

Franpearl Equities Corp. v Priest

2022 NY Slip Op 33468(U)

October 14, 2022

Supreme Court, New York County

Docket Number: Index No. 155648/2021

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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FRANPEARL EQUITIES CORP.,
Plaintiff,

- v -

BENJAMIN PRIEST and SHELBY PRIEST,
Defendants.

INDEX NO. 155648/2021

MOTION DATE 06/29/2022, 09/26/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24

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

Motion sequence nos. 001 and 002 are consolidated for decision.

This action arises out of an alleged breach of a residential lease. In motion sequence no. 001, plaintiff Franpearl Equities Corp. moves, pursuant to CPLR 3215, for a default judgment against defendants Benjamin Priest (Benjamin) and Shelby Priest (Shelby) (together, defendants). In motion sequence no. 002, defendants move, pursuant to CPLR 317 and 3012 (d), to vacate their default and for an extension of time to answer or appear in this action.

Background

Plaintiff owns the building located at 12 West 68th Street, New York, New York (the Building) (NYSCEF Doc No. 12, Ashley R. Elem affirmation, Ex B, ¶ 6). On May 8, 2020, plaintiff, as owner, and defendants, as tenants, entered into a written lease for apartment PH 5A (the Apartment) at the Building for a two-year term commencing June 1, 2020 and ending May 31, 2022, with monthly rent set at \$7,600 (id., ¶¶ 8-9). Defendants allegedly failed to pay the

monthly rent due in December 2020 and February 2021 and vacated and surrendered the Apartment to plaintiff in February 2021 (*id.*, ¶¶ 12-14). Plaintiff has since re-let the Apartment for \$6,600 per month (*id.*, ¶¶ 25-26).

Plaintiff commenced this action on June 11, 2021 (NYSCEF Doc No. 1). The amended complaint asserts two causes of action for (1) \$45,072 in unpaid rent and additional rent and (2) attorneys' fees under the lease. Plaintiff now moves for a default judgment against defendants. Defendants move separately to vacate their default and for an extension of time to answer the complaint. Plaintiff did not file any opposition to defendants' motion.

Discussion

An application for a default judgment must be supported with proof of service of the summons and complaint, proof of the facts constituting the claim, and the default (CPLR 3215 [f]). “To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense” (*Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]). It is within the court's discretion to determine what constitutes a reasonable excuse (*see Xiaoyong Zhang v Jong*, 195 AD3d 435, 435 [1st Dept 2021]). Factors to consider include “the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits” (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012] [internal quotation marks and citation omitted]).

CPLR 3012 (d) allows the court to extend a party's “time to appear or plead ... upon a showing of a reasonable excuse for delay or default.” Where a default judgment has not yet been entered, the party moving to serve a late answer is not required to demonstrate the existence of a

potentially meritorious defense (*Pichardo v 969 Amsterdam Holdings LLC*, 176 AD3d 571, 572 [1st Dept 2019]).

Addressing defendants' motion first, defendants have satisfied their burden under CPLR 3012 (d). Benjamin avers that he and his wife, Shelby, vacated the Apartment on February 15, 2021, and that defendants have resided at 12421 Rochedale Lane, Los Angeles, California 90049 since¹ (NYSCEF Doc No. 20, Benjamin aff, ¶¶ 1, 15 and 20-21). The affidavits of service show that defendants were served pursuant to CPLR 308 (2) by delivery of the summons and complaint, amended complaint and notice of electric filing to "Jane Doe," a person of suitable age and discretion on July 7, 2021 at 89 Murray Street, Apt. 6S, New York, New York 10007, and that the papers were mailed to defendants at that address two days later (NYSCEF Doc No. 13, Heather A. Ticotin affirmation, Ex C at 1 and 3). Benjamin, though, avers that defendants resided at the Murray Street address before they moved into the Building, and that plaintiff was aware defendants no longer lived in New York state in July 2021 (NYSCEF Doc No. 20, ¶ 21). Benjamin further avers that once defendants received the motion papers at their Los Angeles residence on August 1, 2022, they retained counsel (*id.*, ¶ 18-19), who promptly filed a notice of appearance (NYSCEF Doc No. 17). These actions show the absence of willfulness as defendants never received the summons and complaint (*see Gorman v English*, 137 AD3d 556, 556 [1st Dept 2016]).

Additionally, defendants have raised a potentially meritorious defense to the action, although they were not required to do so (*Pichardo*, 176 AD3d at 572). Correspondence between Benjamin and plaintiff's managing member, Thjis Menger (Menger), dated November 30, 2020 shows that Menger allowed defendants to "go on a month to month" and asked they

¹ The court presumes that Benjamin's reference to February 2022 is a scrivener's error, as the amended complaint states that defendants vacated the Apartment in February 2021 (NYSCEF Doc No. 12, ¶ 14).

give him 30-days notice on the first day of the month defendants wished to vacate the Apartment (NYSCEF Doc No. 22, Benjamin aff, Ex B at 2). Defendants gave Menger written notice on January 15, 2021 (*id.* at 1). Benjamin avers the parties later negotiated an agreement whereby plaintiff retained defendants' \$7,600 security deposit and defendants paid \$2,600 towards a broker's fee (NYSCEF Doc No. 20, ¶ 11). Benjamin challenges whether the broker/building manager was authorized to collect a fee (*id.*, ¶¶ 12-14 and 16-17). Given the lack of prejudice to plaintiff, the absence of proof that defendants' delay was willful and the existence of a potentially meritorious defense, defendants' motion will be granted, and the proposed answer annexed to the moving papers as Exhibit D is deemed timely served nunc pro tunc (*see Nedeltcheva v MTE Transp. Corp.*, 157 AD3d 423, 423 [1st Dept 2018]). To the extent defendants seek to vacate their default under CPLR 317, this statute is inapplicable as a judgment has not been entered against them.

In view of the foregoing, plaintiff's motion for a default judgment will be denied.

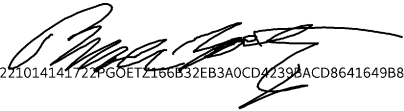
Accordingly, it is

ORDERED, that the motion by plaintiff Franpearl Equities Corp. for a default judgment against defendants Benjamin Priest and Shelby Priest (motion sequence no. 001) is denied; and it is further

ORDERED that the motion by defendants Benjamin Priest and Shelby Priest to vacate their default and for an extension of time to answer or appear (motion sequence no. 002) is granted; and it is further

ORDERED that the proposed answer annexed to defendants' moving papers as Exhibit D

(NYSCEF Doc No. 24) is deemed timely served nunc pro tunc.


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10/14/2022
DATE

PAUL A. GOETZ, 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: