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2022-10-19

### Harlem 133 Owner, LLC v. Jimenez

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<b>Harlem 133 Owner, LLC v Jimenez</b>
2022 NY Slip Op 33591(U)
October 19, 2022
Supreme Court, New York County
Docket Number: Index No. 152456/2022
Judge: Andrea Masley
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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HARLEM 133 OWNER, LLC F/K/A HARLEM 133  
LENDER, LLC,

Plaintiff,

- v -

ROSA JIMENEZ, LOURDES AQUINO, MEDELINE  
BURDIER, BLANCA MOLINUEVO, KEVIN SCOTT,  
KATRINA WILEY, MARIO FLORES, ALBAR IRIS  
FLORES, DEBBIE LIMA, AMANDA DEVALLE, YVONNE  
GARCIA, JOCLYN GARCIA, REEM MARBROUK,  
GISELLE PENA, YARLIN PENA, JENNIFER AVILA,  
KARINA MARTINEZ, CRISTO REYES, OLIVIA  
JOHNSON, GABRIEL JAMES, JAZZMIN ROSARIA,  
ABDULLAH RASHID, SHARNASIA VANCE, GEORGETTE  
HYMAN, GREGORY GADSEN, SHAKIA JOHNSON,  
DWAYNE SEIFFORTH, PAULETTE CRAWFORD,  
WISMIDE LOUIS, TONIA VAIL, TYSHEFF BROWN,  
JAZMINE GUZMAN, JARILZA CORUJO, SONYA JAMES,  
EPPY DAVIS, and JOHN AND JANE DOES 1-26,

Defendants.

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INDEX NO. 152456/2022  
MOTION DATE N/A  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 156, 157, 158, 159  
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

Defendant Karina Martinez moves by order to show<sup>1</sup> to vacate the default  
judgment against her, which was entered on September 28, 2022 (NYSCEF Doc No.  
[NYSCEF] 149, Decision and Order.)

<sup>1</sup> Defendants’ objection to Martinez’s motion by OSC, authorized by CPLR 2211, instead  
of by notice of motion pursuant to CPLR 2214(a) or (b), is wrong as a matter of law  
since an OSC is a “substitute for motion.” (Siegel, NY Prac. § 248 at 478 [6th ed  
2018].) An order to show cause is entirely appropriate in light of Ms. Martinez’s  
imminent eviction; she need not wait until the sheriff is at her door.

Under CPLR 5015, a party seeking to vacate a default judgment must demonstrate both a reasonable excuse for the default and a meritorious defense to the action. (See e.g., *Eugene Di Lorenzo, Inc. v AC Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 [1986].) For the reasons stated on the record on October 17, 2022, the motion is denied. This court's September 28, 2022 Order and Judgment is stayed for 30 days, until November 15, 2022, to give Ms. Martinez and her two sons time to find a new home, after which plaintiff may proceed with the eviction.

This is an ejectment action commenced by plaintiff, Harlem 133 Owner, LLC, the owner of the real property located at 308- 310 West 133rd Street, New York, New York 10030 (Property). (NYSCEF 2, Complaint ¶1.)

On March 18, 2019, plaintiff made a loan to W133 Owner, LLC (Borrower) in the amount of \$26,000,000 (Loan). (*Id.* ¶35.) The loan was guaranteed by Borrower's principal Levi Balkany. (*Id.* ¶44.) The Loan was contingent on Borrower's representation that the Property is only permitted to be "used exclusively as a residential Condominium property." (*Id.* ¶37; NYSCEF 3, Loan Agreement, § 4.1.20.) Borrower agreed it "may not enter into any Lease . . . without the prior written consent of Lender." (NYSCEF 2, Complaint ¶39; NYSCEF 3, Loan Agreement § 5.1.17[a].) Borrower defaulted under the Loan Documents for leasing in violation of the Loan Documents, and in violation of N.Y.C. Admin. Code §27-2097 (barring unregistered rental establishments). (NYSCEF 2, Complaint ¶40.)

On June 5, 2020, Lender commenced an action against Borrower and co-defendant guarantor Balkany in this court, captioned *Harlem 133 Lender, LLC v W133 Owner, LLC, et al.*, Index No. 652300/2020 (State Court Action), asserting three causes

of action: (1) breach of contract; (2) injunctive relief enjoining and restraining Borrower and Balkany from continuing leasing and directing Borrower and Balkany to advise interested parties that any lease purportedly executed in violation of the Loan Documents is void; and (3) appointing a receiver. (NYSCEF 2, Complaint ¶¶44.) On June 16, 2020, the court enjoined the Borrower, Balkany, or anyone else from “transferring, leasing, using, misusing, or otherwise encumbering the Property.” (NYSCEF 5, June 16, 2020 Order to Show Cause.) Borrower and Balkany admitted to leasing Property units without Lender’s permission, thereby breaching the terms of the Loan Documents. (NYSCEF 6, July 13, 2020 Decision and Order at 1.)

The Borrower filed for bankruptcy in the EDNY on July 16, 2020. (NYSCEF 2, Complaint ¶¶49 [*In re W133 Owner LLC*, Case No. 20-42637-nhl].) The Bankruptcy Court rejected the unexpired leases. (*Id.* ¶¶54; NYSCEF 8, Findings of Fact.)

Plaintiff initiated this action on March 23, 2022 against 35 unknowing tenants who leased the premises from Borrower and Balkany with the assistance of New York City agencies.<sup>2</sup> (NYSCEF 1 and 2, Summons and Complaint.) On March 29, 2022, plaintiff’s process server, personally served the complaint, upon Ms. Martinez, pursuant to CPLR 320(a), requiring an answer or appearance by April 18, 2022. (NYSCEF 20, Affidavit of Service.)

In an October 8, 2022 affidavit, Christine Perez, Ms. Martinez’s sister, states that she mailed the answer on May 10, 2022 to Meisel, plaintiff’s attorney in this action as

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<sup>2</sup> The court was informed at arguments on September 26, 2022 and October 18, 2022 by attorneys for some of the tenants that HRA and DSS worked with Balkany and the tenants to arrange occupancy.

directed by the Summons. (NYSCEF 156, Perez Affidavit at 8/9.<sup>3</sup>) Meisel denies receipt of Ms. Martinez’s answer. (NYSCEF 47, Meisel Aff ¶12.) In addition to being late, to date, the answer has not been provided to the court. Ms. Martinez has not provided the court with a reasonable excuse.

Plaintiff served Ms. Martinez with the default motion on June 3, 2022. (NYSCEF 60, Affidavit of Service.) Ms. Martinez failed to oppose the motion or contact the court or appear for the argument on September 26, 2022. Ms. Martinez has not provided any explanation for failing to respond to the default motion.

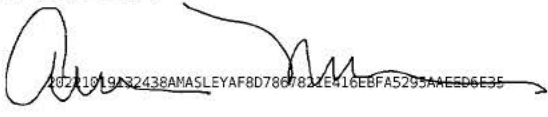
Ms. Martinez also has no meritorious defense. She has no right to occupy the condominium unit because (a) she unknowingly entered into occupancy in violation of this Court’s TRO; (b) any purported lease which she entered into was invalid and void; and (c) even if the lease was valid at some point, it was rejected by the Bankruptcy Court. (NYSCEF 8, ¶9.)

Accordingly, it is

ORDERED that the TRO is vacated; and it is further

ORDERED that the motion to vacate the default is denied; and it is further

ORDERED that this court’s September 28, 2022 Order and Judgment (NYSCEF 161) is stayed as to Karina Martinez until November 15, 2022.



<u>10/19/2022</u> DATE	<u>ANDREA MASLEY, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>3</sup> NYSCEF pagination.