

**State of N.Y. Mtge. Agency v 936-938 Cliffcrest Hous.
Dev. Fund Corp.**

2023 NY Slip Op 32618(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 850011/2013

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

STATE OF NEW YORK MORTGAGE AGENCY,

Plaintiff,

- v -

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION, THE DEPARTMENT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.

-----X

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

-against-

THE WAVECREST MANAGEMENT TEAM LTD., SHUHAB HOUSING DEVELOPMENT FUND CORPORATION, COMMUNITY CAPITAL BANK, LEE WARSHAVSKY, JOHN AND JANE DOES 11-20, and THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Defendants.

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INDEX NO. 850011/2013

MOTION DATE 07/24/2023

MOTION SEQ. NO. 030

DECISION + ORDER ON MOTION

Third-Party
Index No. 595322/2014

The following e-filed documents, listed by NYSCEF document number (Motion 030) 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion pursuant to CPLR § 3215(a) of third party plaintiff for a default judgment against third party defendant City of New York for the failure of such third party defendant to timely answer the third amended third party complaint is DENIED; and it is further

ORDERED that the cross motion pursuant to CPLR § 3215(c) of third party defendant to dismiss the third amended third party complaint for the failure of third party plaintiff to move for a default judgment within one year is DENIED; and it is further

ORDERED that the amended third party answer (NYSCEF Document Number 1301), as proposed, to the third amended third party complaint is deemed served and filed, effective upon entry of the herein Order; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed discovery status conference order or competing proposed discovery status conference order(s) at least two days before September 21, 2023, on which date counsel are directed to appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

The Court of Appeals, held, in De Lourdes Torres v Jones, 26 NY3d 742, 771-772 (2016) that where a defendant appears and

unequivocally waives all jurisdictional defenses, such defendant unequivocally waives any right to dismissal pursuant to CPLR § 3215(c). However, such waiver is not the case here, as third party defendant City answered only the original and second amended complaints, but not the third amended complaint that is the subject at bar. Instead, here, the controlling precedent is that the "filing of an answer by the defendants to the plaintiffs' original complaint (does not) render the provisions of CPLR 3215(c) inapplicable" (Hoppenfeld v Hoppenfeld, 220 AD2d 302, 303 [1st Dept 1995]). In addition, it is not fatal to third party defendant's application that it was made by cross motion. See MTGLQ Investors, LP v Shay, 190 AD3d 527 (1st Dept 2021). In any event, third party plaintiff clearly did not abandon its third party action and complaint, as twice amended, as it participated in motion practice, discovery proceedings and settlement negotiations in the intervening five years. See Citimortgage, Inc v Sahai, 172 AD3d 552 (1st Dept 2019).

A fortiori, a plaintiff that does not move for a default judgment within a year after the expiration of defendant's time to answer is not entitled to a default judgment, whether or not such plaintiff proffers a viable excuse for the delay and a meritorious defense, in accordance with the explicit statutory language of CPLR § 3215(c) ("If the plaintiff fails to take proceedings for the entry of judgment within one year after the

default, the court **shall not** enter judgment" (emphasis supplied). See Selective Auto Insurance Company of New York v Nesbitt, 161 AD3d 560 (1st Dept 2018). Therefore, third party plaintiff is not entitled to entry of a default judgment against third party defendant City of New York.

Debra A. James

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7/28/2023

DATE

DEBRA A. JAMES, 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