

<b>Harding v Czmielowski</b>
2018 NY Slip Op 33948(U)
April 24, 2018
Supreme Court, Kings County
Docket Number: 500105/17
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Rules of the Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of April, 2018.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X

CHARLES SCOTT HARDING,

Plaintiff,

- against -

WOJCIECH CZMIELEWSKI, MALGORZATA  
CZMIELEWSKI, ADRIAN CZMIELEWSKI, and  
CHRISTIAN CZMIELEWSKI,

Defendants.

-----X

**DECISION AND ORDER**

Index No. 500105/17

Mot. Seq. No. 3-4

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Cross Motion, Affirmations (Affidavits),  
Memorandum of Law, and Exhibits Annexed \_\_\_\_\_  
Opposing Affirmation (Affidavit) and Exhibits Annexed \_\_\_\_\_  
Supplement to the Affidavit in Support of Defendants'  
Cross Motion and Exhibits Annexed \_\_\_\_\_  
Plaintiff's Counsel Letter to the Court \_\_\_\_\_

37-43, 47-54, 55  
56  
57-59  
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Plaintiff Charles Scott Harding (plaintiff), a judgment creditor of Wojciech Czmielewski (Wojciech), brought this action against him, his wife, Malgorzata Czmielewski, and their sons, Adrian Czmielewski and Christian Czmielewski (collectively, defendants), to set aside transfers of certain parcels of real property<sup>1</sup> as fraudulent conveyances under the Debtor and Creditor Law. Plaintiff moves under

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<sup>1</sup> Three improved parcels of real property were at issue: 6809 54<sup>th</sup> Avenue in Maspeth, New York (the 54<sup>th</sup> Avenue property), 291 Eckford Street in Brooklyn, New York (the Eckford Street property), and 68-10 53<sup>rd</sup> Drive in Maspeth, New York (the 53<sup>rd</sup> Drive property). Before plaintiff obtained a money judgment against Wojciech, he and his wife made intrafamily conveyances of the 54<sup>th</sup> Avenue property and the Eckford Street property so as to reduce or eliminate, as the case may be, Wojciech's interest in those properties (hereafter, collectively, the unsold properties). In addition and during that time, Wojciech and his wife sold the 53<sup>rd</sup> Drive property to third parties (hereafter, the sold property).

CPLR 3215 (a) for leave to enter a default judgment against defendants, who, in turn, cross-move under CPLR 3012 (d) to compel him to accept their late answer.

### *Background*

On January 4, 2017, plaintiff commenced the instant action by electronically filing his summons and complaint with the Kings County Clerk. On February 21, 2017, defendants moved, pre-answer, to dismiss the complaint in its entirety. By order, dated June 16, 2017 (the prior order), this Court granted defendants' motion to the extent of dismissing those of plaintiff's causes of action (numbered six and seven) that were *not* based on the Debtor and Creditor Law, but left undisturbed those of plaintiff's causes of action (numbered one through five) that were. On July 10, 2017, plaintiff served the prior order with notice of entry upon defendants.

On September 8, 2017, plaintiff served the instant motion for leave to enter a default judgment against defendants on the ground that they failed to answer the complaint by July 20, 2017; that is, within ten days after their counsel was electronically served with the prior order with notice of entry, as provided for in CPLR 3211 (f). On September 11, 2017, defendants filed and served their answer. On September 13, 2017, plaintiff rejected defendants' answer. On November 17, 2017, defendants served the instant cross-motion under CPLR 3012 (d) to compel plaintiff to accept their answer. Defendants' cross-motion is supported by Wojciech's affidavit, stating, in relevant part, that he was in the process of restoring title to the unsold properties in his and his wife's names. Before oral argument of defendants' cross-motion, but following plaintiff's

opposition to the relief requested therein, defendants supplemented Wojciech's affidavit by submitting a set of fully executed conveyance documents restoring title to the unsold properties in the original titleholders (*i.e.*, Wojciech and his wife). By letter, dated March 20, 2018, plaintiff objected to defendants' supplementation of Wojciech's affidavit as an improper surreply. On March 23, 2018, this Court heard oral argument on the instant motion and cross-motion, and reserved decision.

### *Discussion*

Although an unauthorized surreply containing new arguments generally should not be considered, this Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept a surreply for good cause. *See U.S. Bank Trust, N.A. v. Rudick*, 156 A.D.3d 841, 67 N.Y.S.3d 646 [2d Dept. 2017]; *Gluck v. New York City Tr. Auth.*, 118 A.D.3d 667, 987 N.Y.S.2d 89 [2d Dept. 2014]). Here, this Court will consider defendants' supplementation of Wojciech's affidavit because such supplementation does not advance new arguments; rather, it merely reflects the consummation of the transactions referenced in his timely filed affidavit.

It is well established that on a motion for leave to enter judgment against a defendant for failure to answer, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defendant's default. *See e.g. Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 903 N.Y.S.2d 424 (2d Dept 2010). To demonstrate the facts constituting a cause of action, the plaintiff need only submit sufficient proof to enable a Court to determine if the cause of action is viable.

*See Clarke v Liberty Mut. Fire Ins. Co.*, 150 A.D.3d 1192, 55 N.Y.S.3d 400 (2d Dept. 2017). In determining whether the plaintiff has a viable cause of action, the Court may consider the complaint and the plaintiff's affidavits. *See Interboro Ins. Co. v Johnson*, 123 A.D.3d 667, 1 N.Y.S.3d 111 (2d Dept. 2014).

Here, plaintiff satisfied all of the requirements for demonstrating his entitlement to a default judgment with respect to his causes of action pleaded under the Debtor and Creditor Law. Plaintiff submitted proof of service of the summons and complaint, proof of the facts constituting his claims by way of his affidavit, and proof of defendants' default in timely answering the complaint. *See Mercury Cas. Co. v Surgical Ctr. at Milburn, LLC*, 65 AD3d 1102, 885 N.Y.S.2d 218 (2d Dept. 2009).

Successful opposition to a CPLR 3215 motion for leave to enter a default judgment requires the same showing for an affirmative motion under CPLR 3012 (d) to compel acceptance of a late answer; that is, a reasonable excuse for the delay and the existence of a potentially meritorious defense. *See Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 970 N.Y.S.2d 260 (2d Dept. 2013). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005).

Here, the record demonstrates that (1) defendants' did not delay in their appearance in this action, (2) defendants' delay in answering the complaint, following the issuance of the prior order, was only 53 days, (3) defendants' part as to the delay was attributable to a law-office failure, not willfulness and (4) no prejudice will enure to plaintiff by accepting defendants' late answer. In addition, through the submission of Wojciech's affidavit and its supplementation, defendants met their burden of demonstrating the existence of two potentially meritorious defenses. The first potentially meritorious defense is that the portion of this action seeking avoidance of the conveyance of the "unsold properties" (as that term is defined in footnote 1 above) appears moot, considering that title to those properties has now been re-vested in the original titleholders (*i.e.*, Wojciech and his wife). *See Bombardier Capital, Inc. v Richfield Hous. Ctr., Inc.*, 1994 WL 118294 (ND NY 1994). The second potentially meritorious defense is that the portion of this action seeking avoidance of the conveyance of the "sold property" (as that term is defined in footnote 1 above) appears to lack merit under CPLR 3211 (a) (10) for failure to join the transferees of that property as necessary parties to this action. *See Alvaro v. Faracco*, 85 A.D.3d 1072, 927 N.Y.S.2d 366 (2d Dept 2011); *Friedman v. Friedman*, 125 A.D.2d 539, 509 N.Y.S.2d 617 (2d Dept 1986).

*Conclusion*

Accordingly, it is

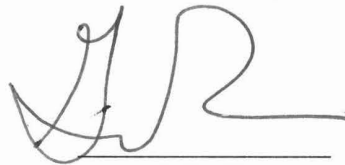
ORDERED that plaintiff's motion in Seq. No. 3 is denied; and it is further

ORDERED defendants' cross-motion in Seq. No. 4 is granted, and defendants' answer, dated September 10, 2017 (NYSCEF #44), is deemed timely filed and served; and it is further

ORDERED that defendants' counsel shall serve a copy of this decision and order with notice of entry on plaintiff's counsel and shall file an affidavit of said service with the County Clerk.

This constitutes the Decision and Order of the Court.

ENTER,



J. S. C.

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