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Kennedy v. Turin Hous. Dev. Fund Co., Inc.

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Kennedy v Turin Hous. Dev. Fund Co., Inc.
2022 NY Slip Op 33132(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 156861/2021
Judge: Arlene P. Bluth
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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. ARLENE P. BLUTH PART 14

Justice

-----X

MINER KENNEDY AND VALIENNE ROUSSEL, as
Administrators for the Estate of Mary Lee Mayo,

Plaintiffs,

INDEX NO. 156861/2021

MOTION DATE 09/16/2022

MOTION SEQ. NO. 001

- v -

TURIN HOUSING DEVELOPMENT FUND COMPANY,
INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 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.

The motion by plaintiffs for a default judgment is denied and the cross-motion by defendant is granted only to the extent that it must answer on or before October 12, 2022.

Background

Plaintiffs contend they were appointed in Surrogate’s Court to be the administrators of the estate of Mary Lee Mayo (they are Ms. Mayo’s grandchildren). They claim that after Ms. Mayo’s death, defendant started a nonpayment proceeding in 2017 in which defendant obtained possession on default. Plaintiffs argue that they eventually vacated that default judgment but that all of the personal property in the apartment was removed by the time this occurred. Plaintiffs allege that defendant has not returned any of the belongings. They observe that defendant then started a new non-payment proceeding in 2020.

Plaintiffs bring three causes of action against defendant for conversion (related to the removal of the belongings from the apartment), replevin and for legal fees. They now bring a motion for a default judgment and contend defendant failed to timely answer or appear.

In opposition and in support of its cross-motion, defendant contends it has both a reasonable excuse for its failure to timely answer and a meritorious defense. It points out that the parties are currently litigating in Housing Court and that counsel for defendant pointed out to plaintiff's attorney that defendant had not yet received the complaint filed in this matter. Counsel for defendant believed that the parties were close to reaching a global settlement of the entire dispute and did not expect the instant motion practice to proceed.

Defendant argues that plaintiffs seek the exact same relief in this action as they do in Housing Court—money damages for the alleged conversion of the personal property. It maintains that the instant matter is barred by the statute of limitations and a lack of personal jurisdiction. Defendant insists that the belongings at issue were removed from the apartment prior to July 2018 and so this case, filed on July 22, 2021, is barred by the three-year limitations period for conversion claims. It also maintains that the decedent moved to South Carolina and passed away there in 2014 while living in a long-term care facility.

Defendant also claims that service was improper because plaintiff purportedly served the summons and complaint on "Mario Doe" but there is no indication of who this person is and whether or not he was authorized to accept service on behalf of defendant. It maintains that it has not been able to find someone named Mario who might have accepted service on behalf of defendant.

Discussion

The Court grants the cross-motion by defendant, but only to the extent that the default is vacated and defendant may file an answer on or before October 12, 2022.

As an initial matter, the Court observes that plaintiffs did not submit a reply or opposition to the cross-motion by defendant although the parties agreed to a briefing schedule that provided for such a filing (NYSCEF Doc. No. 33). However, the Court is unable to grant the cross-motion to dismiss because defendant failed to attach anything from the defendant itself.


Although an affidavit from someone named Robert Irvine is referenced in the notice of cross-motion (NYSCEF Doc. No. 14), defendant instead uploaded its memo of law twice (NYSCEF Doc. Nos. 16 and 17). Without submitting anything from someone with personal knowledge of the facts asserted by defendant, the Court is unable to find that service was improper or that the statute of limitations bars this action.

The Court observes, however, that because plaintiff had not yet obtained a default judgment, defendant did not have to demonstrate a meritorious defense (*see Hirsch v New York City Dept. of Educ.*, 105 AD3d 522, 961 NYS2d 923 (Mem) [1st Dept 2013] [“defendants were not required to set forth a meritorious defense because no default judgment had been entered”]). And, here, defendant raised a reasonable excuse for not answering because, according to counsel for defendant, the parties were engaged in settlement talks and thought that this case was essentially on hold while that happened. Plaintiffs did not offer a reply to contradict this assertion. Therefore, defendant raised a reasonable excuse and is entitled to appear and answer.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for a default judgment is denied and the cross-motion by defendant is granted only to the extent that defendant must answer on or before October 12, 2022 and denied with respect to the remaining relief requested.

Conference: November 9, 2022 at 10:30 a.m. By November 2, 2022, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether the conference is necessary. The failure to upload anything by November 2, 2022 will result in an adjournment of the conference.

<u>9/19/2022</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE