

**Board of Mgrs. o the Cove Club Condominium v
Lynn**

2016 NY Slip Op 31081(U)

February 29, 2016

Supreme Court, New York County

Docket Number: 162322/14

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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: Hon. Nancy Bannon PART 42
Justice

THE BOARD OF MANAGERS OF THE COVE CLUB CONDOMINIUM INDEX NO. 162322/14
- v - MOTION DATE 2/24/16
MICHAEL LYNN and DANIEL WALDREN MOTION SEQ. NO. 002

The following papers were read on this motion for leave to enter a default judgment pursuant to CPLR 3215 and other relief.

Table with 2 columns: Document type and No(s). Rows include Notice of Motion/ Order to Show Cause, Answering Affirmation(s), and Replying Affirmation(s).

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

In this action seeking to recover unpaid common charges, interest, late fees and attorneys fees, this court, by a prior order dated November 5, 2015, granted summary judgment to defendant Daniel Waldren and dismissed the complaint as against him, and denied the plaintiff's cross-motion for summary judgment as against defendant Waldren and for a default judgment as against defendant Michael Lynn upon the plaintiff's failure to appear for oral argument on November 4, 2015.

The plaintiff now moves to (1) discontinue the action as against defendant Daniel Waldren (CPLR 3217) and amend the caption accordingly (CPLR 3025); and (2) vacate its default in appearing for oral argument on November 4, 2015, on its cross-motion, inter alia, for a default judgment and restoring that portion of its cross-motion (CPLR 5015) and (3) granting the default motion on the issue of liability and directing a hearing on damages (CPLR 3215).

The branch of the motion seeking to discontinue the action as against defendant Waldren is denied as moot as that defendant was previously granted summary judgment in his favor and the plaintiff does not seek to vacate that portion of the prior order. The portion of the motion seeking to amend the caption to delete defendant Waldren is granted.

The branch of the motion seeking to vacate the plaintiff's default is granted. To vacate a judgment entered on default, the moving party must demonstrate both a reasonable excuse for the failure to appear and a potentially meritorious defense to the action. See CPLR 5015; Matter of

Bendeck v Zablah, 105 AD3d 457 (1st Dept. 2013); Youni Gems Corp. v Bassco Creations Inc., 70 AD3d 454 (1st Dept. 2010). Further, under CPLR 2005, law office failure may constitute a reasonable excuse for a defendant's default. See Kassiano v Palm Mgt. Corp., 95 AD3d 541 (1st Dept. 2012); Goodwin v New York City Hous. Auth., 78 AD3d 550 (1st Dept. 2010). In order for a law office failure to constitute a reasonable excuse, the defendant must submit facts explaining the reason for his default, and it is "within the court's sound discretion to determine whether the excuse for the default is sufficient." Chevalier v 368 E. 148th St. Assoc., LLC, 80 AD3d 411, 413 (1st Dept. 2011); see also Tandy Computer Leasing v Video X Home Library, 124 AD2d 530, 531 (1st Dept. 1986). However, in the absence of evidence that the law office failure was willful or in bad faith, the court is inclined to find such a failure to be a reasonable excuse. See Imperato v Mount Sinai Med. Ctr., 82 AD3d 414 (1st Dept. 2011); Chelli v Kelly Group, P.C., 63 AD3d 632 (1st Dept. 2009). Here, the plaintiff has established that its excuse of law office failure is a reasonable one.

The branch of the motion seeking to restore the portion of the cross-motion seeking leave to enter a default judgment and granting the motion is granted. The plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendants' failure to answer or appear. See CPLR 3215(f) and (g); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). The proof submitted includes the summons and complaint, the condominium by-laws, assignment documents showing transfer of the premises to defendant Lynn, Lynn's lease agreement with defendant Waldren, the account ledger for the subject unit, and the affidavit of James Hopkins, President of the plaintiff board, which show that defendant Lynn, owner of Unit 5N at 2 South End Avenue, owes in excess of \$32,494.59, as of October 13, 2014, and that sums continued to accrue through the date of the foreclosure sale on July 29, 2015. By failing to answer or oppose the motion, defendant Lynn has proffered no proof or argument to the contrary.

Accordingly, it is

ORDERED that the branch of the motion seeking to discontinue the action as against defendant Daniel Waldren (CPLR 3217) is denied as moot, and it is further,

ORDERED that the branch of the motion seeking to amend the caption to delete defendant Daniel Waldren as a defendant (CPLR 3025[a]) is granted, and the caption is amended to delete Daniel Waldren, and it is further,

ORDERED that the branch of the motion seeking to vacate the plaintiff's default (CPLR 5015) in appearing for oral argument on its cross-motion on November 4, 2015, is granted and the cross-motion is restored, and it is further,

ORDERED the branch of the plaintiff's cross-motion seeking leave to enter a default judgment as against defendant Michael Lynn (CPLR 3215) is granted, without opposition, to the extent that the plaintiff may enter a default judgment on the issue of liability, and it is further,

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

1. the issue of the amount due to the plaintiff from defendant Michael Lynn for unpaid common charges, assessments, late fees, interest, and contractual attorney’s fees under the parties’ agreements, through July 29, 2015,

and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further,

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further,

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff’s papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further,

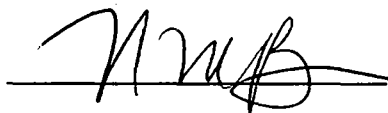
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good

cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order of the court.

Dated: February 29, 2016

 JSC
HON. NANCY M. BANNON

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER