

**New Pelham Parkway N. LLC v Prieto**

2022 NY Slip Op 32024(U)

June 17, 2022

Supreme Court, New York County

Docket Number: Index No. 655609/2020

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

*Justice*

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INDEX NO. 655609/2020

NEW PELHAM PARKWAY NORTH LLC,  
NEW MATTHEWS AVENUE LLC,  
NEW PARKWAY TERRACE LLC,  
NEW PELHAM PARKWAY SOUTH LLC,  
Plaintiffs/  
Judgment Creditors,

MOTION SEQ. NO. 001

- v -

D'WAYNE PRIETO,  
PRIETO HOLDINGS LLC,  
WARD CAPITAL LLC,

**DECISION + ORDER ON  
MOTION**

Defendants,

WARD CAPITAL MANAGEMENT LLC,  
Nominal-Defendant/  
Judgment/Debtor.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25

were read on this motion to/for

DEFAULT JUDGMENT

In this declaratory judgment and fraudulent conveyance action, plaintiffs seek to enforce a monetary judgment that was entered against WARD CAPITAL MANAGEMENT LLC (“nominal defendant” or “judgment debtor”) and against D’WAYNE PRIETO, PRIETO HOLDINGS LLC, and WARD CAPITAL LLC (“defendants”).

The claims made in this action are incident to a failed \$60 million real estate transaction involving plaintiffs and the nominal defendant. In their complaint, dated October 23, 2020, plaintiffs allege that in 2013, the nominal defendant placed into escrow \$1 million as down payment on a \$60 million real property purchase with plaintiffs, who were the sellers of the property. The transaction failed to close due to the nominal defendant’s inability to obtain the necessary funding for the purchase. In an action in Bronx County Supreme Court, it was held that the nominal defendant breached the purchase agreement and plaintiffs were awarded the release from escrow of the \$1 million down payment.<sup>1</sup> The Appellate Division, First Department upheld this decision, and judgment was entered in 2018 against the nominal defendant.<sup>2</sup> As of the date of the filing of the instant complaint, it is claimed that the outstanding judgment and

<sup>1</sup> *Ward Capital Mgmt. v New Pelham Parkway N. LLC*, NYLJ, Feb. 8, 2018 at 28 (Sup Ct, Bronx County 2018).

<sup>2</sup> *Ward Capital Mgt. LLC v New Pelham Parkway N. LLC*, 165 AD3d 477 (1st Dept 2018).

counsel fees owed by the nominal defendant remain in excess of \$600,000.00. (NYSCEF Doc. No. 1, *summons and verified complaint*.)

Plaintiffs now move the court, pursuant to CPLR 3215, for a default judgment against defendants for their failure to interpose an answer or otherwise appear in this action. Specifically, plaintiffs seek an order “(i) granting [p]laintiffs a default judgment in the sum of \$679,137.63 on their first cause of action for a declaratory judgment, plus nine (9%) percent interest from the date of entry; (ii) granting [p]laintiffs a default judgment in the sum of \$679,137.63 on their second through fifth causes of action, setting aside all conveyances from Ward Capital Management to Prieto, Ward Capital, and Prieto Holdings, plus nine (9%) percent interest from the date of entry; (iii) severing and granting [p]laintiffs reasonable counsel fees incurred, costs and disbursements incident to this action in an amount to be determined in a separate application to the Court.” (NYSCEF Doc. No. 6, *notice of motion*; NYSCEF Doc. No. 7, *affirmation in support of motion*.)

After plaintiffs served the CPLR 3215 motion upon the defendants and the nominal defendant, attorney Bernard H. Jackson, III, appeared in this action for defendants (but not the nominal defendant) on November 9, 2021. (NYSCEF Doc. No. 23, *notice of appearance*). On that day, defendants filed opposition to the instant default judgment motion. (NYSCEF Doc. No. 24, *affirmation in opposition to motion*.)

Defendants’ opposition consist of a two-page attorney affirmation by Jackson. Therein, Jackson, avers that defendants are not parties to any contract with plaintiffs, and that the court has no personal jurisdiction over defendant PRIETO because said defendant was not properly served with the summons and complaint given that the affidavit of service “does not identify any party known to [d]efendant Prieto.” Jackson, further avers that the pleadings are “insufficient to attach the judgment against Ward Capital Management, LLC to non-parties and such pleadings do not rise to the necessary legal standard to extend liability to the [d]efendants, who are independent third parties.” Jackson’s opposition thus requests that the court deny plaintiffs’ motion for default judgment and dismiss the complaint.

In reply, plaintiffs argue that defendants’ opposition fails to show a reasonable excuse for the default and a meritorious defense to the claims made. First, plaintiffs point out that defendants failed to submit an affidavit by someone with personal knowledge or any documentary support. Second, plaintiffs argue that defendants failed to offer any reasonable excuse for their default. Third, plaintiffs maintain that defendants’ opposition fails to show any meritorious defense to warrant denial of the default judgment motion (NYSCEF Doc. No. 25, *Barnes’ reply affirmation*).

CPLR 3215(a) provides, in pertinent part, that when “a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him [/or her].” To establish entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (*See PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt v. North Shore-LIJ Health Sys.*, 140 AD3d 417, 317 [1st Dept 2016].) An application for a

default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim or a complaint verified by a person with actual knowledge of the facts surrounding the claim. (See *Zelnick v Biderman Indus. U.S.A., Inc.*, 242 AD2d 227, 229 [1st Dept 1997]; *Hazim v Winter*, 234 AD2d 422, 422 [2d Dept 1996].)

Pursuant to CPLR 3012(d), “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 a showing of reasonable excuse for delay or default.” Moreover, the court has discretion and authority to grant relief pursuant to CPLR 3012(d), *sua sponte*, even in the absence of a cross-motion seeking such relief. (See *Willis v New York*, 154 AD2d 289, 289-290[1st Dept 1989] citing *Shure v Westhampton Beach, Inc.*, 121 A.D2d 887 [1st Dept 1986].) The Appellate Division, First Department has held that the following factors “must . . . be considered and balanced” in determining whether a court should exercise its discretion in granting relief pursuant to CPLR 3012(d), including “the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense.” (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017] [citations omitted].)

Here, while plaintiffs present a plethora of allegations in the summons and complaint in support of their claims, defendants have now appeared by counsel and raise colorable defenses to plaintiffs’ claims. Moreover, the court finds that defendants’ delay in appearing was not unduly protracted, especially on account of the COVID-19 pandemic, to cause prejudice to plaintiff. In addition, plaintiffs’ complaint shows that WARD CAPITAL MANAGEMENT was the party against whom judgment was awarded in the prior proceeding, said judgment which plaintiffs now seek to recover against defendants. It is undisputed that defendants were not parties to that prior proceeding. Therefore, to the extent defendants’ opposition, however barebones, alleges that plaintiffs’ pleadings are insufficient to attach the judgment against WARD CAPITAL MANAGEMENT LLC to “non-parties,” being PRIETO, PRIETO HOLDINGS LLC, and WARD CAPITAL LLC, defendants’ opposition has raised a meritorious defense to the action sufficient to deny plaintiffs’ motion.

Furthermore, although defendants’ counsel avers that defendant PRIETO was not served with process, warranting dismissal of the action based on lack of personal jurisdiction, the court notes that the allegations challenging service were not made by someone with personal knowledge. Accordingly, after considering all arguments, balancing all relevant factors and considering the strong public interest in resolving cases on the merits, it is hereby

**ORDERED** that the motion for a default judgment is denied and plaintiffs are compelled to accept defendants’ answer; and it is further

**ORDERED** that defendants shall interpose an answer within fifteen (15) days after this decision and order is uploaded to NYSCEF; and it is further

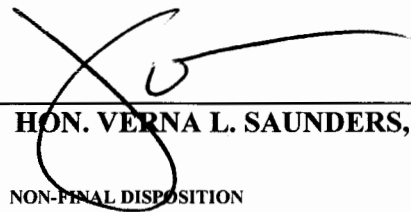
**ORDERED** that to the extent defendants’ opposition seeks to dismiss the action, that motion is denied without prejudice; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NSYCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiffs; and it is further

**ORDERED** that the parties are directed to participate in a preliminary conference on August 17, 2022, details which shall be provided no later than, August 15, 2022.

This constitutes the decision and order of this court.

June 17, 2022



**HON. VERNA L. SAUNDERS, JSC**

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"/>	