

<b>Lopez-Reyes v Heriveaux</b>
2014 NY Slip Op 31946(U)
July 24, 2014
Sup Ct, New York County
Docket Number: 101452/2013
Judge: Louis B. York
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: L. York  
Justice

PART 12

Lopez-Royes;  
Emile Heriveaux et al.

INDEX NO. 101452/13

MOTION DATE 3/21/14

MOTION SEQ. NO. 02

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 denied in accordance  
with the accompanying decision.

**FILED**  
JUL 28 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/24/14

Ray, J.S.C.

**LOUIS B. YORK**  
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: IAS PART 2**

-----X  
**MARIA YOLANDA LOPEZ-REYES,**

**Plaintiff,**

**Index No. 101452/2013**

**-against-**

**EMILE HERIVEAUX, HCACC – HISPANIC AND  
CHINESE AMERICAN CHAMBERS OF COMMERCE,  
INC., AND NATURAL FOODS SUPERMARKETS, INC.**

**Defendants.**

**JUL 28, 2014**

-----X  
**LOUIS B. YORK, J.:**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Corporate defendants, HCACC – HISPANIC AND CHINESE AMERICAN CHAMBERS OF COMMERCE INC., AND NATURAL FOODS SUPERMARKETS, INC (“corporate defendants”) bring this motion to vacate the default judgment entered against them on April 2, 2014 and to grant corporate defendants additional time to answer or otherwise respond to the complaint. In the action, plaintiff alleged that the defendants failed to undertake any of their promised actions, failed to establish a supermarket for the plaintiff, failed to procure any of the equipment or the licenses and never accounted to the plaintiff for their use of the plaintiff’s own funds. Plaintiff alleges that the monies furnished to the defendants were unlawfully converted to and used for the sole benefit of defendant Emile Heriveaux. Plaintiff seeks compensatory and punitive damages as against the named defendants. Plaintiff served the complaint on October 30, 2013 and defendant Emile Heriveaux served an answer, purportedly on behalf of himself and corporate defendants, around November 25, 2013.

On December 23, 2013, plaintiff filed a motion to dismiss counterclaims and for the entry of a default judgments as against the corporate defendants. According to the motion, the corporate defendants were in default because an attorney did not represent them in this case. On January 6, 2014, defendant Heriveaux opposed Plaintiff's cross-motion.

On April 2, 2014, all parties appeared before this Court for oral argument. Defendant Heriveaux appeared on behalf of the corporate defendants. The Court granted the plaintiff's motion. The Court concluded that because an attorney did not represent the corporate defendants for the proceedings, the corporate defendants were in default. The Court stressed that defendant Heriveaux did not explain the corporate defendants' failure to appear by an attorney, although the defendants had ample time to obtain counsel. Currently the Court considers an order to show cause to vacate the default judgment as to the corporate defendants.

To obtain relief from an order or judgment under CPLR 5015(a)(1), the moving party must provide a reasonable excuse for the default and a meritorious case. Mediavilla v. Gurman, 272 A.D.2d 146, 148, 707 N.Y.S.2d 432 (1<sup>st</sup> Dep't 2000); Kellert v. Mail Boxes, Etc. USA, Inc., 248 A.D.2d 127, 669 N.Y.S.2d 557 (1<sup>st</sup> Dep't 1998), Aronson v. Hyatt Intl. Corp., 202 A.D.2d 153, 154, 608 N.Y.S.2d 187 (1<sup>st</sup> Dep't 1994).

First, as plaintiff states, corporate defendants defaulted when they did not appear by an attorney per CPLR 321(a). A corporation cannot assign its status as a defendant to an individual to circumvent CPLR 321(a). See Rembrandt Personnel Group Agency v. Van-Go Transport Co., 162 Misc.2d 64, 617 N.Y.S.2d 258 (Sup. Ct. App. 2d Dep't 1994). Even though defendant Heriveaux served a timely pro se answer and continued to

appear on behalf of the corporate defendants for all the proceedings, defendant Heriveaux violated CPLR § 321 because he cannot answer for the corporate defendants. Corporations are required to act through an attorney because a corporation is a hydra-headed entity and its shareholders are insulated from personal liability. For this reason, there must be a designated spokesman accountable to the Court. Austrian, Lance & Sterwart v. Hastings Props., 87 Misc. 2d 25, 385 N.Y.S.2d 466 (Sup. Ct. N.Y. County, 1976). Therefore, the defendant Heriveaux's appearance on behalf of the corporate defendants was a nullity. See Matter of Lefkowitz v. Therapeutic Hypnosis, 52 A.D.2d 1017, 383, N.Y.S.2d 868 (3<sup>rd</sup> Dep't. 1976).

Second, the Court does not find that the defendants proffered a reasonable excuse to vacate the corporate defendants' default judgment because defendants had ample time to retain an attorney. The only explanation corporate defendants proffered to this Court is that defendant Heriveaux "mistakenly believed" that he could appear on behalf of the corporate defendants since he was a principal of the corporations. This was raised for the first time after the entry of the default order. The affirmation of the pro se defendant's attorney stated that

"Heriveaux appeared [p]ro se on his own belief and erroneously thought that he could do the same for Corporations. Mr. Heriveaux's intentions were not to abandon its legal rights on behalf of himself or the Corporation. The Defendants, HCACC- Hispanic and Chinese American Chamber of Commerce, Inc., and Natural Foods Supermarket, Inc., never intended to abandon its legal rights as evident by the verified answer interposed by Mr. Heriveaux." Aff. In Support of Motion to Vacate Default at 21, No 101452/2013 (N.Y. Sup. Ct., April 23, 2014).

However, even if defendant Heriveaux mistakenly believed he could represent a corporation, courts in this department have not recognized a violation of CPLR 321(a) to constitute a reasonable excuse for vacating a default judgment under CPLR 5015(a)(1).

See Jimenez v. Brenille Corp., 48 A.D.3d 352, 852 N.Y.S.2d 94 (1<sup>st</sup> Dep't 2008); Mail Boxes Etc. USA v. Higgins, 281 A.D.2d 176, 721 N.Y.S.2d 524 (1<sup>st</sup> Dep't 2001). The rule is not intended to penalize an adverse party for the corporations' improper appearance, (Lake George Park Commn. v Salvador, 245 A.D.2d 605, 607, 664 N.Y.S.2d 847 (3<sup>rd</sup> Dep't 1997), lv denied 91 N.Y.2d 939, 693 N.E.2d 749, 670 N.Y.S.2d 402 (1998), but to ensure that the corporation has a licensed representative who is answerable to the court and other parties. Jimenez v. Brenille Corp., 48 A.D.3d 351, 852 N.Y.S.2d 94 (1<sup>st</sup> Dep't. 2008); Matter of Sharon B., 72 N.Y.2d 394, 398, 534 N.Y.S.2d 124 (1988). While the Court may sympathize with the defendant concerning his legal plight and may extend some leniency to a pro se litigant who makes technical mistakes (see Du-Art Film Laboratories, Inc. v. Wharton Intern. Films Inc., 91 A.D.2d 572, 457 N.Y.S.2d 60 (1<sup>st</sup> Dep't 1982)), a pro se litigant acquires no greater rights or special leniency than any other litigant (see Walter v. Jones Sledzik, Garneau & Nardone, LLP, 67 A.d.3d 671, 889 N.Y.S.2d 197 (2<sup>nd</sup> Dep't. 2009)).

Here, defendant Heriveaux continued to answer on behalf of the corporate defendants in subsequent proceedings. An attorney represented the corporate defendants for the first time *after* a default judgment was rendered against the corporations on April 24, 2014. In fact, the corporate defendants were notified of their default through plaintiff's numerous filings. For example, on November 8, 2013, plaintiff provided corporate defendants with default notices pursuant to CPLR § 3215(g)(4). The notices stated that the corporate defendants were in default for their failure to timely answer the summons and complaint and/or appear in the action. Specifically, the corporate defendants were informed that

“the pro se defendant, Emile Heriveaux, is asserting claims on behalf of HCACC – a non appearing Defendant, which Defendant is currently in default for their failure to answer or otherwise appear in this action. It is submitted that the individual defendant is without standing or the requisite capacity to maintain claims for alleged damage sustained by a non-appearing, defaulting defendant, to wit, HCACC.” Notice of Motion to Dismiss Counterclaims And For The Entry of Default Judgment at 23, 24, No. 101452/2013 (N.Y Sup. Ct., December 20, 2013).

In another filing, plaintiff asserted that “... HCACC – a non-appearing defendant, which [d]efendant is currently in default for their failure to answer or otherwise appear in this action.” Affirmation in Opposition to Defendant’s Cross-Motion to Dismiss and In Further Support of Plaintiff’s Motion For a Default Judgment at 13, 14, No. 101452/2013 (N.Y Sup. Ct., January 7, 2014). The Court further notes that defendant Heriveaux did not indicate that he was appearing on behalf of the corporations in his notice of appearance. The notice of appearance specifically stated that “pro se defendant Heriveaux hereby appears in the above action...” Notice of Appearance, No. 101452/2013 (N.Y Sup. Ct., November 26, 2013). Defendant Heriveaux also did not provide any arguments or explanation for the corporate defendants failure to appear by counsel during the oral argument. Therefore, the Court finds that defendants did not proffer a reasonable excuse under CPLR 5015(a)(1) since defendant Heriveaux was notified that the corporate defendants were in default and had ample time to retain an attorney to respond to the subsequent proceedings on behalf of the corporate defendants per CPLR § 321 prior to the entry of the default judgment

In view of this determination, the Court does not need to address the question of whether the corporate defendants established the existence of a meritorious defense.

Therefore, it is

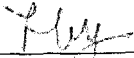
ORDERED that the motion to vacate the default judgment as to HCACC –

[7]  
HISPANIC AND CHINESE AMERICAN CHAMBERS OF COMMERCE INC., AND  
NATURAL FOODS SUPERMARKETS, INC is DENIED.

Accordingly, it is

ORDERED that defendant's request for additional time to answer or respond to  
the complaint is DENIED.

ENTER

  
\_\_\_\_\_  
Louis B. York  
J.S.C

Date: 7/27/14

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
JUL 28 2014  
NEW YORK  
COUNTY CLERK'S OFFICE