and it is further

ORDERED that, to the extent that it seeks a trial of the counterclaims, the motion of respondents is granted and the proceeding is set down for a trial on the petition and counterclaims; and it is further

ORDERED that a copy of this order with notice of entry be served by the movants upon the petitioner by regular first-class mail at his last known address and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), the latter who is directed to place this proceeding on the appropriate trial calendar for the trial of the claims and counterclaims hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

The court recognizes that petitioner did not post his opposition papers and request for an adjournment until March 4, 2022, the return date of the motion to dismiss. As such papers were wholly untimely, the court does not consider same. However, given that in his reply papers, counsel for respondents acknowledges and appends petitioner's responsive papers that he represents that such counsel received by e-mail from petitioner, in time for respondents to post a reply, the court considers such opposition papers in opposition to respondents' motion to dismiss the petition.

Respondents are correct that petitioner has not complied with the directive of the Order entered on November 15, 2021, which directed petitioner to "notify the Clerk of the Part of [his] decision [to represent himself] in writing, within 30 days" after the mailing by his former attorney, "of a copy of this order with notice of entry" (NYSCEF Document 36). However, the court finds that petitioner constructively appeared when he posted papers in opposition, though wholly untimely, to the herein motion to dismiss of the respondents. Finding no prejudice to respondents with respect to the absence of a formal notice of appearance, the court shall now direct petitioner to formally post such notice of appearance on NYSCEF.

On September 2, 2021, former counsel for petitioner served, upon respondents and the Office of the General Clerk, the Order entered on August 6, 2021 (NYSCEF Document Number 28), which Order set the case down for trial. Thereafter, on September 2, 2021, such counsel also posted the Note of Issue and Certificate of Readiness. A review of the NYSCEF docket shows that on that date, counsel for petitioner moved by show cause order to be relieved. The Order granting such relief to petitioner's now former counsel, stayed the proceeding for 40 days from service of such Order with notice of entry. As stated by respondents' counsel, such stay expired on December 10, 2021.

However, there is no evidence of an unanswered clerk's calendar call or of this case being marked "off" or struck from the calendar. Thus, there are no grounds for dismissal of the petition pursuant to CPLR 3404. Nor are respondents entitled to dismissal of the petition on the grounds of lack of petitioner's prosecution pursuant to CPLR 3216, as respondents have not met the strictures of that statute. See Wilmington Trust, National Association v Mausler, 192 AD3d 1212, 1213 (3d Dept 2021).

Finally, the fourth counterclaim for declaratory judgment interposed in the answer of respondents raises some of the same issues, adjudication of stock ownership, for example, that are implicated in the petition for corporate dissolution. To that extent, there is no prejudice to respondents, who seek a trial

before this court with respect such declaration. See In re Three Hours Plants and Flowers, Ltd., 135 AD2d 396 (1st Dept 1987).

Debra A. James

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<u>6/6/2022</u>			<u>DEBRA JAMES, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>
		<input type="checkbox"/> DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			REFERENCE