

**Board of Mgrs. of 444 E. 57th St. Condominium v  
Maccioni**

2022 NY Slip Op 33284(U)

September 30, 2022

Supreme Court, New York County

Docket Number: Index No. 156528/2021

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33

Justice

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INDEX NO. 156528/2021

BOARD OF MANAGERS OF 444 EAST 57TH STREET
CONDOMINIUM,

MOTION DATE 11/03/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

MAURO MACCIONI, JOHN DOE, JANE DOE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, and oral argument which took place on June 8, 2022, with Rachel Lust, Esq. appearing on behalf of Plaintiff Board of Managers of 444 East 57th Street Condominium ("Plaintiff") and Patrick Binakis, Esq. appearing on behalf of Defendant Mauro Maccioni ("Mauro"), Plaintiff's motion for default judgment is denied and Defendant's motion to compel acceptance of an Answer is granted.

I. Background

This is an action seeking foreclosure on a lien placed on Defendants unit located at 444 East 57th Street, Unit 1A/2A, New York, New York 10022 (the "Premises") (NYSCEF Doc. 1). It is alleged that Defendant failed to pay common charges, capital assessments, late fees, and attorneys' fees incurred by Plaintiff in attempting to collect such unpaid sums (id. at ¶ 1).

Plaintiff filed its Complaint on July 12, 2021 (id.). After multiple failed attempts at personal service, Plaintiff resorted to service via "nail and mail" (NYSCEF Doc. 12). Plaintiff then moved for default judgment on October 12, 2021 (NYSCEF Doc. 17). On November 4, 2021, counsel

for Defendant filed a notice of appearance (NYSCEF Doc. 29). Defendant then cross-moved to dismiss the Complaint pursuant to CPLR 3211(a)(4) or in the alternative, compelling Plaintiff to accept Defendant's proposed answer pursuant to CPLR 3012(d) (NYSCEF Doc. 33).

Defendant points out that there is parallel litigation that was commenced July 15, 2020 wherein Plaintiff's sought a money judgment against Defendant for the sums they seek in this foreclosure action (the "2020 action") (NYSCEF Doc. 40). Defendant asserts that pursuant to CPLR 3211(a)(4), since Plaintiff seeks the same relief, this action should be dismissed (NYSCEF Doc. 34). Defendant claims that if this action is not dismissed, his default should be vacated and his Answer accepted, since Defendant was in Europe when he was served and therefore had no knowledge of this action (NYSCEF Doc. 37). Defendant also claims he has a meritorious defense because he disputes the authenticity of the documents provided in support of the motion for default judgment (NYSCEF Doc. 34).

Plaintiff, in reply, states the action should not be dismissed since Real Property Law ("RPL") Article 9-B § 339-aa allows for a suit to recover a money judgment for unpaid common charges without foreclosing or waving the lien securing the same, and vice versa (NYSCEF Doc. 44). Moreover, Plaintiff states that Defendant has failed to provide a reasonable excuse to vacate default (*id.*)

In New York, public policy favors resolving cases on their merits (*Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]). To successfully oppose a motion for default judgment, a Defendant must demonstrate both a reasonable excuse for the default and a meritorious defense to Plaintiff's claims (*Genao v Salcedo Maintenance Corp*, 168 AD3d 528, 528-529 [1st Dept 2019]). Whether Defendant demonstrates a reasonable excuse for default and a meritorious

defense is within the discretion of the Court (*Oberon Securities v Parmar*, 135 AD3d 446 [1st Dept 2016]).

Moreover, CPLR 3012(d) provides that “upon the application of 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.”

Granting an extension of time to answer is within the discretion of the Court (*Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]).

In lieu of the clear statutory language of RPL § 339-aa, the Court denies Defendant’s cross motion to dismiss the Complaint. However, the Court finds Defendant has presented a reasonable excuse warranting denial of Plaintiff’s motion for default judgment. Plaintiff has provided a sworn affidavit that he was in Italy from April 15, 2020 through October 7, 2021 and has shown that his flight returning from Europe to New York was not until October 7, 2021 (NYSCEF Doc. 37). Further, although Defendant’s counsel was representing Plaintiff in the 2020 action; upon Plaintiff effectuating service in this action, Plaintiff’s counsel apparently did not mention to Defendant’s counsel the existence of the present action until Defendant had “defaulted” (NYSCEF Doc. 34).

Similarly, the Court finds Defendant has shown possible meritorious defenses. The proposed Answer has numerous affirmative defenses as well as counterclaims against Plaintiff (NYSCEF Doc. 35). The combination of Defendant’s reasonable excuse for default, coupled with the possible meritorious defenses, warrants denying Plaintiff’s default judgment motion and granting Defendant’s motion to compel acceptance of his proposed answer.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for default judgment is denied; and it is further,

ORDERED that Defendant's cross-motion to dismiss the Complaint is denied; and it is further,

ORDERED that Defendant's cross motion seeking to compel acceptance of his Answer is granted, and the Answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further,

ORDERED that counsel for Defendant is to serve a copy of this order with notice of entry on Plaintiff and the Clerk of the Court within ten (10) days of this decision and order.

This constitutes the decision and order of the Court.

9/30/2022  
DATE

Mary V Rosado  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: