

**Leslie J. Garfield & Co., Inc. v Evans**

2024 NY Slip Op 33023(U)

August 27, 2024

Supreme Court, New York County

Docket Number: Index No. 651854/2021

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*

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LESLIE J. GARFIELD & CO., INC.,  
Plaintiff,

- v -

MARY C. EVANS,  
Defendant.

-----X

**INDEX NO.** 651854/2021  
**MOTION DATE** 06/02/2022  
**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67

were read on this motion for A DEFAULT JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff’s motion for a default judgment and defendant’s cross-motion to dismiss the complaint are denied, in accordance with the following memorandum decision.

Plaintiff is a real estate brokerage, whose individual broker, Matthew Lesser, assisted with, and ultimately was the procuring cause of, the \$3.6 million sale of defendant’s townhouse (Lesser aff, NYSCEF Doc. No. 10, ¶¶ 6-11). The contract of sale provides that defendant agreed to pay plaintiff “pursuant to a separate commission earned thereby (pursuant to a separate contract)” (contract, NYSCEF Doc. No. 14, § 27). No separate written commission agreement was ever executed. Plaintiff asserts that an oral agreement existed for a 5% commission (Lesser aff, NYSCEF Doc. No. 10, ¶ 5). Defendant contests that she agreed to that amount (Evans aff., NYSCEF Doc. No. 37, ¶ 4).

Plaintiff commenced this action by filing a summons with notice on March 19, 2021. An affidavit of service, regular on its face, indicates that defendant was served by affix and mail service pursuant to CPLR 308 (4), with service complete on April 24, 2021, ten days after plaintiff filed the proof of service (CLR 308 [4]). Defendant's time to respond to the summons with notice expired on May 24, 2021 (CPLR 320 [a]). Plaintiff made an initial application to the Clerk of the Court for a default judgment on June 5, 2021 (NYSCEF Doc. No. 3), which was rejected. In the interim, defendant filed a notice of appearance on August 27, 2021 (NYSCEF Doc. No. 17), which plaintiff rejected the same day as untimely (NYSCEF Doc. No. 18). Ultimately, plaintiff moved for default judgment on May 23, 2022.

Turning first to the cross-motion, plaintiff raises two grounds for dismissal. First, she argues that the motion is untimely pursuant to CPLR 3215 (c), which requires that an application for a default judgment be made within a year of defendant's default. This argument fails for two reasons. First, plaintiff's application to the Clerk for a default judgment is sufficient to show a timely application for a default judgment, even if it was later rejected (*see US Bank Natl. Assn. v Brown*, 147 AD3d 428, 428 [1st Dept 2017] ["Plaintiff clearly and unequivocally indicated that it intended to continue the prosecution of this case at the time it made its motion for a reference. Such a timely application even if unsuccessful will not result in the dismissal of the complaint as abandoned pursuant to CPLR 3215(c)"] [internal quotation marks and citations omitted]). Even if the application to the Clerk were insufficient, plaintiff made its motion on May 23, 2022, one day prior to the expiration of the one-year period on May 24, 2022.

Defendant also argues that the complaint should be dismissed pursuant to CPLR 3012 (b), which provides that upon a plaintiff's failure to serve a complaint, "[t]he court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision."

The statute provides that a defendant may demand a complaint within its time to respond to the summons as set forth in CPLR 320 (a), in this instance, thirty days. However, defendant did not demand a complaint until three months after her time to do so had expired. In the absence of an application from defendant for additional time to demand a complaint, plaintiff was under no obligation to respond to the untimely demand.

As neither ground for defendant's cross-motion is sufficient, the court will now address plaintiff's motion for a default judgment. A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215[f]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff has satisfied its burden by proof of service upon defendant (affidavit of service (NYSCEF Doc. No. 2); the affidavits of Mr. Lesser in support of the application to the Clerk and of the instant motion, setting forth the facts constituting the claim (NYSCEF Doc. Nos. 10, 27); and the affirmations of plaintiff's counsel, William J. Candee IV, Esq., establishing the non-appearance of defendant as of June 5, 2021 (prior to defendant's late appearance on

August 27, 2021) (NYSCEF Doc. Nos. 4, 22). The contract of sale plainly indicates that defendant was to pay plaintiff a commission. “Where a contract of sale or lease agreement admits the broker's performance of services and includes an express promise by the seller to pay the broker's commission, the broker is entitled to summary judgment on its claim for a commission as a third-party beneficiary of the contract or lease” (*Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152 [1st Dept 2003]; *see also Ambrose Mar-Elia Co. v Dinstein*, 151 AD2d 416, 418 [1st Dept 1989] [“we held that summary judgment should have been granted because the paragraph represents an admission by defendants that plaintiffs rendered some services with respect to the transaction and are entitled to the reasonable value thereof”] [internal quotation marks and citations omitted]). Even in the absence of a separate written agreement, the broker may recover solely upon the contract of sale (*Ambrose Mar-Elia Co.*, 151 AD2d at 418).

To oppose a motion for default judgment, defendant must “demonstrate a reasonable excuse for their delay and the existence of a potentially meritorious defense to the action” (*Sharestates Inv., LLC v Hercules*, 166 AD3d 700, 701 [2d Dept 2018]).<sup>1</sup> Defendant states that she received the summons in the mail, but then became ill and was unable to timely respond or retain counsel to do so on her behalf (Evans aff, NYSCEF Doc. No. 37, ¶ 18). In the discretion of the court, this showing is sufficient to establish a reasonable excuse (*Dong v Howe*, 219 AD3d 1219 [1st Dept 2023] [“A determination of what constitutes a reasonable excuse lies within the court's discretion”]). As for a meritorious defense, while the lack of a written brokerage agreement is, in and of itself, not an impediment to plaintiff's recovery under the circumstances (as noted above), defendant flatly denies any agreement at the amount claimed by plaintiff

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<sup>1</sup> Defendant relies on CPLR 317 and 5015 (a) (1), but both of those statutes relate to vacating an existing default judgment, which is not the case here.

(Evans aff., NYSCEF Doc. No. 37, ¶ 4). In the absence of a written agreement, the only contemporaneous documentary proof submitted by plaintiff in support of its claim is a series of emails among the parties to the underlying transaction that are equivocal at best. Therefore, and in accordance with this state's well-established preference for deciding matters on the merits (e.g., *Rosario v General Behr Corp.*, 217 AD3d 641 [1<sup>st</sup> Dept 2023]), the court finds that defendant has sufficiently presented, at this stage of the action, a meritorious defense.

Accordingly, it is hereby

ORDERED that plaintiff's motion for entry of a default judgment and defendant's cross-motion to dismiss the complaint are denied; and it is further

ORDERED that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from the date of filing hereof; and it is further

ORDERED that the parties shall appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on October 16, 2024, at 2:15 PM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at [https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary\\_conf\\_forms.shtml](https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml), to the Principal Court Attorney of this Part (Part 38) at [ssyaggy@nycourts.gov](mailto:ssyaggy@nycourts.gov).

This constitutes the decision and order of the court.

ENTER:



<u>8/27/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> OTHER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE