

Arthur v Gager

2013 NY Slip Op 31913(U)

August 12, 2013

Sup Ct, NY County

Docket Number: 652452/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.

PART

Index Number : 652452/2012
ARTHUR, NORA
vs
GAGER, BARBARA
Sequence Number : 006
DEFAULT JUDGEMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/12/13

CYNTHIA S. KERN, J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
NORA ARTHUR, MICHELE MORGAN, DEIBE
RONDON, DOMINGOS CALAZ and MICHAEL
MASCHIO, as Shareholders, Directors and Officers
of 1809-15 7th Avenue Housing Development Fund Corp.,

Plaintiffs,

Index No. 652452/12

-against-

DECISION/ORDER

BARBARA GAGER, SHERRY E. BAILEY, CRYSTAL
EDWARDS, CATHLEEN MACKKEY, ELVIRA SAMI
ANAS, CHRISTOPHER T. WOODLEY and WOODLEY
REAL ESTATE GROUP,

Defendants.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits..... | <u>2</u> |
| Cross-Motion and Affidavits Annexed..... | <u>3</u> |
| Answering Affidavits to Cross-Motion..... | <u>4</u> |
| Replying Affidavits..... | <u>5</u> |
| Exhibits..... | <u>6</u> |

Plaintiffs commenced the instant action seeking, among other things, a declaratory judgment that a vote held at a meeting of shareholders of a cooperative corporation was illegal and in contravention of the By-Laws of the cooperative. Plaintiffs now move for an Order (1) pursuant to CPLR § 3215 for a default judgment against defendants Barbara Gager (“Ms. Gager”), Sherry E. Bailey (“Ms. Bailey”), Crystal Edwards (“Ms. Edwards”), Cathleen Mackey

(“Ms. Mackey”) and Elvira Sami Anas (“Ms. Anas”) (hereinafter the “defaulting defendants”) on the ground that the defaulting defendants failed to timely interpose an answer to the amended complaint; (2) pursuant to CPLR § 1001(a) granting 1809-15 7th Avenue Housing Development Fund Corp. (“HDFC”) leave to formally join this action as a plaintiff on the ground that HDFC is a necessary party to this action; and (3) amending the caption in this action to reflect the addition of HDFC as a plaintiff. For the reasons set forth below, plaintiff’s motion is granted in part and denied in part.

Plaintiffs’ motion for an Order pursuant to CPLR § 3215 for a default judgment against the defaulting defendants is granted in part and denied in part. As an initial matter, plaintiffs’ motion for a default judgment against Ms. Gager is denied as she has timely answered the amended complaint. In a decision rendered by this court, dated July 3, 2013, Ms. Gager was directed to file an answer to plaintiffs’ amended complaint within twenty days. Ms Gager filed her answer to the amended complaint on July 16, 2013 and served it on plaintiffs’ counsel that same day. Therefore, Ms. Gager is not in default. Plaintiffs’ motion for a default judgment against Ms. Bailey, Ms. Edwards and Ms. Anas is also denied. “Service of an answer to an amended complaint must generally be made within 20 days after service of the amended complaint.” CPLR § 3025(d); *see also Leogrande v. Glass, M.D.*, 106 A.D.2d 431, 432 (2d Dept 1984). “[A] defendant seeking to excuse a default in answering must establish a reasonable excuse for the delay and a meritorious defense.” *Leogrande*, 106 A.D.2d at 432. However, due to the public policy favoring determination of cases on their merits, even if no excuse is proffered, a court has the discretion to direct plaintiff to accept late service if it is shown that defendant served an answer to the original complaint, continued to defend the action following

its answer and that plaintiff will not be prejudiced. *See id.* In this case, it is undisputed that Ms. Bailey, Ms. Edwards and Ms. Anas were served with the amended complaint on February 20, 2013 but did not serve their answers until April 9, 2013, approximately one month late. Although they were untimely pursuant to CPLR § 3025(d), they each served timely answers to the original complaint and have continued to defend the action following their answers as they have engaged in motion practice and appeared for compliance conferences before this court. Additionally, plaintiffs have not established that they would be prejudiced by the untimeliness. However, plaintiffs' motion for a default judgment against Ms. Mackey is granted without opposition as she has failed to answer the amended complaint at any time after its service in February 2013.

Plaintiffs' motion for an Order pursuant to CPLR § 1001(a) granting HDFC leave to join this action as a plaintiff on the ground that HDFC is a necessary party is granted. Pursuant to CPLR § 1001(a),

Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.

In the instant action, HDFC shall be joined as a plaintiff as it is a necessary party. Plaintiffs assert that HDFC is a necessary party to this action because all claims for relief in the amended complaint are made by plaintiffs in their fiduciary capacities as Board members for and on behalf of HDFC and that therefore, complete relief cannot be afforded absent HDFC's joinder. Ms. Gager's assertion that HDFC should not be granted leave to join the action as a plaintiff on the ground that she, as a shareholder, "do[es] not want to be a part of this Lawsuit" or allow the

