

Poynder v IP Mtge. Borrower, LLC

2023 NY Slip Op 31003(U)

March 29, 2023

Supreme Court, New York County

Docket Number: Index No. 156409/2022

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52

Justice

-----X

MARLENE POYNDER,

Plaintiff,

- v -

IP MORTGAGE BORROWER, LLC, THE CITY OF NEW
YORK

Defendant.

-----X

INDEX NO. 156409/2022

MOTION DATE 02/09/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 2, 16, 17, 18, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is

The plaintiff moves, pursuant to CPLR § 3215, for a default judgment against defendant IP MORTGAGE BORROWER, LLC ("IP"). IP MORTGAGE BORROWER, LLC, cross-moves, pursuant to CPLR §§ 3012(d) and 2101(f), to compel plaintiff to accept IP's answer. Defendant City of New York has not opposed or supported either the motion or cross-motion.

This is the third time that plaintiff has moved for a default judgment. The first motion was withdrawn by the plaintiff because they attached the wrong affidavit to it (see NYSCEF Doc. No. 10). The second motion for a default judgment was withdrawn pursuant to a December 19, 2022, stipulation withdrawing the motion, entered between counsel for plaintiff and counsel for IP (see NYSCEF Doc. No. 15). On or about December 15, 2022, plaintiff and IP entered into a stipulation waiving jurisdictional defenses and extending IP's time to answer to January 16, 2023 (Plaintiff's Exh. A).

The instant motion for a default judgment was filed on or about January 23, 2023. IP's answer was filed on or about January 26, 2023. On or about January 30, 2023, plaintiff filed a notice of rejection of the answer. IP's cross-motion was filed on or about February 6, 2023.

IP contends that it did not timely answer the complaint because they did not know of the suit until December 5, 2022, when counsel for IP in another matter became aware of the case and provided a copy of the complaint to IP's insurance broker (see *Sceppe Aff.*). The complaint was originally served on IP by serving defendant's registered agent, the CT Corporation System on August 11, 2022 (*Aff. of Service*, NYSCEF Doc. No. 2). The complaint was first referred to IP's counsel on December 15, 2022, the day that the stipulation extending the time to answer was entered (*Fischer Aff. in Opp.*, ¶ 11).

With regards to the failure to file an answer by the stipulated date of January 16, 2023, IP contends that the 10-day delay in filing its answer results from the error of the attorney, who affirms that as a result of an excessive caseload and due to the winter holidays, counsel was unable to fully review the matter and interpose an answer by the January 16, 2023, deadline (*Fischer Aff. in Opp.*, ¶ 23).

Pursuant to CPLR § 3012(d), "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." Furthermore, a court is not "precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure" (CPLR § 2005). A court properly exercises its discretion in denying a plaintiff's motion for

default judgment and allowing a defendant to file a late answer where the delay in answering is only ten days, is due to law office failure, there is no prejudice caused to plaintiff by the delay, and no indication that defendants intended to abandon their defense against the proceeding (*see Eagles Landing, LLC v New York City Dept. of Env'tl. Protection*, 75 AD3d 935, 936-37 [3d Dept 2010], *lv denied Eagles Landing, LLC v New York City Dept. of Env'tl. Protection*, 16 NY3d 710 [2011]; *see also Josovich v Ceylan*, 133 AD3d 570, 571 [2d Dept 2015] ["Supreme Court providently exercised its discretion in denying that branch of the defendant/third-party plaintiffs' motion which was for leave to enter a default judgment ... and granting ... cross motion pursuant to CPLR 3012(d) to compel the defendants third-party plaintiffs to accept his late answer"]).

"Defendants [are] not required to demonstrate a meritorious defense in order to be granted relief under CPLR 3012(d)" (*Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 [1st Dept 2011]).

The court finds that law office failure by IP's counsel constitutes a reasonable excuse for the failure to timely answer the complaint. Furthermore, the plaintiff will not be prejudiced by allowing the late answer, and there is no indication that the defendant intended to abandon their defenses against the proceeding. Additionally, the delay was short. Therefore, the motion of defendant IP to compel acceptance of its answer should be granted and the plaintiff's motion for a default judgment should be denied.

For the reasons set forth herein, it is hereby

ORDERED that the plaintiff's motion for a default judgment is DENIED; and it is further

ORDERED that defendant IP Mortgage Borrower, LLC's cross-motion to compel the acceptance of its late answer herein is granted, and the Answer shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant City of New York shall serve an answer to the cross-claims asserted in defendant IP Mortgage Borrower, LLC's Answer or otherwise respond thereto within 20 days from the date of said service.

This constitutes the decision and order of the court.

3/29/2023
DATE


NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE