

**Mishal v Hirsch**

2023 NY Slip Op 31364(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 526504/2019

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of April 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
MOSHE MISHAL a/k/a ARYE MOSHE MISHAL,

Plaintiff,

-against -

BENJAMIN HIRSCH, FIDUCIARY HOLDINGS, LLC  
and 945 E27, LLC

Defendants.

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By notice of motion, filed on January 6, 2022, under motion sequence number two, plaintiff Moshe Mishal a/k/a Arye Moshe Mishal (plaintiff) sought an order (1) pursuant to CPLR §3215, for a default judgment against defendants Benjamin Hirsch (“Hirsch”), Fiduciary Holdings, LLC (“Fiduciary”) and 945 E27, LLC (“945 LLC”) on the 2<sup>nd</sup> through 7<sup>th</sup> Causes of Action set forth in the Complaint pursuant to DCL §270-276, 276a, 278(1)a, 278(1)b, (2) determining that the conveyance from defendants Hirsch and Fiduciary to 945 LLC of the property located at 945 East 27th Street Brooklyn New York was a fraudulent conveyance and should be set aside pursuant to DCL; §270-276, §278(1)a, 278(1)b (3) pursuant to DCL §278(1)(a) to have said conveyance set aside or obligation annulled to the extent necessary to satisfy plaintiff’s claim, (4) pursuant to DCL §278(1)(b), disregarding the fraudulent conveyance of the subject premises, (5) imposing a constructive trust of the subject premises, (6) pursuant to DCL §276-a awarding attorney’s fees to be to plaintiff;

The following NYSCEF documents numbers 33-36, 43-44, 48 were considered.

**DECISION & ORDER**  
Index No. 526504/2019  
Oral Argument: 3/27/2023  
Cal. No.: 5-8; Ms. No.: 3,4,5,6

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215(f), *Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 651, 932 N.Y.S.2d 109 [2nd Dept 2011]). CPLR 3215(f) states specifically, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim are to be set forth in an affidavit made by the party (*HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736[2nd Dept 2009]). After oral argument, the motion is denied without prejudice to renew for failure to provide an Affidavit of Merit by the party.

By notice of motion, filed on July 21, 2022, under motion sequence number three, defendant Hirsch sought an order pursuant to CPLR 3211(a)(8) dismissing this action for lack of personal jurisdiction or alternatively; granting Hirsch leave to interpose a late answer.

The following NYSCEF documents numbers 42-65 were considered. Motion sequence number three is marked off due to the non-appearance of the movant.

By notice of cross motion, filed on November 14, 2022, under motion sequence number four, plaintiff sought an order pursuant to CPLR §306-b granting an extension of time to serve the Summons and Complaint on Defendant Hirsch, upon good cause shown or in the interest of justice. The following NYSCEF documents numbers 66-70 were considered. After oral argument, the order of the Court is as follows.

A court may, in the exercise of its discretion, extend a plaintiff's time to serve a complaint upon good cause shown or in the interest of justice (CPLR 306-b; *State of New York Mtge. Agency v Braun*, 182 AD3d 63, 66 [2d Dept 2020]; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105 [2001]; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31-32 [2d Dept

2009)). Good cause and interest of justice are two separate and independent statutory standards (*Bumpus*, 66 AD3d at 31). To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (*BAC Home Loans Servicing, L.P. v Herbst*, 180 AD3d 980, 981 [2nd Dept 2020], quoting *Bumpus*, 66 AD3d at 31). Whereas, in considering the interest of justice standard, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant (*Leader*, 97 NY2d at 105-106).

For the reasons set forth in the plaintiff's motion papers, the plaintiff's motion for an order to extend the time to effectuate service of process of the summons and complaint upon defendant Benjamin Hirsch is granted in the interest of justice (*see Zoya Smushkevich v Perel*, 69 Misc 3d 712 [Sup Ct 2020]).

Plaintiff Moshe Mishal a/k/a Arye Moshe Mishal time to serve the summons and complaint upon defendant Benjamin Hirsch is extended to a period of 120 days from entry of the instant order.

By order to show cause, filed on December 1, 2022, under motion sequence five, plaintiff, sought an order pursuant to CPLR 6513 for an extension of the Notice of Pendency and pursuant to CPLR 6301 for a preliminary injunction. The following NYSCEF documents numbers 71-74, 77, 79 were considered.

The order of the Court is as follows.

Plaintiff's request for an extension of time to serve the order to show cause on defendant Hirsch is granted.

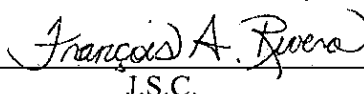
The order to show cause shall be served on defendant Hirsch on or before May 15, 2023.

The toll and stay of the expiration of the Notice of Pendency remains in full force and effect pending the hearing and determination of the order to show cause.

The order to show cause is adjourned to June 8, 2023.

The foregoing constitutes the decision and order of this Court

ENTER:

  
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J.S.C.

**HON. FRANCOIS A. RIVERA  
J.S.C.**