

Doberge Torte LLC v Hernandez

2025 NY Slip Op 34109(U)

October 24, 2025

Supreme Court, New York County

Docket Number: Index No. 651581/2025

Judge: Emily Morales-Minerva

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

-----X

INDEX NO. 651581/2025

DOBERGE TORTE LLC, INDIAN KRAPPEN, LLC, HOUSE OF ABBOTT, LLC

MOTION DATE 05/13/2025

Plaintiffs,

MOTION SEQ. NO. 001

- v -

RUPERTO J HERNANDEZ, REBECCA SAUNDERS,

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for EXTEND - TIME

APPEARANCES:

Peraino Malinowski LLP, New York, NY (Mohammad Hassan, Esq., of counsel) for plaintiffs.

Romano Law PLLC, New York, NY (Ru Ho Chen, Esq., of counsel) for defendants.

HON. EMILY MORALES-MINERVA, J.S.C.

In this action, defendants RUPERTO J. HERNANDEZ and REBECCA SAUNDERS move, by notice of motion (sequence number 01), for an order, extending their time to file a pre-answer motion to dismiss the complaint, pursuant to CPLR §§ 2004 and 3012 (d).¹ Plaintiffs DOBERGE TORTE, LLC, INDIAN KRAPPEN, LLC, and HOUSE OF ABBOTT, LLC, oppose the motion and cross move for an order granting them a default judgment against defendants (see CPLR

¹ CPLR § 2004, governs extensions of time generally, and CPLR § 3012 (d), governs extension of time to appear or plead specifically.

§ 3215 [regulating default judgments in New York State courts where, among other things, the defendants fail to appear]).

Defendants oppose the cross-motion.

For the reasons set forth below, defendants' motion (seq. no. 01) for an extension of time to file a pre-answer motion to dismiss is granted, and the pre-answer motion to dismiss (seq. no. 02) is deemed timely. Further, plaintiffs' cross-motion for a default judgment is denied, as there has been no failure of either defendant to appear in this action.

BACKGROUND

On March 20, 2025, plaintiffs DOBERGE TORTE LLC, INDIAN KRAPPEN, LLC, and HOUSE OF ABBOTT, LLC, filed this action sounding in fraud and conversion against defendants RUPERTO J. HERNANDEZ and REBECCA SAUNDERS (see New York State Courts Electronic Filing System [NYSCEF] Doc. Nos. 01 and 02, summons and complaint). It is undisputed that, on March 28, 2025, plaintiffs executed service on defendant REBECCA SAUNDERS through in-hand delivery of the summons and complaint at her residence (see CPLR § 308 ["Personal service upon a natural person"]; see also NYSCEF Doc. No. 17, affirmation of service, undated).

It is also undisputed that plaintiffs executed service on

defendant RUPERTO J. HERNANDEZ by affixing the summons and complaint to the door of Hernandez's residence on April 01, 2025, and mailing a copy of the same to his residence on April 02, 2025 (see CPLR § 308 (4) [governing affix and mail service of process, under specific circumstances not challenged here]; see also NYSCEF Doc. No. 18, notice of cross-motion, exhibit C, affirmation of service, undated).

Thereafter, on April 17, 2025, defendants' counsel filed a notice of appearance in this action (see NYSCEF Doc. No. 03, notice of appearance of defendants' counsel, Romano Law, PLLC). That same day, on behalf of defendants, counsel filed the instant motion (seq. no. 01), seeking an order extending their time to file a pre-answer motion to dismiss the complaint, until August 17, 2025 (see CPLR § 2004 [governing extensions of time generally]; see also CPLR § 3102 (d) [governing extension of time to appear or plead]; and NYSCEF Doc. No. 04, notice of motion, dated April 17, 2025).

On May 02, 2025, plaintiffs submitted opposition to defendants' application, and cross-moved for an order granting them a default judgment, pursuant to CPLR § 3215 (see NYSCEF Doc. No. 08, notice of cross-motion, dated May 02, 2025). As exhibits to the cross-motion, plaintiffs, for the first time, filed proof of service of the summons and complaint with the clerk (see NYSCEF Doc. No. 17, notice of cross-motion, exhibit

B, affidavit of service on defendant Saunders, and Doc. No. 18, exhibit C, affidavit of service on defendant Hernandez).

ANALYSIS

Preliminarily, the court addresses the question whether defendants timely appeared in this action, and answers it in the affirmative.

Generally, an appearance "shall be made within twenty days after service of the summons" (CPLR § 320 [a]). "The defendant appears by serving . . . a notice of appearance, or by making a motion which has the effect of extending the time to answer" (id. [emphasis added]).

Here, plaintiff served defendant REBECCA SAUNDERS on March 28, 2025 (see NYSCEF Doc. No. 17, affirmation of service) and -- exactly 20 days thereafter -- defendants counsel filed notice of appearance and the subject pre-answer motion on behalf of defendants, on April 17, 2025 (see NYSCEF Doc. 03, notice of appearance of Romano Law PLLC; see also NYSCEF Doc. No. 04, defendants' notice of motion). Therefore, defendant Saunders has timely made her appearance in this action.

Further, it is black letter law that, "[a]t any time before service of the responsive pleading is required," a defendant may move to dismiss the complaint asserted against them (see CPLR

§ 3211 [e]; see also Article 30 of the CPLR [governing remedies and pleadings, including "responsive pleading" at CPLR § 3018, including denials and affirmative defenses as set forth in answers]). As defendant Saunders moved for an extension of time to file her motion to dismiss prior to answering the complaint, her motion effectively "extend[ed] the time to serve the pleading until ten days after service of notice of entry of the order" deciding the motion (CPLR § 3211 [f]).²

The timeliness of defendant RUPERTO J. HERNANDEZ's application requires a different analysis but also leads to a finding of punctual appearance in this matter.

Plaintiffs served defendant Hernandez with the summons and complaint by affix-and-mail service, pursuant to CPLR § 308 (4). Section 308 (4) provides "proof of [such] service shall be filed with the clerk of the court designated in the summons within 20 days of either the affixing or mailing, whichever is effected later; [and] service shall be complete ten days after such filing" (CPLR § 308 [4] [emphasis added]).

Here, the process service affixed the summons and complaint on defendant Hernandez's door on April 01, 2025, and mailed the same to his "last known residence" on April 02, 2025 (see NYSCEF

² CPLR § 3211 (f) provides: "Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order."

Doc. No. 18, notice of cross-motion, exhibit C, affidavit of service on defendant Hernandez). This means April 02, 2025, is the later date from which plaintiffs had 20 days to file proof of service with the clerk as to defendant Hernandez.

However, plaintiffs waited 30 days after mailing the summons and complaint to file such proof with the clerk on May 02, 2025. Setting aside thier tardiness, plaintiffs completed service on defendant Ruperto J. Hernandez on May 12, 2025 (see CPLR § 308 [4]). Accordingly, when defendant Hernandez filed notice of appearance and this pre-answer motion on April 17, 2025, he did so "before service of the responsive pleading was required," and his time to answer has not yet expired (CPLR § 3211 [f]).

The court next addresses the merits of defendants' motion for an extension to file a pre-answer motion to dismiss. Defendants rely, in part, on CPLR § 3012 (d), to support this application. However, as section 3012 (d) governs "[s]ervice of pleadings and demand for complaint," it is not applicable here.³

Defendants are seeking an extension of the time to file a motion (see CPLR § 2211 ["A motion is an application for a court

³ CPLR § 3012, governs "[s]ervice of pleadings and demand for complaint," and subdivision (d) section 3012 provides, in full: "Extension of time to appear and plead. Upon application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse or delay or default."

order"])). They neither seek to extend defendants' "time to appear or plead, [n]or [seek] to compel the acceptance of a late pleading" (CPLR § 3012 [d]; see also CPLR § 3011 ["Kind of pleadings"]; CPLR § 3018 ["Responsive pleadings"])).

Pursuant to CPLR § 2004:

"Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed"

([emphasis added]; cf CPLR § 3012 [quoted herein in n 3]). This statute explicitly "vests the trial court with discretion to extend the time to perform any act . . . 'upon such terms as may be just and upon good cause shown'" (Tewari v Tsoutsouras, 75 NY2d 1, 11-12 [1989], quoting CPLR § 2004 [emphasis added]).

In determining a motion, pursuant to CPLR § 2004, the court considers several factors, including: (1) the length of the delay, (2) prejudice to the opposing party, if any, (3) the reason for the delay, and (4) if the moving party was in default before seeking the extension (see Tewari, 75 NY2d at 12; see also Bank of N.Y. Mellon v Adam Plotch, LLC, 226 AD3d 497, 497 [1st Dept 2024] [quoting the same considerations, in part]).

Here, defendants timely appeared in this action and are not in default (see above discussion concerning service of the summons and complaint, at p 4-5). At the time defendants sought

an extension, there was not yet a delay on the part of either defendant to file an answer or pre-answer motion. Further, as plaintiffs shall have permission to respond to the proposed motion to dismiss, no prejudice appears to exist in permitting defendants an extension and deeming the pre-answer motion served; it has been part of the record for over two months.

In addition, plaintiffs do not dispute defendants' reason for requesting extra time to make their motion -- that the parties were attempting to resolve this matter (see NYSCEF Doc. No. 05, notice of motion, affirmation in support of defendants' motion, dated April 17, 2025 [affirming their efforts to resolve the issue with plaintiffs' counsel]). Finally, the absence of an affidavit of merit is not dispositive here because defendants were not in default at the time of the subject application (see Tewari, 75 NY2d at 12]).

The court next addresses plaintiffs' cross-motion for a default judgment, pursuant to CPLR § 3215 (f), and denies the motion entirely. Section 3215 (f) permits a plaintiff to file for a default judgment "[w]hen a defendant has failed to appear, plead or proceed to trial or an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." None of these circumstances are present.

Accordingly, it is hereby

ORDERED that defendants' motion (seq. no. 01) for an extension of time to respond to plaintiffs' complaint is granted; it is further

ORDERED that defendants' pre-answer motion to dismiss (seq. no. 02), filed on August 17, 2025 (NYSCEF Doc. No. 28), shall be deemed timely served, now for then, upon service of a copy of this decision and order on plaintiffs, with notice of entry; it is further

ORDERED that plaintiffs' cross-motion is denied; it is further

ORDERED that within ten days of entry, defendants shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that the Clerk of Court shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

10/24/2025

DATE


EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE