

154 E. 62 LLC v Normanus Realty LLC

2022 NY Slip Op 33479(U)

October 14, 2022

Supreme Court, New York County

Docket Number: Index No. 160329/2021

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

-----X

154 E. 62 LLC,

Plaintiff,

- v -

NORMANUS REALTY LLC,

Defendant.

-----X

INDEX NO. 160329/2021

MOTION DATE 07/12/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 53, 54, 55, 56, 57, 59, 60

were read on this motion to/for JUDGMENT - DEFAULT

Plaintiff 154 E. 62 LLC moves, pursuant to CPLR 3215, for a default judgment against defendant Normanus Realty LLC for its failure to answer the complaint. Defendant opposes the motion and cross-moves, pursuant to CPLR 2005 and 3012, for an extension of time to answer and to compel plaintiff to accept its answer.

Background

This action concerns an alleged breach of a License, Access and Settlement Agreement (the License Agreement) and an Agreement Regarding Trellis Chimney Maintenance and Underpinning (the Trellis Agreement) (together, the Agreements) executed by plaintiff, the owner of a townhouse located at 154 East 62nd Street, New York, New York (the 154 Property), and defendant, the owner of an adjacent townhouse located at 152 East 62nd Street, New York, New York (the 152 Property) (NY St Cts Elec Filing [NYSCEF] Doc No. 42, Brett B. Theis [Theis] affirmation, Ex A, ¶¶ 3-4 and 7). The complaint pleads three causes of action for: (1) breach of contract; (2) specific performance, including construction of the east wall and installation of the agreed-upon anchor points; and (3) attorneys' fees.

In lieu of serving an answer, defendant moved to dismiss the complaint under CPLR 3211 (a) (1) and (7). The motion was denied (NYSCEF Doc No. 44, This affirmation, Ex C). Under CPLR 3211 (f), a defendant's time to serve an answer is extended to 10 days after service of written notice of entry of the order on the motion, and plaintiff served defendant's attorneys with written notice of entry on June 6, 2022 (NYSCEF Doc No. 45, This affirmation, Ex D). Thus, defendant had until June 16, 2022 to timely answer the complaint. Defendant failed to serve an answer by that date, and plaintiff filed its motion for a default judgment on June 21, 2022 (NYSCEF Doc No. 39). Defendant filed a verified answer on June 24, 2022 (NYSCEF Doc No. 55, Josh Oberman affirmation, Ex A), and plaintiff served a notice of rejection the same day (NYSCEF Doc No. 50). Defendant now opposes the motion for a default judgment and cross-moves for an extension of time to answer the complaint and to compel plaintiff to accept its answer.

Discussion

“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]). The court also has “the inherent power to forgive even an unexplained default ‘in the interest of justice’” (*id.* [citation omitted]). The demonstration of a meritorious defense, however, is not required on a motion for

an extension brought under CPLR 3012 (d) (*Pichardo v 969 Amsterdam Holdings LLC*, 176 AD3d 571, 572 [1st Dept 2019]). All that is required is a showing of a “reasonable excuse for delay or default” (CPLR 3012 [d]).

Addressing the cross motion first, defendant maintains that it has proffered a reasonable excuse. Defendant’s managing member, Dr. Michael Mass (Mass), avers that defendant’s counsel inadvertently failed to timely file an answer by June 16, 2022 (NYSCEF Doc No. 56, Mass aff, ¶¶ 1 and 8). Defendant also contends that plaintiff’s rejection of its answer is unjustified, as plaintiff has not suffered any prejudice from the short delay.

Defendant’s excuse for the delay, namely law office failure, constitutes good cause (*see* CPLR 2005; *Velasquez v New York City Tr. Auth./MTA*, 198 AD3d 555, 556 [1st Dept 2021]). Contrary to plaintiff’s assertion, defendant has not engaged in a pattern of dilatory conduct in this action. Defendant had previously moved to dismiss the complaint, and due to counsel’s inadvertent mistake, defendant served its answer only three days after plaintiff moved for a default judgment. As noted by plaintiff, defendant’s filing of a motion to dismiss under CPLR 3211 constitutes an “appearance” for purposes of CPLR 320 (a). These actions demonstrate defendant’s intent to appear and litigate this action (*see Aegis SMB Fund II, L.P. v Rosenfeld*, 189 AD3d 472, 473 [1st Dept 2020]). Furthermore, although plaintiff complains otherwise, plaintiff has not articulated suffering specific prejudice from defendant’s delay in answering the complaint. Defendant’s brief eight-day delay in answering, the absence of willfulness on defendant’s part or prejudice to plaintiff and the State’s preference for resolving cases on the merits warrants granting the cross motion (*HSBC Bank USA, N.A. v Donaldson*, 181 AD3d 464, 465 [1st Dept 2020]; *Bey v Sobro Local Dev. Corp.*, 177 AD3d 448, 449 [1st Dept 2019]). A

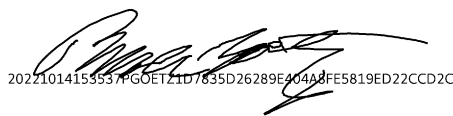
showing of a meritorious defense is not required as a default judgment has not been entered against defendant (*Pichardo*, 176 AD3d at 572).

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

Accordingly, it is

ORDERED that the motion by plaintiff 154 E. 62 LLC for a default judgment against defendant Normanus Realty LLC (motion sequence no. 002) is denied; and it is further

ORDERED that the cross motion by defendant Normanus Realty LLC to extend its time to answer the complaint and to compel plaintiff 154 E. 62 LLC to accept its late answer served June 24, 2022 (NYSCEF Doc No. 49) is granted, and the answer is deemed timely served and filed nunc pro tunc.



20221014153537PGOETZ107835D26289E404A8FE5819ED22CCD2C

<u>10/14/2022</u> DATE			<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE