

**Omansky v 300-302 E. 119 St. HDFC**

2023 NY Slip Op 33708(U)

October 16, 2023

Supreme Court, New York County

Docket Number: Index No. 650217/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

EVE OMANSKY,

Plaintiff,

- v -

300-302 EAST 119 STREET HDFC; BOARD OF  
DIRECTORS OF 300-302 EAST 119 STREET HDFC;  
H.S.C. MANAGEMENT CORP., AMO; and GINA TORRES,

Defendants.

-----X

**INDEX NO.** 650217/2023

**MOTION DATE** 04/07/2023,  
06/24/2023

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 54, 55, and 56

were read on this motion for DEFAULT JUDGMENT (& CROSS-MOTION TO DISMISS).

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 57

were read on this motion to AMEND THE COMPLAINT.

Upon the foregoing documents, it is ORDERED that the plaintiff’s motion seeking entry of a default judgment (Mot. Seq. No. 001) against defendants H.S.C. Management Corp., AMO (“HSC”); and Gina Torres (“Torres”), is denied. A motion for a default judgment should be denied upon a showing of justifiable excuse for the default and a proffer of a meritorious defense (*see, New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]).

Prior to filing their submissions in this motion practice, HSC and Torres requested an adjournment of time to submit papers on the grounds that insurance coverage issues relating to assignment of counsel were still being worked out, which adjournment request plaintiff opposed (NYSCEF Doc. Nos. 18, 19). The explanations proffered by counsel for HSC and Torres (NYSCEF Doc. No. 18) furnish the threshold justifiable excuse, and the affirmation in

opposition (contained within NYSCEF Doc. No. 22) proffers said defendants' statement of meritorious defense. Further, said defendants' delay in responding was relatively short, and plaintiff fails to demonstrate any prejudice. Based upon those considerations, and in accordance with the court's preference for deciding matters on the merits rather than on default, the motion is denied (*e.g., Naber Electric v Triton Structural Concrete, Inc.*, 160 AD3d 507, 508 [1st Dept 2018]); and it is further

ORDERED that the cross-motion of HSC and Torres to dismiss the complaint against them is denied. Said defendants assert that they are merely agents of the nonmoving defendants, who are the cooperative entity and the board of directors thereof, and that, therefore, they cannot be held liable for plaintiff's damages. However, the cross-moving papers challenge several of the factual allegations of the complaint as to the sequence of events leading plaintiff's prospective purchaser to cancel the sale of plaintiff's apartment within the Co-Op. On a motion to dismiss, the facts asserted in the pleading must be presumed true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Further, the cross-moving defendants' agency argument raises factual issues as to conduct and control, and the management agreement submitted in support of the cross-motion does not "utterly refute[] plaintiff's factual allegations and conclusively establish[] a defense to the asserted claims as a matter of law" (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]). Such factual issues cannot be resolved on a motion to dismiss (*Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]); and it is further

ORDERED that HSC and Torres are directed to serve an answer to the complaint within 20 days after the date of filing hereof; and it is further

ORDERED that the plaintiff's motion seeking leave to amend the complaint (Mot. Seq. No. 002) is denied, without prejudice to renewal. "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025[b]). Here, plaintiff submitted a proposed amended complaint but does not clearly show where any changes or additions have been made. In an effort to understand the proposed amendment(s), the court studied plaintiff's counsel's affirmation (NYSCEF Doc. No. 43) which, presumably, would point out the proposed amendment(s). That affirmation states the proposed amendment to be "to include a Third Cause of Action for Fraud" (*id.*, ¶ 25). However, no opening clause or title is found in the proposed pleading referencing such "Third Cause of Action" (*see*, NYSCEF Doc. No. 52). In addition, the proposed amended complaint appears to make a change to the second cause of action. In sum, further clarification is necessary, consistent with CPLR 3025[b]) (*see*, *Cafe Lughnasa Inc. v A & R Kalimian LLC*, 176 AD3d 523, 524 [1st Dept 2019] ["The proposed third amended complaint also fails to 'clearly [show] the changes or additions' between it and the second amended complaint, as directed by the court and required by CPLR 3025(b)"]). Plaintiff may renew her motion upon submission of a proposed amended complaint that clearly shows, by redlining or by other means, its proposed changes and additions, clearly stated; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on November 15, 2023, at 2:15 PM.

This constitutes the decision and order of the court.



<u>10/16/2023</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	