SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SALVADOR APOLONIO,

Plaintiff,

Index No.: 450852/2012

-against-

DECISION/ORDER
HON. ANDREA MASLEY

HAAV 575 REALTY CORP., ELYSEE INVESTMENT CO. a/k/a ELYSEE INVESTMENT COMPANY, AVI DISHI a/k/a ABRAHAM DISHI, ARMANDO GUZMAN, HAIM YEHEZKEL and ABRAHAM YEHEZKEL,

Defendants.

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This is an action for damages arising from an overcharge on a rent-stabilized apartment. On February 14, 2014, the court issued a final order and judgment in the amount of $198,543.05 with interest from September 17, 2013 and attorneys' fees of $17,795 which was entered on May 14, 2014. Defendants Haav 575 Realty Corp., Elysee Investment Co. a/k/a Elysee Investment Company, Avi Dishi a/k/a Abraham Dishi, Armando Guzman,[1] Haim Yehezkel and Abraham Yehezkel move to vacate the judgment.

The case was commenced on May 31, 2012 and all defendants were served. None of the defendants timely answered. On August 22, 2012, plaintiff's attorney, Mr. Chachere, emailed Mr. Pilson, whom he believed might be representing the defendants as he had in the past. Mr. Chachere received no response, but emailed Mr. Pilson again on September 4, 2012 to inquire whether he had been retained on the matter. Mr. Pilson responded that day and promised to call the next day, but failed to do so. On September 11, 2012, Mr. Chachere emailed Mr. Pilson a third time, but there was no

[1]The OSC was originally returnable on August 26, 2014. When Mr. Pilson accused defendant Armando Guzman, his client, of being a thief, the court adjourned argument to give Mr. Pilson an opportunity to consider his position. A motion to withdraw as attorney for Mr. Guzman was never filed.

response.

On October 19, 2012, Judge Scarpulla granted plaintiff's motion for a default judgment and directed an inquest. Plaintiff filed a Note of Issue on October 22, 2012 and the matter was calendared for February 8, 2013. On February 6, 2013, Mr. Pilson sent an email to Mr. Chachere stating that he found out the case was "on for something on 2/8 in the PM" and stated that he could not be present because of a medical procedure. However, the record is clear that neither Mr. Pilson nor any defendant had appeared.

On February 8, 2013, the matter was before this court. A person claiming to be the "managing agent" for the subject apartment building requested that the matter be adjourned. This court explained that as a non-attorney this person could not represent the corporate defendants and adjourned the matter for 30 days in order to give the defendants more time to obtain counsel. However, on March 8, 2013, defendant failed to appear or request additional time and the court proceeded to inquest. This court issued a judgment in favor of the plaintiff in the amount of $75,453.71 on May 14, 2013.

Plaintiff filled a motion for reconsideration, modification and/or clarification on June 6, 2013. On June 26, 2013, Mr. Pilson emailed Mr. Chachere. He wrote, "I have not gotten involved in this case since learning about it in March because I insisted upon getting information about tenant improvements...I would like the opportunity to discuss settlement of this matter with you, it looks to me like there is still an overcharge, albeit not as much as you think." Mr. Pilson also noted that his client had not received service of the plaintiff's motion and was only aware of it because it was listed on the court's web site.

On August 23, 2013, the court granted plaintiff's motion in part. The court also

scheduled a conference for September 17, 2013 to address three limited issues: the calculation of penalties for willful overcharge, rent abatement for lead paint, and attorneys' fees. Mr. Pilson was present on September 17 but he refused to file a notice of appearance. Instead, he informed the court that he had not been authorized by his clients to appear before the court, but he wanted to participate. The court denied his request and informed Mr. Pilson that he was welcome to observe the proceeding.

Defendants moved by order to show cause on October 1, 2014 challenging this court's May 14, 2014 order and judgment. Avi Dishi, principal of the corporate defendants, states in his August 5, 2014 affidavit that he erred by not allowing his attorney to participate in the inquest on September 17, 2013. Mr. Dishi blames Mr. Guzman for sending the initial court papers to a different law firm and neglecting to tell Mr. Dishi that firm rejected the case. Mr. Dishi admits the overcharge, blames Mr. Guzman for taking improper commissions and embezzling, and takes responsibility for overcharges. He disputes the amount which does not account fo improvements and long term vacancy allowances. Mr. Dishi also objects to CPLR 5222(b) which allows a restraint of twice the amount of the judgment.

Defendants' papers are silent as to the authority under which they seek relief. Mr. Pilson's oral application under CPLR 2221 to vacate Judge Sacarpulla's October 19, 2012 default judgment is denied as such a motion must be made to Judge Scarpulla on papers. The court presumes that defendants seek relief under CPLR 5015.

A party seeking to vacate a default judgment must demonstrate a reasonable excuse for the default and a meritorious defense to the action. *1680 Eastchester Realty Corp v Poli*, 32 Misc 3d 128 (1st Dept 2011).

It is not a reasonable excuse for the defendant to erroneously assume the

invalidity of an action and the need to defend against it. *Garal Wholesalers, Ltd. v Raven Brands, Inc.* 82 AD 3d 1041, 1042 (2nd Dept, 2011). A pattern of repeated neglect and intentional default is not a reasonable excuse for a seven month delay in serving an answer. *Hokayem v Leland*, 226 AD 2d 345, 346 (2nd Dept 1996). Choosing not to appear when defendants know of a complaint is not a reasonable excuse; nor is it excusable where failure to answer is "willful' or "part of a pattern of dilatory behavior." *Moore v Claudio*, 224 AD 2d 502, 503 (2nd Dept 1996). See also, *D&R Global Selections, SL v Bodega Olegario Falcon Pinerio*, 90 AD 3d 403, 405 (1st Dept 2011). Failure of a party to communicate or cooperate with their attorney does not excuse a default. *Allied Building Products Corp. v Clarke*, 187 AD 3d 1036 (4th Dept 1992).

Here, defendants' motion must be denied for the absence of a meritorious defense and reasonable excuse. Defendants admit liability and thus have no defense. Defendants were aware of the litigation and chose not to respond. The record is clear that Mr. Pilson followed his client's misguided instructions and did not appear in this litigation until October 1, 2014 when this 2012 matter was suddenly an emergency. Defendants' miscalculation as to the amount the plaintiff would be awarded upon default is not an excuse. Nor can defendants rely on the fact that they were not in communication with their attorney and they had misplaced paperwork. Defendants have been aware of this litigation from the outset and chose not to participate. The court will not reward defendants for their strategic decision to absent themselves.

Accordingly, it is

ORDERED, that the motion to vacate is denied.

October 15, 2014

ENTER:

Andrea Masley

HON. ANDREA MASLEY