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| Chin Hao Chang v Chen |
| 2016 NY Slip Op 32579(U) |
| December 21, 2016 |
| Supreme Court, New York County |
| Docket Number: 154032/2015 |
| Judge: Gerald Lebovits |
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

CECILY CHIN HAO CHANG,

Plaintiff,

-against-

JULIE S.Y. CHEN & ALLEN P. CHIU, ESQ.,

Defendants.

Index No.: 154032/2015

DECISION/ORDER

Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for a default judgment under CPLR 3215 and plaintiff's cross-motion for leave to file an answer to defendant Chen's counterclaim.

| Papers | Numbered |
|---|-----------------|
| Defendants' Notice of Motion | 1 |
| Plaintiff's Notice of Cross-Motion | 2 |
| Defendants' Affirmation in Opposition to Cross-Motion..... | 3 |
| Defendants' Reply Affirmation in Support of Motion for Default Judgment | 4 |

Heng Wang & Associates, P.C., New York City (Heng Wang of counsel), for plaintiff.
Borchert & LaSpina, P.C., New York (Helmut Borchert of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff commenced this case on April 23, 2015.¹ Plaintiff alleges in her complaint that the deed of April 17, 2014, conveying 275 West 96th Street, Unit 19E (the property), from Eric C.F. Ma — plaintiff's husband — to defendant Chen was a forgery. Plaintiff asks the court to declare that the April 17 deed was a forgery and that 50 percent of the property should be distributed by intestate succession. On September 9, 2015, defendant Chen filed an answer and counterclaim seeking a declaratory judgment that upon Eric C.F. Ma's death, she became the property's sole owner.² Plaintiff defaulted on the counterclaim when she failed to answer it. On August 4, 2016, defendants filed this motion for a default judgment on defendant Chen's counterclaim. On August 26, 2016, plaintiff's counsel filed a notice of appearance and a stipulation, signed by defense counsel, stating that the parties were seeking to resolve the matter by settlement, that negotiations were ongoing, and the court should adjourn the motion to September 26, 2016. On September 19, 2016, plaintiff filed a consent-to-change-attorney form and a notice of cross-motion seeking leave to answer defendant Chen's counterclaim.

¹ Upon filing her complaint, plaintiff appeared pro se.

² Defendant Chiu filed his answer on August 31, 2015.

Defendant's motion for a default judgment on Chen's counterclaim is granted in part and denied in part, and plaintiff's cross-motion for leave to file an answer to defendant Chen's counterclaim is denied.

A party that wishes to avoid a default judgment or to extend the time to answer must provide a reasonable excuse for the delay and a meritorious defense to the action. (CPLR 5015 [a] [1]; *Eugene Di Lorenzo, Inc., v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986].)

Courts have also considered, in addition to CPLR 5015 (a), the length of the delay, whether the delay caused any prejudice, and whether a pattern of neglect or intent to abandon defenses existed. (*Fisch v Gold*, 109 AD3d 870, 871 [2d Dept 2013]; *Moran v Regency Savings Bank, F.S.B.*, 20 AD3d 305, 306 [1st Dept 2005].)

Although a strong public policy favors resolving cases on the merits, "this preference will not justify vacating a default judgment where the moving party fails to satisfy the two prong burden of showing a meritorious defense and a reasonable excuse for the default." (*Eisenstein v Rose*, 135 AD2d 369, 369 [1st Dept 1987].)

Plaintiff has not provided a reasonable excuse for her delay. (*See Simons v Doyle*, 262 AD2d 236, 237 [1st Dept 1999] ["In opposing defendant's motion for a default judgment upon her counterclaims, plaintiff failed to demonstrate that he had a . . . reasonable excuse for his default in replying."].) Plaintiff states she "knew virtually nothing about procedural rules governing litigation," yet she was "eager to deal with the Counterclaim but did not know how." (Plaintiff's Notice of Cross-Motion, Aff of Cecily Chin Hao Chang, September 19, 2016, at ¶ 19.) Plaintiff's delay in attempting to answer defendant Chen's counterclaim belies her claim that she was eager to answer defendant Chen's counterclaim. After defendant Chen served plaintiff with its counterclaim, plaintiff waited almost a year to retain counsel to answer defendant Chen's counterclaim. (*See Simons*, 262 AD2d at 237 ["The . . . court properly determined that plaintiff had defaulted in replying to defendant's counterclaims since plaintiff failed to serve a reply . . . within 25 days of the service of defendant's answer and counterclaims."]; *P & L Group, Inc. v Garfinkel*, 150 AD2d 663, 663 [2d Dept 1989] ["The plaintiff, having failed to serve a reply to the counterclaims asserted by the defendants, defaulted."].) No proof exists that plaintiff attempted to answer defendant Chen's counterclaim in the time between being served with defendant Chen's counterclaim (September 9, 2015) and defendant Chen's motion for default judgment (August 4, 2016).

Also, plaintiff does not have a meritorious defense. (*See Simons*, 262 AD2d at 237 ["In opposing defendant's motion for a default judgment upon her counterclaims, plaintiff failed to demonstrate that he had a meritorious defense . . ."].) The documents defendants submitted on this motion — which have not been contested — show that plaintiff has no claim to the property and, instead, that defendant Chen has a superior claim to the property. (Defendant's Notice of Motion, Exhibit C, E.) On August 4, 1983, Ma, together with defendant Chen, acquired the property as "[j]oint tenants with rights of survivorship." (Defendant's Notice of Motion, Exhibit C.) Ma and defendant Chen continued to hold the property as the sole joint tenants until January 8, 2003 (2003 deed), when Ma and defendant Chen transferred 50 percent of the property to themselves, "as husband and wife"; 25 percent to Jassica E. Ma, individually; and 25 percent to

Elbert J. Ma, individually — “all as joint tenants with rights of survivorship.”³ (Defendant’s Notice of Motion, Exhibit E.) On April 17, 2014 (2014 deed), Eric C.F. Ma, allegedly, transferred his interest in the property to defendant Chen. (Defendant’s Notice of Motion, Exhibit F.) Plaintiff asserts that this transfer was fraudulent. But whether the transfer was fraudulent is irrelevant. If the April 17, 2014, transfer were fraudulent, the January 8, 2003, deed would control. (*Accord Faison v Lewis*, 25 NY3d 220, 225 [2015], citing *Yin Wu v Wu*, 288 AD2d 104, 105 [1st Dept 2001] [“A forged deed is void and conveys no title.”].) Because plaintiff is not mentioned in the 2003 deed, plaintiff, irrespective of the validity of the transfer on April 17, 2014, does not have any right to the property. (*See Smith v Bank of America, N.A.*, 103 AD3d 21, 24 [2d Dept 2012] [“Under the common law . . . joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.”] [citation omitted].) Plaintiff has no meritorious defense.

The court grants a default judgment for defendants on defendant Chen’s counterclaim, but only as described below.

From defendant Chen’s own submission, on her counterclaim, she did not own the entire property at the time of Eric C.F. Ma’s death. (*See* Defendant’s Notice of Motion, Aff of Helmut Brochert, August 4, 2016, at ¶ 10 [“On January 8, 2003 Eric C.F. Ma and Chen conveyed the Premises to themselves as ‘husband and wife’ as to a 50% interest and a 25% interest to Jessica Ma and a 25% interest to Elbert J. Ma.”]; Defendant’s Notice of Motion, Exhibit E [“all as joint tenants with rights of survivorship”].) Rather, upon Eric C.F. Ma’s death, defendant Chen had a right to the property only as one of the survivors of the joint tenancy. (*See United States v Craft*, 535 US 274, 280 [2002] [“Upon the death of one joint tenant, that tenant’s share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it.”].)

Therefore, the portions of defendant Chen’s counterclaim, ¶¶ 14, 20, 23, which read: “Defendant became the sole owner” should state that defendant Chen was a surviving joint tenant. Further, the portion of defendant Chen’s counterclaim, ¶14, which reads: “was thereafter free to alienate the Premises as Defendant saw fit,” should state that “defendant Chen was free to alienate her interest in the joint tenancy.” Similarly, the portion of defendant Chen’s counterclaim, ¶ 23, which reads: “Defendant thereafter had the right to alienate the Premises in any manner Defendant saw fit,” should state that “defendant Chen was free to alienate her interest in the joint tenancy.”

These changes shall be reflected in defendants’ settle order.

³ Before the 2003 deed, Ma married plaintiff on March 14, 2000. (Plaintiff’s Notice of Cross-Motion, Exhibit A.) It is unclear whether Ma and defendant Chen were married at any point. It is irrelevant, however, whether Ma and defendant Chen were married at the time of the transfer on January 8, 2003. (*See* EPTL 6-2.2 [d] [“A disposition of real property . . . to persons who are not legally married to one another but who are described in the disposition as husband and wife creates in them a joint tenancy, unless expressly declared to be a tenancy in common.”].)

Accordingly, it is

ORDERED that defendants' motion for default judgment is granted in part and denied in part, and defendants shall settle order; and it is further

ORDERED that plaintiff's motion for leave to file an answer to defendant Chen's counterclaim is denied.

Defendants must serve all parties with a copy of this order with notice of entry.

Dated: December 21, 2016



J.S.C.

HON. GERALD LEBOVITS
J.S.C.