

**Penta Restoration Corp. v Normanus Realty LLC**

2022 NY Slip Op 33616(U)

October 21, 2022

Supreme Court, New York County

Docket Number: Index No. 156936/2021

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
Justice

PART 33M

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INDEX NO. 156936/2021

PENTA RESTORATION CORP.,
Plaintiff,

MOTION DATE 12/13/2021

- v -

MOTION SEQ. NO. 001

NORMANUS REALTY LLC, STEVEN KRATCHMAN
ARCHITECT, P.C., JOHN DOE ONE THROUGH JOHN DOE
TWENTY

DECISION + ORDER ON MOTION

Defendant.

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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, 17, 18, 19, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, Plaintiff Penta Restoration's motion for default judgment against Normanus Realty LLC is denied and Defendant Normanus Realty LLC's ("Normanus") motion to compel Plaintiff Penta Restoration to accept Defendant Normanus's Answer is granted.

I. Procedural and Factual Background

This action arises out of construction work done by Plaintiff for Normanus at 152 East 62nd Street, New York, New York (the "Subject Property") (NYSCEF Doc. 1). Plaintiff filed its Complaint on July 26, 2021 (id.). Service was effectuated on Normanus and Defendant Steven Kratchman Architect, P.C. via the Secretary of State on August 4, 2021 (NYSCEF Docs. 6 and 7). There were attempts between Plaintiff and Normanus to try and settle this action prior to Normanus filing an Answer. Normanus was granted extensions to answer but never did. Plaintiff then moved for default judgment against Normanus on December 10, 2021 (NYSCEF Doc. 8).

On December 14, 2021, Normanus attempted to serve an answer on Penta (NYSCEF Doc. 21). Penta filed a notice of rejection on December 14, 2021 (NYSCEF Doc. 22). In the notice of

rejection, Penta stated that pursuant to an e-mail agreement on November 2, 2021, Normanus was granted an extension of time to respond to Penta's Complaint until November 30, 2021; however, Normanus failed to do so, and it did not request any further extension prior to Penta's motion for default judgment (*id.*)

Normanus then cross moved pursuant to CPLR §§ 2004 and 3012(d) for an order compelling Penta to accept Normanus's Verified Answer. Normanus claims that it failed to respond on time due to a calendar error and because the parties were attempting to reach a settlement agreement (NYSCEF Doc. 25). Normanus also claims they have a meritorious defense to the claim through the affidavit of Nancy Weinman, AIA, a licensed architect who was retained by Normanus and asserted that the damages Penta is seeking is greatly exaggerated based on the percentage of work it actually completed (NYSCEF Doc. 27).

In its brief in opposition to Penta's motion and in support of its cross motion, Normanus asserts that the delay in filing its Answer, which was only 14 days, is *de minimis* and results in no prejudice to Penta. Normanus also raises that New York public policy strongly favors cases being decided on the merits, and that it has proffered a reasonable excuse for default.

## II. Discussion

### A. Default Judgment

An applicant for default judgment against a defendant must submit: (i) proof of service of the summons and complaint, (ii) proof of the facts constituting the claim, and (iii) proof of the defaulter's failure to appear (*PV Holding Corp v AB Quality Health Supply Corp*, 189 AD3d 645 [1st Dept 2020]). Affidavits submitted in support of a motion for default judgment only need to allege enough facts to allow a court to assess where a viable cause of action exists (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The Court is mindful that "defaulters are

deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them (*Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007]).

Plaintiff Penta has not complied with certain procedural requirements of CPLR 3215. Specifically, CPLR 3215(g)(4) requires that Plaintiff serve an additional notice of the summons and complaint by first class mail since Defendant Normanus was served via the Secretary of State (NYSCEF Doc. 6). There is no proof that any additional service as “accompanied by a notice to the corporation that service is being made or has been made pursuant to” BCL 306. Such failure to comply with the notice requirements of CPLR 3215(g)(4) requires denial of the motion (*see Balaguer v 1854 Monroe Ave. Hous. Dev. Fund Corp.*, 71 AD3d 407, 407 [1st Dept 2010]; *Admiral Ins. Co. v Marriott Intl., Inc.*, 67 AD3d 526, 526 [1st Dept 2009]).

#### **B. Extension of Time to Answer**

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 the e-mail correspondence between counsel for Normanus and Penta provided to the Court on this motion, there was never any mention of Penta seeking default judgment against Normanus. Rather, there were extensions of time to answer granted to Normanus by Penta, and attempts were being made to set up settlement discussions (NYSCEF Doc. 25 at ¶ 5; *see also* NYSCEF Docs. 31-32). The First Department has held that where settlement discussions are ongoing, and a party moves for default without warning to the party against whom default was sought, there exists a reasonable excuse to vacate the default (*Gluck v McDonough*, 139 AD3d 628, 629 [1st Dept 2016]). Moreover, there has been no showing of prejudice to Penta by allowing Normanus to serve a late Answer. Further, there is a strong public policy favoring resolving cases on their merits (*Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]). Finally, the Court finds there exist meritorious defenses to Penta's claims, as Normanus has provided the affidavit of Nancy Weinman, which asserts that the amount of damages sought by Penta are unsubstantiated by the work Penta actually completed (NYSCEF Doc. 27). Therefore, Normanus' cross motion is granted.

Accordingly, it is hereby

ORDERED that Plaintiff Penta Restoration Corp.'s motion for default judgment against Defendant Normanus Realty LLC is denied; and it is further

ORDERED that Defendant Normanus Realty LLC's cross-motion to extend the time to 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 the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the parties are directed to appear for a preliminary conference via Microsoft Teams on December 15, 2022 at 9:00 a.m.; and it is further

ORDERED that counsel for Defendant Normanus Realty LLC shall, within thirty (30) days of entry of this decision and order, serve a copy of this decision and order on all parties to this action with notice of entry.

This constitutes the decision and order of the Court.

10/21/2022

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: