2022-03-29

Department of Hous. Preserv. & Dev. of the City of N.Y. (DHPD) v. LL Solutions, LLC

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Department of Hous. Preserv. & Dev. of the City of N.Y. (DHPD) v LL Solutions, LLC
2022 NY Slip Op 50225(U)
Decided on March 29, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 29, 2022

Civil Court of the City of New York, Bronx County

Department of Housing Preservation and Development of the City of New York (DHPD), Petitioner,

against

LL Solutions, LLC, ISSAKA MAIGUZO & RUBEN RAMIREZ, Respondents.

L & T Index No. 303831-2021

For Petitioner, Adam Aprigliano, Esq.

For Respondents, Jason Green, Esq.

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY RESPONDENTS TO VACATE THE JUDGMENT ENTERED ON NOVEMBER 15, 2021:

Notice of Motion, Affidavits & Affirmation & Exhibits Annexed No. 15 (NYSCEF)
Affirmation in Opposition & Exhibits Annexed # 17

Reply Affidavit & Exhibits Annexed # 18

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

HISTORY AND PROCEDURAL POSTURE

This action was commenced by DHPD seeking, *inter alia*, an order to correct open building violations, as well as civil penalties for both uncertified violations and for respondents' failure to comply with an Underlying Condition Program Order (UCP) dated November 4, 2019.

Respondents were represented by Jayson Blau, Esq. (prior counsel). After three court appearancess stretching from June 16, 2021, to September 17, 2021, trial was scheduled for November 15, 2021.

On November 15, 2021, prior counsel informed the court he would not appear at trial. He explained that he had not filed a notice of appearance or answer.[FN1]

After inquest held on the same day, the court issued, *inter alia*, an order directing the respondents to correct open violations at the subject building and awarded petitioner a judgment in the amount of $93,080.00. (*see* November 15, 2021 Order).

Respondents now move to vacate their default and for leave to file a late answer alleging that their default was due to law office error. Respondents submit an affirmation from their [*2]current counsel, an affirmation from prior counsel, and an affidavit from respondent Maiguzi.[FN2] The court will address these submissions individually.

Prior counsel states that although he represents respondents in some matters, he was only directed to adjourn this case until respondents had the opportunity to retain counsel. Since prior counsel had not been retained, he did not submit a notice of appearance nor interpose an answer. He avers that, had he been retained, he would have appeared. Essentially, prior counsel chalks up the default to "miscommunication."

Current counsel's affirmation largely tracks prior counsel's: that prior counsel had only been retained to adjourn the matter. Current counsel also alleges that there "was some confusion on the last court date" regarding whether prior counsel, respondents themselves, or some other counsel would appear for respondents. He states that prior counsel "would have appeared had he known he was appearing on behalf of respondents."

For his part, Maiguzi states the default was not intentional because prior counsel is always in court and "but for the error in calendaring and/or confusion of who was appearing, would have appeared and there would have been no default."

Respondents argue that they have established excusable law office error.

Petitioner strongly opposes the motion, arguing that respondents show neither an excusable reason for their default nor a meritorious defense to the proceeding.

Petitioner disputes the assertion that prior counsel's sole purpose was to obtain adjournments since he appeared on three court dates, held himself out as respondents' attorney, and engaged in substantial negotiations with petitioner's counsel.

Petitioner argues the default was willful because respondents affirmatively refused to appear on the trial date.[FN3]

As to a meritorious defense, respondent Maiguzi states "I am quite confident that respondents timely corrected the violations and simply failed to certify due to Covid 19 restrictions and lack of staff during Covid."

Petitioner responds that no proof was submitted that the violations were corrected "timely."

FORMAL VERSUS INFORMAL APPEARANCES

As an initial matter, the court will address prior counsel's allegation that he did not "appear" as the term is understood in the law. The implication being, of course, that he had no obligation to appear on the trial date.

Normally, a defendant or respondent appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. (*see* CPLR § 320(a); *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1008, 129 NYS3d 146 [2nd Dept 2020]; *16 Lincoln Square Associates v Amrep Corp.*, 129 Misc 2d 697, 698, 493 NYS2d 692 [Civ Ct, New York County 1985])). Here, respondents did none of these things.

While CPLR§ 320(a) speaks to formal appearances, the courts have also recognized

informal appearances. (*see Matter of Sessa v Board of Assessors of Town of N. Elba*, 46 AD3d 1163, 1164, 847 NYS2d 765 [3rd Dept 2007]; *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1009). One appears informally by actively participating in the merits of the proceeding. (*id*; *see also, Washington v Palanzo*, 192 Misc 2d 577, 580, 746 NYS2d 875 [2nd Dept 2002] (participation in lengthy settlement negotiations for which the court granted multiple adjournments evidenced participation on the merits)).

Prior counsel incredibly states *now* that he only appeared to adjourn the case. However, he consistently held himself out as respondents' attorney, (*see Taveras v City of New York*, 108 AD3d 614, 617, 969 NYS2d 481 [2nd Dept 2013]), participated in three (3) virtual court conferences, adjourned the matter three (3) times, and held extensive negotiations with petitioner's counsel. He never once informed the court he was appearing as a friend of the court with the limited purpose of adjourning the case.

On September 17, 2021 alone, prior counsel made multiple statements on the record evincing active participation: he had spoken to the landlord three (3) days ago; represented many violations had been corrected and would be removed from DHPD's database; and represented that eight of twelve tenants of the subject building were not paying rent [in a further attempt to lower petitioner's settlement request]. Over the course of the conference, prior counsel offered $2,000 to settle petitioner's monetary claim, raised that offer to $3,000 after speaking to the landlord, later raised that to $4,000 and finally to $4,250.[FN4]

When reminded that he had not filed an answer, and thus had not stated a defense to any of petitioner's claims, prior counsel countered that he would rather not bill the landlord for the answer if he could eventually settle the case. Prior counsel had made some of these same allegations in prior appearances in attempts to lower petitioner's settlement demand.

Critically, Maiguzi understood that prior counsel was his attorney in this matter and never states that prior counsel had only been retained to adjourn the case.

Consequently, there is no doubt that prior counsel appeared on the respondents' behalf. Regardless, the default can be vacated if respondents can establish both an excusable reason for their default and a meritorious defense.

DEFAULTS AND LAW OFFICE ERROR

In New York, there is a strong policy in favor of resolving disputes on the merits rather

than on default of a party. (*see Chevalier v 368 E. 148th Street Associates, LLC*, 80 AD3d 411, 914 NYS2d 130 [1st Dept 2011]; *Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508, 497 NYS2d 924 [1st Dept 1986]). However, this preference does not justify vacating a default where a party fails to show a reasonable excuse for the default and a potentially meritorious defense. (*see* CPLR 5015(a)*; Leader v Parkside Group*, 174 AD3d 420, 421, 103 NYS3d 427 [1st Dept 2019]; *Jenny Chase Inc. v Pizzolato*, 67 Misc 3d 127[A], 2020 NY Slip Op 50387[U] [App Term, 1st Dept 2020]).

Whether to excuse a default is left to the sound discretion of the court. (*see Aponte v Raychuk*, 172 AD2d 280, 282, 568 NYS2d 735 [1st Dept 1991]).

Law office error, of course, may constitute an excusable default. (*see* CPLR § 2005; *[*3]Mutual Marine Office, Inc. v Joy Const. Corp.*, 39 AD3d 417, 419, 835 NYS2d 88 [1st Dept 2007]). As the legislature never intended to vacate defaults at the mere mention of "law office error," (*see Onishenko v Ntansah*, 145 AD3d 910, 911, 43 NYS3d 504 [2nd Dept 2016]), the claim must be supported by a detailed and credible explanation of the default, rendering conclusory allegations of law office failure insufficient. (*see Tri-State Consumer Insurance Company v Hereford Insurance Company*, 167 AD3d 416, 417, 88 NYS3d 188 [1st Dept 2018]; *Le Monda v City of New York*, 159 AD3d 470, 2018 NY Slip Op 01546 [1st Dept 2018]; *Galaxy General Contracting Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790, 945 NYS2d 298 [1st Dept 2012]).

No Excusable Reason for The Default

Respondents offer neither a detailed nor credible explanation for the default.

Prior counsel states that "[r]espondents had not retained my office on this matter. Had I been retained, I certainly would have appeared, and submit that the default was not intentional either by myself or the Respondents and was simply a miscommunication between my office and the Respondents."

Maiguzi offers that the default was not intentional because prior counsel would have appeared "but for the error in calendaring and/or confusion of who was appearing."

No one with personal knowledge explains how the alleged "miscommunication" came to be.

Pointedly, no one offers any factual statement about *any* communication between

respondents and prior counsel. As such, allegations of "miscommunication" are entirely vague, conclusory and unsubstantiated. (*see Pryce v Montefiore Medical Center,* 114 AD3d 594, 594-595, 981 NYS2d 67 [1st Dept 2014]; *Carmody v 208-210 East 31st Realty, LLC,* 135 AD3d 491, 25 NYS3d 14 [1st Dept 2016] (property manager's conclusory claim that attorney must "have dropped the ball" is insufficient to establish reasonable excuse); 555 *Prospect Associates, LLC v Greenwich Design & Development Group Corp.*, 154 AD3d 909, 62 NYS3d 530 [2nd Dept 2017]; *Lotz v Westbourne Apartments, Inc.*, 159 AD3d 810, 812, 73 NYS3d 572 [2nd Dept 2018] (*detailed* explanation of law office failure established reasonable excuse [emphasis added])).

Respondents' explanations are incredible considering all the circumstances. Prior counsel affirmatively chose not to appear at trial, after having failed to file an answer. Furthermore, there is no evidence submitted that respondents took any steps to ascertain the status of this case. (*see Cusumano v Riley Land Surveyors, LLP*, 179 AD3d 593, 594, 118 NYS3d 94 [1st Dept 2020] (failure to follow up with counsel, in any respect, is unreasonable)).

The court notes that even if the failure to appear at trial were somehow excused, respondents have offered no reason for their failure to answer by September 30, 2021, after being afforded several extensions to do so. (*see e.g., U.S. Bank Trust N.A. as Trustee for LSF9 Master Participation Trust*, 187 AD3d 624, 624-625, 2020 NY Slip Op [1st Dept 2020]; *Betz v Carbone*, 126 AD3d 743, 744, 5 NYS3d 256 [2nd Dept 2015]; *333 Cherry LLC v Northern Resorts, Inc.*, 66 AD3d 1176, 1177, 887 NYS2d 341 [3rd Dept 2009]; *see also Roussadimou v Zafiriadis*, 238 AD2d 568, 569. 657 NYS2d 66 [2nd Dept 1997] (Conduct of attorney, including failure to answer, constitutes neglect)).

No Meritorious Defense

Even assuming arguendo that respondents had established a reasonable excuse for their default, the motion must be denied as they have not raised a potentially meritorious defense to [*4]the claim.

Respondent Maiguzi offers that "I am quite confident that Respondents timely corrected the violations and simply failed to certify due to Covid 19 restrictions and lack of staff during Covid." He further states, "[r]espondent's [sic] have always provided adequate services and have corrected violations as they arise." These entirely conclusory statements are insufficient. (*see Yes Contracting Inc., v CLST Enterprises LLC*, 193 AD3d 535, 147 NYS3d 12 [1st Dept

2021]; *Casimir v Consumer Home Mort. Inc.*, 65 AD3d 954, 886 NYS2d 11 [1st Dept 2009]).

To the extent that respondents offer further facts in their reply, the court does not consider them.[FN5]

First, there is no right to reply on a motion brought by order to show cause and the court did not grant respondents permission to do so.[FN6] (*see D.D. v R.M.*, 74 Misc 3d 1214(A), n.2, 2022 NY Slip Op 50123(U) [Fam. Ct, Nassau County 2022]). Additionally, the reply includes facts not offered in the motion. Generally, a movant is not permitted, in reply, to supply new evidence in support of the application. (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381, 822 NYS2d 264 [1st Dept 2006]; *Dannasch v Bifulco*, 184 AD2d 415, 417, 585 NYS2d 360 [1st Dept 1992]). While this rule is not inflexible, respondents give no justification for why the additional evidence was not submitted with their motion.[FN7] (*see Matter of Dusch v Erie County Medical Center*, 184 AD3d 1168, 1172, 125 NYS3d 511 [4th Dept 2020] (No excuse given for offering records which were available at the time of the application.); *Mohsin v Port Authority of New York*, 83 AD3d 536, 2011 NY Slip Op 03119 [1st Dept 2011]).

Based on the foregoing, the respondents' motion is entirely denied. This constitutes the Decision of the court. Copies will be emailed to all parties and filed on NYSCEF.

SO ORDERED,
Dated: March 29, 2022
Bronx, NY
/S/
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: The court noted the lack of a notice of appearance on more than one occasion and directed prior counsel to file an answer several times. Prior to leaving the Teams appearance, counsel indicated that if the *court* felt he was counsel of record that he would need to make a motion to be relieved. Obviously, the court considered Mr. Blau respondents' counsel. Similarly, the court would not entertain an application to adjourn the matter under these circumstances.

Footnote 2: The court notes that the case caption has a slightly different spelling of

respondent Maiguzi's last name.

Footnote 3: Petitioner attaches to its opposition a October 1, 2021 email addressed to both current and prior counsel informing them of the trial date and advising that petitioner would be ready for trial [some six-weeks later] and would not consent to any last-minute change in attorneys.

Footnote 4: Petitioner's opposition also alleges out of court negotiations with prior counsel.

Footnote 5: Reply papers uploaded to NYSCEF on or about March 22, 2022.

Footnote 6: The court did state that perhaps additional proof could be forwarded to petitioner's counsel.

Footnote 7: All the documents submitted are dated from December 2020 to April 2021.

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