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[*1]

Malta v 801-803, LLC
2020 NY Slip Op 51523(U)
Decided on December 18, 2020
Supreme Court, New York County
Lebovits, J.
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Decided on December 18, 2020

Supreme Court, New York County

Robert Malta, Diego Malta, and Tarek Alam, Plaintiffs,
against
801-803, LLC, Sudhakar Rayapudi, and Besim Kukaj, Defendants.

651503/2019

Scott Levenson, Esq., New York, NY, for plaintiffs.

Manmohan K. Bakshi, P.C., Manhasset, NY (Manmohan K. Bakshi of counsel), for defendants 801-803, LLC, and Sudhakar Rayapudi.

Gerald Lebovits, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 were read on this motion for DEFAULT JUDGMENT.

This action relates to personal guarantees of a lease of commercial property on Ninth Avenue in Manhattan—although that description understates the complexity of the various underlying transactions among the parties.

For present purposes, it suffices to say that plaintiffs claim that they were forced to incur costs to defend a holdover proceeding in Housing Court regarding that commercial property, although their obligations under the lease and the guarantees assertedly had lapsed several years before. Plaintiffs sued for declaratory relief and damages. Defendants answered; and defendants 801-803, LLC, and Sudhakar Rayapudi also counterclaimed against plaintiffs Robert Malta and Diego Malta for rent and additional rent allegedly owed under the lease and guarantees.

Plaintiffs served an untimely reply to defendants' counterclaims, which defendants promptly rejected

Nine months later, defendants filed the current motion for default judgment under CPLR 3215 on the counterclaims Plaintiffs oppose, arguing that their delay in replying should be excused under CPLR 2005 Plaintiffs also cross move for a default judgment of their own, asserting that defendants' answer should be treated as a nullity due to a defective verification Defendants also have filed what they style as a "cross cross motion" for summary judgment, arguing that it is clear on the pleadings that they are entitled to judgment as a matter of law dismissing plaintiff's claims against them

Defendants' motion, plaintiff's cross-motion, and defendants' "cross-cross motion" are all denied—as is defendants' request for monetary sanctions.

DISCUSSION

I. Defendants' Motion for Default Judgment

Defendants move for default judgment on their counterclaims against the Maltas for rent and additional rent It is undisputed that the Maltas' reply to these counterclaims was untimely, that the motion for default judgment is timely, and that defendants have come forward with facts in support of their counterclaims The Maltas argue that the default

judgment motion should nonetheless be denied, and their default in answer excused under CPLR 2005, because they have a reasonable excuse for their default and a meritorious defense.

As an initial matter, defendants are correct that CPLR 2005 requires "an application satisfying the requirements of subdivision (d) of section 3012," which the Maltas have not made. That is, rather than merely opposing defendants' default-judgment motion, the Maltas should have included in their cross-motion a request under CPLR 3012 (d) for this court to require defendants to accept the Maltas' late answer. This court concludes, however, that this procedural error did not prejudice defendants, and that defendants had—and took advantage of—a full opportunity to respond to the Maltas' reasonable-excuse and meritorious-defense arguments. This court therefore exercises its discretion to treat the Maltas' opposition as an application for relief under CPLR 2005 and CPLR 3012 (d), even absent a formal notice of cross-motion. (*See Wimbledon Financing Master Fund, Ltd. v Laslop*, 169 AD3d 550, 551 [1st Dept 2019]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-66 [2d Dept 2013].) [\[FN1\]](#)

On considering the Maltas' opposition, this court concludes that they have shown both a reasonable excuse for their default and a potentially meritorious defense. With respect to reasonable excuse, the Maltas have provided an affidavit of their former counsel, explaining that the default occurred because a since-fired associate in his law office neglected to prepare a timely reply to the counter-claim, and then failed to file the reply once it had been prepared. This court agrees with the Maltas that this is an example of excusable law office failure—particularly given the comparatively short length of delay in serving the reply and the absence of any indication of prejudice to defendants. [\[FN2\]](#)

The Maltas also have a potentially meritorious defense. The counterclaims appear to be seeking rent and original rent owed over the full term of the original lease—*i.e.*, through 2017. [\[*2\]](#) That lease was for retail space on the north end of the commercial space located at 801-803 Ninth Avenue. The Maltas allege that in 2013, after the Maltas relinquished possession of this north space, defendant Besim Kukaj entered into a lease with 801-803 LLC for the *south* end of the commercial space, and then entered into a separate written agreement to modify the north space lease under which a default on the south space lease would also be deemed a default under the *north* space lease as well.

The Maltas contend that because these 2013 agreements, read together, significantly expanded their potential liability on their guarantees, the guarantees lapsed at that point. Therefore, they argue, they cannot be responsible for rent and additional rent owed under the leases between 2013 and 2017. This court concludes that this argument is a potentially meritorious defense. (*See White Rose Food v Saleh*, 99 NY2d 589, 591 [2003] [holding that "if the original note is modified without its consent, a guarantor is relieved of its obligation"])^[FN3]

This is not to say the Maltas *necessarily* will prevail on this defense to the counterclaims. The Maltas' guarantees provide, for example, that the liability of the guarantors shall not be impaired or terminated by reason of "any modifications, renewals, extensions, or amendments of the lease." (*See* NYSCEF No. 24 at 41.) At a minimum, though, the legal effect of the quoted language and how it relates to the modification of the north space lease—including, for example, whether this modification constituted a novation—should be decided by the court on the merits, rather than on default.

Defendants' motion for default judgment is denied.

II. Plaintiffs' Cross-Motion for Default Judgment

Plaintiffs cross-move for a default judgment of their own, arguing that defendants' answer was a nullity due to a defective verification. The cross-motion for default judgment is denied.

As an initial matter, it is not clear that plaintiffs have shown even that the verification necessarily was defective, given the conflicting evidence about which county 801-803 LLC should be deemed to be located in for purposes of the attorney-verification exception in CPLR 3020 (d) (3). But even assuming that the original verification of the answer *was* faulty, that would not of its own force render the answer a nullity. Rather, plaintiffs were required to "give[] notice with due diligence to the attorney of the adverse party" that they were treating the answer as a nullity. (CPLR 3022.) Plaintiffs did not immediately reject the answer as a nullity. And raising the putative verification defect only in a cross-motion for default judgment filed a year after the answer was far too late to constitute "due diligence." (*See Cherubin Antiques, Inc. v Matiash*, 106 AD3d 861, 862 [2d Dept 2013].)

III. Defendants' "Cross-Cross Motion" for Summary Judgment

Defendants have also brought what they describe as a "cross-cross motion" for summary judgment, seeking dismissal under CPLR 3212 of plaintiffs' claims. The motion is denied.

This court is skeptical that this application is properly before the court: CPLR 2215 (a) [*3] provides that in advance of a motion's return date, another party may "serve upon the moving party a notice of cross-motion demanding relief"—not that in advance of the motion's return date the *movant* may serve a further cross-motion upon the *cross-movant*. Regardless, the court declines to grant judgment as a matter of law without, as far as this court is aware, any discovery even being scheduled, much less conducted [FN4]. The absence of discovery is a particular problem in the context of this case, in which it appears at this stage that both plaintiffs' claims and defendants' counterclaims may well turn on evidence not yet present in the record.

Accordingly, it is hereby

ORDERED that defendants' motion for default judgment under CPLR 3215 is denied; and it is further

ORDERED that under CPLR 3012 (d) defendants shall accept plaintiffs' reply to counterclaims in the form of the reply filed on NYSCEF on August 22, 2019; and it is further

ORDERED that plaintiffs' cross-motion under CPLR 3215 is denied; and it is further

ORDERED that defendants' "cross-cross-motion" for summary judgment under CPLR 3212 dismissing plaintiffs' claims is denied; and it is further

ORDERED that the parties shall appear before this court for a telephonic preliminary conference on January 19, 2021.

Dated: December 18, 2020

Hon. Gerald Lebovits

J S C

Footnotes

Footnote 1: Defendants cite *Fried* for the proposition that the absence of a notice of cross-motion is a jurisdictional defect precluding the grant of relief. In context, however, the cited passage from *Fried* is merely describing one strand of the Second Department's prior and conflicting precedents in this area, before going on to repudiate the proposition on which defendants now rely. (*See* 110 AD3d at 63-65.) And defendants do not address the First Department's later *Laslop* decision in any event.

Footnote 2: Defendants are correct that a longer delay ensued after defendants served their notice of rejection of the untimely counter-claim reply. At the same time, defendants also delayed for a considerable period of time in moving for default judgment on the counterclaims. And given that defendants were put on notice relatively quickly of the Malts' potential arguments in response to the counterclaims, this court is disinclined to give dispositive weight to the Malts' delay in seeking relief under CPLR 3012 (d) *after* they filed their (untimely) counterclaim-reply.

Footnote 3: Defendants attempt to distinguish *White Rose Food* on the ground that here, unlike there, the guarantee is absolute and unconditional. But it was undisputed in *White Rose Food* that the guarantee in that case was absolute and unconditional as well. (*See* Br. For Appellant, 2003 WL 22299403, at *3 [quoting guarantee]; Br. for Respondent, 2003 WL 22769969, at *4 [quoting guarantee].)

Footnote 4: The RJI in this case was filed only with defendants' default judgment motion (*i.e.*, twelve days before the "cross-cross motion"); and no preliminary conference in the case has yet been held.

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