

**Jacob Cram Coop., Inc. v Ziolkowski**

2018 NY Slip Op 32829(U)

November 7, 2018

Supreme Court, New York County

Docket Number: 156980/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

-----X

JACOB CRAM COOPERATIVE, INC.

Plaintiff,

- v -

THOMAS ZIOLKOWSKI,

Defendant.

INDEX NO. 156980/2017

MOTION DATE 10/30/2018

MOTION SEQ. NO. 006 007

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 129

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to/for VACATE -  
DECISION/ORDER/JUDGMENT/AWARD.

DECISION

Plaintiff moves for a default judgment based upon the defendant's failure to file and serve an answer, which answer was due on August 15, 2018. Such motion was brought on September 17, 2018.

By Show Cause Order dated October 12, 2018, defendant moves to vacate his default in serving and filing an answer.

While it is true that plaintiff's statement about his mental disability is unsubstantiated, self-serving, and contradictory, his difficulty retaining a new attorney states a reasonable excuse, particularly considering his only two-month

delay in retaining an attorney. In Busone v Bellevue Maternity Hosp., 266 AD2d 665 (4<sup>th</sup> Dept. 1999), the Fourth Department, Appellate Division, affirmed the trial court's vacatur of the plaintiff's finding that plaintiff's one-year delay in retaining a new attorney constituted a reasonable excuse.

With respect to whether defendant states a meritorious defense, Busone, is likewise instructive: "'the quantum of proof needed to prevail on a CPLR 5015(a)(1) motion is not as great as that required to successfully oppose a motion for summary judgment' (Winney v. County of Saratoga, 252 A.D.2d 882, 884". 266 AD2d at 667.

However, though on a motion to vacate a default, defendant "is not required to establish a defense as matter of law", he "is required . . .to make a prima facie showing of legal merit" (David Saunders, P.C. v Harris a. Sanders, Architects, P.C., 140 AD2d 787, 789 [4<sup>th</sup> Dept. 1988]). While some of the defenses of defendant's unverified proposed answer, and/or suggested in his affidavit of merits, have merit, defendant has not prima facie established the merits of all such defenses. Lacking in merit are any references to "burden of proof" and such allegations are stricken. Likewise, the defenses of the proposed answer enumerated first, second, third (except for the first sentence), sixth, seventh, eighth, and ninth are utterly lacking in merit. See 40 West 67<sup>th</sup> Street Corp. v Pullman, 100 NY2d 147 (2003).

In addition, the first counterclaim for attorney's fees constitutes a remedy, perhaps for the second counterclaim, but in and of itself does not state a viable cause of action and is therefore stricken.

Finally, plaintiff is entitled to the payment of past and prospective use and occupancy by defendant, without prejudice to either party's position. See Levinson v 390 West End Associates, LLC, 22 AD3d 397, 402-403 (1<sup>st</sup> Dept. 2008).

#### ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion to vacate his default (motion sequence number 007) is granted on condition that defendant remit to plaintiff payment of past use and occupancy to date, within ten (10) days of entry of this order, and thereafter use and occupancy, on the first day of each month at the monthly maintenance rate set forth in defendant's proprietary lease, pendente lite, and without prejudice, and upon the further condition that defendant serve and file a verified answer to the complaint, in accordance with the foregoing decision, within 10 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the plaintiff's motion for a default judgment (motion sequence number 006) is denied; and it is further

ORDERED that plaintiff shall serve a reply to or otherwise move with respect to the counterclaim, within ten (10) days from service of such verified complaint; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that counsel are directed to appear for a status conference in Room 331, 60 Centre Street, on November 27, 2018, at 11:00 AM.

11/7/2018  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: