

Aywid Realty Corp. v Duman

2025 NY Slip Op 31751(U)

May 13, 2025

Supreme Court, New York County

Docket Number: Index No. 654015/2021

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 41M

Justice

-----X

AYWID REALTY CORP.

Plaintiff,

- v -

ALP DUMAN,

Defendant.

-----X

INDEX NO. 654015/2021

MOTION DATE 12/19/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

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

Plaintiff, AYWID REALTY CORP., commenced the underlying action on June 24, 2021, to recover amounts allegedly owed pursuant to an executed guaranty agreement whereby defendant, ALP DUMAN, guaranteed the obligations of the commercial tenant, Pasha Inc. (“Tenant”), under a commercial lease agreement between plaintiff and Tenant.

In its complaint, filed on June 24, 2021, plaintiff alleged claims against defendant for breach of contract based on the guaranty agreement and attorney’s fees (NYSCEF Doc. No. 1). Defendant responded by verified answer on September 1, 2021, and therein raised various affirmative defenses and asked the court to dismiss plaintiff’s complaint (NYSCEF Doc. No. 5). In Motion Sequence 001, plaintiff moved to amend the complaint to reflect/correct the amount of damages sought and for summary judgment (NYSCEF Doc. No. 21), but later withdrew this motion (NYSCEF Doc. No. 41). Thereafter, pursuant to the stipulation dated August 1, 2022, defendant waived all of the affirmative defenses in his answer, except for his eighth affirmative defense: New York City Administrative Code § 22-1005 a/k/a Local Law 1932-A prohibits the

enforcement of the guaranty allegedly executed in connection with the lease (NYSCEF Doc. No. 42).

In Motion Sequence 002, plaintiff again moved for leave to file an amended complaint. By Decision and Order of this court on April 3, 2024, plaintiff's motion was granted, the amended complaint became the operative pleading, and defendant was ordered to serve an answer thereto within 20 days from service of the order with notice of entry (NYSCEF Doc. No. 49). However, defendant failed to respond to the amended complaint within 20 days of plaintiff's filing of the notice of entry on April 10, 2024.

Accordingly, on December 19, 2024, plaintiff moved, pursuant to CPLR § 3215, for default judgment against defendant for the relief requested in the amended complaint (NYSCEF Doc. No. 53). On January 9, 2025, defendant cross-moved for an order, pursuant to CPLR §§ 2004 and 3012(d), extending the time to answer, compelling acceptance of the answer, and denying plaintiff's motion for default judgment (NYSCEF Doc. No. 68). For the reasons set forth below, plaintiff's motion for default judgment is denied and defendant's cross-motion for an extension of time to answer the amended complaint is granted.

In his CPLR § 3012(d) motion, defendant seeks an extension of time to answer or otherwise respond to the pleadings. In conjunction with CPLR § 3012(d), CPLR § 2004 confers discretion upon the courts to extend the time limits fixed by statute, rule or order for doing any act, whether the application for an extension is made before or after the expiration of the fixed time limit. Under CPLR § 3012(d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading upon such terms as may be just, provided that there is a showing of reasonable excuse for the delay (*U.S. Bank N.A. v Barker Project LLC*,

220 AD3d 588, 588 [1st Dept 2023]). Additionally, CPLR § 2005 specifically recognizes law office failure as a possible excuse for delay or default that courts may consider.

In his affirmation, defendant's counsel explains that defendant had previously been represented by another attorney of the same firm, but that attorney left the firm in February 2023 (NYSCEF Doc. No. 71). Upon her departure, she allegedly failed to pass her work to another lawyer and, hers being the only consent listed on NYSCEF for defendant's counsel in this action, the firm was not made aware of documents filed on NYSCEF since the date of her departure. Thus, counsel remained unaware of the status of the action and motion for a default judgment, until they received a copy of the amended verified complaint in the mail, pursuant to CPLR § 3215(g). At this point, the firm discovered the law office failure which occurred when the prior attorney left and failed to transfer consent for the matter to another handling attorney. That same evening, the now handling attorney contacted plaintiff's counsel requesting consent to vacate the motion for a default judgment on the grounds of law office failure. Counsel for defendant alleges that plaintiff's counsel rejected these requests, prompting defendant to file the instant cross-motion (NYSCEF Doc. No. 69).

When considering whether a CPLR § 3012(d) motion for an extension of time to appear or plead was properly granted, the First Department has adopted a balancing test of the following factors, including the: (1) length of the delay; (2) excuse offered; (3) extent to which the delay was willful; (4) possibility of prejudice to adverse parties; and (5) potential merits of any defense (*Emigrant Bank v. Rosabianca*, 156 AD3d 468, 472-73 [1st Dept 2017]). The courts have also recognized the "strong public policy in favor of resolving cases on the merits" (*Marine v Montefiore Health Systems, Inc., et al.*, 129 AD3d 428, 429 [1st Dept 2015]). Importantly, when no default judgment has been entered, a showing of a meritorious defense by the defendant is not

required, although any such defense may still be considered under the balancing test (*see Marine* at 429).

Here, although the delay exceeded nine months and was thus of a significant duration, the defendants have presented a reasonable excuse for the delay: law office failure. Defendant has offered a reasonable excuse where the attorney previously assigned to the matter left the firm and inadvertently failed to transfer consent on NYSCEF to another handling attorney at the firm, resulting in a situation where no attorney for the defendant was put on notice of e-filings in this matter as of February 2023 (*see Morales v Marion Ave. Management LLC*, 188 AD3d 466 [1st Dept 2020]). The delay was not willful, evidenced by defendant's efforts to cure the default immediately upon discovery of the law office failure by contacting the plaintiff to advise of the law office failure and request consent to vacate the motion for default judgment. Defendant's appearance and activity in the matter prior to the previous attorney's departure from the firm also demonstrates a "lack of intent to abandon the action," negating any finding of a willful delay (*see Sanchez v Javind Apt. Corp.*, 246 AD2d 353, 356 [1st Dept 1998]).

Further, there is no reason to believe that granting defendant's motion for an extension of the time to answer the amended complaint will prejudice the plaintiff. This is especially true considering plaintiff's own delay in filing for a default judgment, which tends to neutralize any claim of urgency (*see Emigrant Bank* at 474). Indeed, defendant has already e-filed a "Proposed Verified Answer to the Amended Complaint" (NYSCEF Doc. No. 72), so there is no risk of further delay despite any potential claims by plaintiff regarding an urgency for collection.

Finally, although unnecessary in resolving the instant motion because no default judgment has been entered, defendant has presented a potentially meritorious defense to plaintiff's claims. Defendant has demonstrated that there is a genuine issue of material fact as to

which guaranty agreement or clause applies to the defendant and to what extent. For these reasons, and in accordance with the court’s strong interest in resolving cases on the merits, the court grants defendant’s cross-motion for an extension of time to respond to the amended complaint under CPLR § 3012(d) and denies plaintiff’s motion for a default judgment.

Accordingly, it is hereby

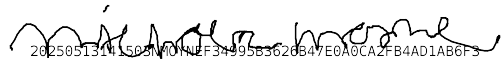
ORDERED that the motion by plaintiff, AYWID REALTY CORP., for a default judgment is DENIED; and it is further

ORDERED that the cross-motion by defendant, ALP DUMAN, for an extension of time and to compel acceptance of a late answer is GRANTED; and it is further

ORDERED that the amended answer, in the form annexed to the defendant’s cross motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 327, 80 Centre Street, New York, New York 10013 on July 24, 2025, at 2:15 PM.

This constitutes the decision and order of this court.



5/13/2025

DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: