

<b>Harlem 133 Owner, LLC v Jimenez</b>
2022 NY Slip Op 33759(U)
November 3, 2022
Supreme Court, New York County
Docket Number: Index No. 152456/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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HARLEM 133 OWNER, LLC F/K/A HARLEM 133  
LENDER, LLC,

Plaintiff,

- v -

ROSA JIMENEZ, LOURDES AQUINO, MEDELINE  
BURDIER, BLANCA MOLINUEVO, KEVIN SCOTT,  
KATRINA WILEY, MARIO FLORES, ALBAR IRIS  
FLORES, DEBBIE LIMA, AMANDA DEVALLE, YVONNE  
GARCIA, JOCLYN GARCIA, REEM MARBROUK,  
GISELLE PENA, YARLIN PENA, JENNIFER AVILA,  
KARINA MARTINEZ, CRISTO REYES, OLIVIA  
JOHNSON, GABRIEL JAMES, JAZZMIN ROSARIA,  
ABDULLAH RASHID, SHARNASIA VANCE, GEORGETTE  
HYMAN, GREGORY GADSEN, SHAKIA JOHNSON,  
DWAYNE SEIFFORTH, PAULETTE CRAWFORD,  
WISMIDE LOUIS, TONIA VAIL, TYSHEFF BROWN,  
JAZMINE GUZMAN, JARILZA CORUJO, SONYA JAMES,  
EPPY DAVIS, and JOHN AND JANE DOES 1-26,

Defendants.

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INDEX NO. 152456/2022

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149, 150, 151, 152, 154, 155

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

Upon the foregoing documents, it is

Plaintiff Harlem 133 Owner, LLC, f/k/a Harlem 133 Lender LLC, moves pursuant to CPLR 3215 for a default judgment against all defendants: (1) for ejectment from the residential apartment units in the building located at 308-310 West 133rd Street, New York, New York 10030 (Property); (2) for a declaratory judgment declaring that

defendants have no right to occupy the Property; and (3) for a permanent injunction enjoining defendants from interfering with plaintiff's access to the Property.

On September 28, 2022, the court issued an interim decision and order granting this motion against defendants Rosa Jimenez, Lourdes Aquino, Kevin Scott, Jr., Katrina Wiley, Albar Iris Flores, Joclyn Garcia, Yarlin Pena, Jennifer Avila, Karina Martinez, Cristo Reyes, Gabriel James, Jazzmin Rosario (s/h/a Rosaria), Abdullah Rashid, Gregory Gadsen, Paulette Crawford, Tysheff Brown, and Jarilza Corujo. (NYSCEF 149, Decision and Order; NYSCEF 161, Judgment; NYSCEF 162, Decision and Order [denying Martinez's motion to vacate].) In its interim decision and order, the court also ordered additional briefings from the Remaining Defendants (defined below) regarding when counsel for the Remaining Defendants became known to plaintiff.

This decision concludes motion sequence number 001 as to the remaining eighteen defendants: Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth—represented by Charles Alvarez of The Legal Aid Society (NYSCEF 95, Charles Alvarez aff ¶ 1)—and Sonya James—represented by Tycel Harris of Manhattan Legal Services (NYSCEF 87, Tycel Harris aff ¶ 1) (collectively, Remaining Defendants).

The Remaining Defendants, not including James, cross-move to dismiss under CPLR 3211(a)(1), (4), or (7), for sanctions, and for a stay in favor of the first filed Housing Court matter. (NYSCEF 94, notice of cross motion.) James cross-moves to

dismiss pursuant to CPLR 3211(a)(4) and for attorneys' fees and costs. (NYSCEF 86, notice of cross motion.)

## Background

In the spring of 2020, defendants, all formerly homeless, leased apartments at the Property, with the assistance of Human Resources Administration (HRA) and Department of Homeless Services (DHS) which provide rent subsidies to defendants. (NYSCEF 95, Alvarez aff ¶¶ 3, 12.)

In February 2022, plaintiff initiated a holdover action in Housing Court against defendants. (See NYSCEF 95, Alvarez aff ¶ 7; see also *id.*, NYSCEF 96-112, copies of holdover petitions against certain defendants.) On March 23 and 31, 2022, The Legal Aid Society appeared for some defendants in Housing Court (see NYSCEF 150, Edwin Vega<sup>1</sup> aff ¶¶ 2-3), though a notice of appearance was not filed (NYSCEF 155, Eric M. Zim<sup>2</sup> aff ¶ 7). Manhattan Legal Services filed its notice of appearance for James on April 4, 2022. (NYSCEF 152, Harris aff ¶ 5.) New York Legal Assistance Group (NYLAG) filed its notice of appearance March 24 and 29, 2022 for defendants Katrina Wiley and Karina Martinez.<sup>3</sup> (NYSCEF 151, Benjamin P. Bisaro<sup>4</sup> aff, ¶¶ 1-4.) Hearings were held in Housing Court on May 7, 2022 and July 7, 2022. (*Id.* ¶¶ 10-11.) As of October 9, 2022, The Legal Aid Society had yet to file a notice of appearance in the Housing Court matter. (NYSCEF 155, Zim aff ¶ 7.)

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<sup>1</sup> Edwin Vega is a retired and former of counsel to The Legal Aid Society. (NYSCEF 150, Vega aff ¶ 1.)

<sup>2</sup> Eric M. Zim is a partner at law firm Horwitz & Zim Law Group, P.C., attorneys for plaintiff in the holdover proceedings in Housing Court.

<sup>3</sup> NYLAG never filed a notice of appearance in this action.

<sup>4</sup> Benjamin P. Bisaro is an attorney at NYLAG.

## Discussion

### Plaintiff's Motion for Default Judgment Against Remaining Defendants

“On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing.” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, \*6-7 [Sup Ct, NY County 2018] [citations omitted].)

As to the first and third elements for a default judgment, plaintiff commenced this ejectment action by summons and complaint against defendants on March 23, 2022. (NYSCEF 1, summons; NYSCEF 2, compl.) Service of the Notice of Electronic Filing, Summons and Verified Complaints with Exhibits on the Remaining Defendants (NYSCEF 11-16, 21-22, 24, 26-28, 34, 36, 39, 40, 42-43, 45, affs of service) was complete on March 29, 2022. Answers were due April 18, 2022. (CPLR 3012 [a].) It is undisputed the court has yet to receive a timely answer or motion from any defendant.<sup>5</sup>

As to the second element for a default judgment, proof of facts constituting the ejectment claim, on a cause of action for ejectment, the plaintiff must state that “(1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate.”

(*Noamex, Inc. v Domsey Worldwide, Ltd.*, 192 AD3d 817, 819 [2d Dept 2021] [citations

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<sup>5</sup> Karina Martinez moved to vacate the default claiming to have mailed an answer to plaintiff's attorney in this action, but plaintiff denies receipt. (NYSCEF 158, Martinez aff in support at 3 [mot. seq. no. 002].) Martinez did not provide the court with a copy with her motion.

omitted].) The proof of the facts constituting the ejectment claim against the Remaining Defendants and James are set forth in the complaint (see NYSCEF 2, verified compl. ¶¶ 56-67), verified by Antoinette Walker, plaintiff's authorized signatory with personal knowledge (*id.* at 15), the loan agreement (NYSCEF 3), condominium declaration (NYSCEF 4), and the exhibits annexed to counsel's affirmation (see NYSCEF 52-55). On June 16, 2020, Levi Balkany, defendant in a prior related action (Balkany Action), was unequivocally barred from entering these leases when the court enjoined him from "transferring, leasing, using, misusing or [ ] encumbering the Property." (See NYSCEF 5, *Harlem 133 Lender, LLC v W133 Owner, LLC and Levi Balkany*, Sup Ct, NY County, index No. 652300/2020.) In addition, the leases were rejected under federal bankruptcy law. (See NYSCEF 8, October 7, 2021 Confirmation Order ¶ 9 at 12 ["9. Rejection of Executory Contracts and Unexpired Leases . . . the Debtor's Executory Contracts and unexpired leases shall be deemed rejection as of the Confirmation Date pursuant to sections 365(a) and 1123(b)(2) of the Bankruptcy Code."].) Therefore, plaintiff has satisfied the requirements for a default judgment against the Remaining Defendants and James.

The Remaining Defendants argue that default judgment should not be entered against them. Under CPLR 5015, "[t]o 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].)

James opposes the default motion explaining that she did not understand that the Housing Court case is different than this ejectment action in Supreme Court and

assumed that all papers would go to her counsel in the pending Housing Court matter. (NYSCEF 91, James aff ¶¶ 6-7.) While Ms. James's confusion about the court's structure is a longstanding concern, it does not excuse her failure to inform her attorney about this action or at least provide her attorney with the personally served papers. Ms. James' retained counsel filed a notice of appearance in the Housing Court matter on April 4, 2022, six days after service was complete in this action, making her failure to provide the papers to her counsel even more confounding. (NYSCEF 152, Harris aff ¶ 5.)

Ms. James also fails to state a meritorious defense. The pending Housing Court matter is not a defense since the actions are not identical; plaintiff seeks equitable relief in this case which is not available in Housing Court. (See, e.g., *Green v Lakeside Manor Home for Adults, Inc.*, 30 Misc 3d 16, 18 [App Term, 2d Dept 2010] ["Here, although the complaint sought monetary damages, it primarily sought declaratory and injunctive relief, which the Civil Court lacks subject matter jurisdiction to grant."].) Plaintiff's claim for ejectment from the residential condominium units is asserted under the common law, not the RPAPL. (See, e.g., *Kosa v Legg*, 12 Misc 3d 369, 371 [Sup Ct, Kings County 2006] ["RPAPL Article 6 modified the common law action of ejectment but did not replace it. 'The common law principles governing the ejectment action are unchanged, unless specifically modified by statute.'" [citations omitted].])

The Remaining Defendants (other than James) fail to sustain their burden to challenge the default. As a reasonable excuse for their defaults, the Remaining Defendants, who are represented by The Legal Aid Society, assert that they have no legal training, some have limited English proficiency, and all were met with funding

obstacles which delayed getting representation in this action. Eventually attorneys from the Legal Aid Society who represent the Remaining Defendants in Housing Court became aware of this proceeding but were compelled to find funding to cover costs in Supreme Court before they could represent defendants in this court.<sup>6</sup> Even if the court accepts defendants' assertions as a reasonable excuse, defendants fail to offer a meritorious defense.

Moreover, at argument on this motion, the court expressed concern that plaintiff's attorney had defendants personally served in this ejectment action while some defendants may have been represented by counsel in the Housing Court matter and thus known to plaintiff. New York Rules of Professional Conduct, Rule 4.2(a) provides:

“In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party that the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.”

Service of process is an exception to the “No Communication Rule.” (New York State Bar Association, Committee on Professional Ethics, Ethics Opinion 894, <https://nysba.org/ethics-opinion-894/#:~:text=%E2%80%9CIn%20representing%20a%20client%2C%20a,to%20do%20so%20by%20law.%E2%80%9D> [last updated Dec. 1, 2011].)

Plaintiff's counsel in this action, Matthew Meisel of law firm Reed Smith LLP, argues that since defendants' counsel had not filed notices of appearance in the Housing Court matter at the time of service in this action, he had no obligation to notify

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<sup>6</sup> New York City pays for attorneys in Housing Court. (NYSCEF 95, Alvarez aff ¶ 23.)  
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defendants' counsel. (See NYSCEF 154, Meisel aff; see *also* NYSCEF 155, Zim aff.) Moreover, plaintiff's counsel in this action denies knowledge of the Housing Court matter, including who defendants' attorneys are, since they are not representing plaintiff in the Housing Court matter. However, counsel cannot evade its obligation to get defendants' counsel's consent and knowledge of that representation since it may be inferred by circumstances.

"The term 'knows,' which is defined in Rule 1.0(k), 'denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.' As explained in Comment [8]: The prohibition on communications with a represented party applies only in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge."

(Simon's NY Rules of Professional Conduct Annotated § 4.2:2 Phrase-by-phrase analysis [Note: online version].)

Attorneys for other defendants filed affirmations explaining when they filed their notices of appearance in Housing Court, all after this case was filed, and denying that plaintiffs' attorney informed them of this ejectment action. (See NYSCEF 150, Vega aff; NYSCEF 151, Bisaro aff.) However, all counsels fail to state whether they were otherwise informed of this action.

Thus, while it is true that plaintiff's attorney had no legal obligation to inform defendants' counsel in the Housing Court action of service of process in this action, common courtesy and professional civility instructs that counsel should have informed new counsel as those attorneys became known to plaintiff, whether official or

unofficially. (Standards of Civility, <https://www.nycourts.gov/LegacyPDFS/RULES/jointappellate/Jan%202020%20-%20civility%20standards%20CLEAN.pdf> [last accessed Nov. 2, 2022].) Moreover, on June 3, 2022, when plaintiff filed this motion, some defendants were certainly known to be represented by counsel since they had filed notices of appearance in Housing Court. While the court rejects plaintiff's contention that the filing of a notice of appearance triggers any obligation since knowledge of whether a party is represented may be inferred from the circumstances, plaintiff served the default motion on represented defendants, not their attorneys. A default motion is not service of process; the exception to the "No Communication" rule is inapplicable. Despite plaintiff's lapse in judgment, and as discussed above, the Remaining Defendants have not stated a reasonable excuse for their failure to timely answer or move in this case and have not moved for permission to file a late answer or motion.

#### Remaining Defendants' Cross Motion

James cross-moves to dismiss pursuant to CPLR 3211(a)(4) is denied for the reasons stated above, i.e., the Housing Court matter is not identical to this action's claim for equitable relief.

The Remaining Defendants (excluding James) cross-move pursuant to CPLR 3211(1), (4) or (7) to dismiss this action. The Remaining Defendants' cross motions to dismiss filed on July 8 and 11, 2022 are almost four months late.

The court is compelled to deny the cross motions on the ground that a party in default may not move for affirmative relief until the default is vacated. (*See, e.g., Bank of NY Mellon v Lawson*, 176 AD3d 1155, 1155 (2d Dept 2019) ["We agree with the

Supreme Court's conclusion ... that a defendant in default is not entitled to affirmative relief of a non-jurisdictional nature absent vacatur of his or her default."].)

In addition, the Remaining Defendants' (excluding James) CPLR 3211(a)(1) motion based on documentary evidence—the leases—is denied. The leases were entered in violation of this court's preliminary injunction in the Balkany Action and the bankruptcy court declared them invalid. Likewise, the voided leases do not prevent plaintiff from stating a claim for ejectment. Plaintiff's allegation in the complaint that defendants are not tenants (NYSCEF 2, compl. ¶ 1) is accurate and thus the court rejects the Remaining Defendants' (excluding James) 3211(a)(7) motion.

As discussed above, there is no legal basis to stay this action in favor of the Housing Court action.

Finally, there is no legal basis for the Remaining Defendants' request for sanctions.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment against Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James (Remaining Defendants) is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a

Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James on the first cause of action; and it is further

ORDERED that the cross motions of defendants Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James are denied; and it is further

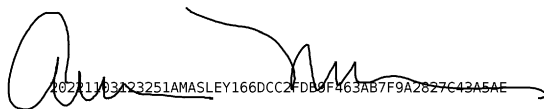
ADJUDGED and DECLARED that plaintiff is entitled to possession of 308-310 West 133<sup>rd</sup> Street, New York, New York as against defendants Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further

ADJUDGED and DECLARED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of 308-310 West 133<sup>rd</sup> Street, New York, New York, including entry thereto, as against defendants Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman

(s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James on the first cause of action; and it is further

ORDERED that this decision and order is stayed for 30 days from the date of this order to give defendants Madeline Burdier (s/h/a Medeline Burdier), Sharnasia Vance, Olivia Johnson, Tonia Vail, Blanca Molinuevo, Debbie Lima, Reem Marbrouk, Eppy Davis, Jasmine Guzman (s/h/a Jazmine Guzman), Mario Flores, Amanda Delvalle (s/h/a Amanda Devalle), Yvonne Garcia, Gisselle Peña, Shakia Johnson, Wismide Louis, Georgette Hyman, Dwayne Seifforth, and Sonya James time to find new housing. However, plaintiff may take necessary steps to prepare for eviction during the stay; and it is further

ORDERED that plaintiff shall e-file to NYSCEF the transcript for this motion and email to [SFC-Part48@nycourts.gov](mailto:SFC-Part48@nycourts.gov).



11/3/2022  
DATE

\_\_\_\_\_  
ANDREA MASLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

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