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MH 770-54th St., LLC v. Qihan Dong

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MH 770-54th St., LLC v Qihan Dong
2022 NY Slip Op 31198(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 154825/2021
Judge: Mary V. Rosado
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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. MARY V. ROSADO PART 33

Justice

-----X

MH 770-54TH STREET, LLC,

Plaintiff,

INDEX NO. 154825/2021

MOTION DATE 08/25/2021

MOTION SEQ. NO. 001

- v -

QIHAN DONG, SHUIRONG DONG, JUDE ONICHA,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, plaintiff moves for default judgment seeking: (1) a money judgment against the defendants for rent and additional rent owed through May 31, 2021, plus statutory interest; (2) a money judgment against the defendants for rent, use and occupancy, and/or additional rent from June 1, 2021 through the date of judgment; and (3) a money judgment against the defendants for attorney fees, costs and disbursements through the date of judgment. Defendants, Qihan Dong and Shuirong Dong, filed a cross-motion to dismiss the action pursuant to CPLR §3211 (a) (1), (7), (8), and CPLR §308 on the ground that: (1) a defense is founded upon documentary evidence; (2) the pleading fails to state a cause of action; and (3) the court has no jurisdiction of the person of the defendant due to improper service.

The Court heard oral argument on this motion and the cross motion to dismiss on March 30, 2022, from the attorneys, Scott F. Loffredo, Esq., for the plaintiff; and Edward Miller, Esq.,

for the defendants, Qihan Dong and Shuirong Dong. Defendant, Jude Onicha, did not appear for oral argument on March 30, 2022.

This Court treats the cross-motion in the instant action as a motion to vacate the default judgment. Defendants must demonstrate a reasonable excuse for their default in answering the complaint and a potentially meritorious defense to the same in order to vacate an order and judgment (see Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A., 42 AD3d 380, 381 [1st Dept 2007], citing, inter alia, Tat Sang Kwong v Budge-Wood Laundry Serv., Inc., 97 AD2d 691 [1st Dept 1983]; World O World Corp. v Anoufrieva, 163 AD3d 610, 611 [2d Dept 2018]). “Whether a proffered excuse is ‘reasonable’ is a ‘sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits’” (Fried v Jacob Holding, Inc., 110 AD3d 56, 60 [2d Dept 2013], quoting Harczark v Drive Variety, Inc., 21 AD3d 876 [2d Dept 2005]).

The defendants, Qihan Dong and Shuirong Dong, have not demonstrated a reasonable excuse for their default in answering the complaint. The instant action was commenced on May 18, 2021, and the defendants were served at the last known place of dwelling, in which a male individual received service via a process server on June 1, 2021 (see NYSCEF Doc. Nos. 1 - 4). Defendant, Jude Onicha, was personally served pursuant to CPLR §308(1); and defendants, Qihan Dong and Shuirong Dong, were served through substituted service pursuant to CPLR §308(2). Defendants, Qihan Dong and Shuirong Dong, were required to answer or appear on or before July 1, 2021, pursuant to CPLR §320.¹ Plaintiff further served the defendants with

¹ The defendants, Qihan Dong and Shuirong Dong, by their attorney conceded to the jurisdiction but refused to withdraw its cross-motion to dismiss.

additional copies of the summons and verified complaint on or about July 20, 2021, via regular, first-class mail to the defendants last known address (see NYSCEF Doc. No. 6). The defendants, Qihan Dong and Shuirong Dong, failed to answer the complaint on or before July 1, 2021, and the defendants, Qihan Dong and Shuirong Dong, only appeared and filed a cross-motion after plaintiff filed the motion for default judgment. Based on the documents submitted by the defendants, they were in communication with the defendant, Jude Onicha, who was personally served. The Dongs have no reasonable explanation for their failure to respond to the complaint. Therefore, the defendants, Qihan Dong and Shuirong Dong, have not demonstrated a reasonable excuse for their default in answering the complaint. The Court need not reach the second prong of the test.

The defendants, Qihan Dong and Shuirong Dong, abandoned the premises before the lease expired. Defendants, Qihan Dong and Shuirong Dong, are liable for rent through the end of the lease, August of 2020, due to their abandonment of the premises without the consent of the owner and under the terms of the lease the defendants, Qihan Dong and Shuirong Dong, are still responsible for rent until the end of the lease (NYSCEF Doc. No. 13). The remaining defendant, Jude Onicha, stayed in the premises and has not surrendered the premises to the plaintiff. Under the terms of the lease the defendant, Jude Onicha, is liable for: (1) rent through August of 2020; and (2) use and occupancy and rent from September of 2020 through March of 2022 (NYSCEF Doc. No. 13).

Accordingly, it is hereby

ORDERED that the cross-motion by the defendants, Qihan Dong and Shuirong Dong, is denied in its entirety; and it is further

ORDERED that plaintiff's motion to enter default judgment is granted against all defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against all defendants, each jointly and severally liable, on part of the first cause of action for rent through August of 2020, in the sum of \$33,703.92; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against defendant, Jude Onicha, on the remaining portion of the first cause of action for additional rent and on the second cause of action for use and occupancy and rent from September of 2020 through March of 2022 in the sum of \$147,613.76; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against all defendants on the third cause of action for attorneys' fees in the sum of \$4,891.63.

This constitutes the decision and order of the Court.

4/8/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE