SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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KENDRA PEAVY AND JULIEN WEISBECKER,

Plaintiffs,

-against-

235 A MADISON LLC, MARK J. NUSSBAUM & ASSOCIATES, PLLC, and JOHN DOES #1-3, said names intended to reflect the individual members of 235 A Madison LLC who are personally liable but presently unknown to Plaintiff.,

Defendants.

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Decision and Order

Index No. 505873/2019

Cal. No. 37/38
Mot. Seq. 001/002
Submitted: 9/10/2019

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion dated June 5, 2019 seeking a default judgment pursuant to CPLR 3215, etc.; Plaintiff's attorney Affirmation of Chad T. Harlan, Esq., affirmed on June 3, 2019; Exhibit A-Summons and Complaint, Ex. A-Contract of Sale, Rider, Schedule A, Second Rider to Contract of Sale, Schedule A punch list, Ex. B. Survival Escrow Agreement, Ex. C Letter dated "December __, 2018, Ex. D. Letter dated December 26, 2018. Exhibit B-Contract of Sale. Exhibit C-Punch list. Exhibit D-Deed. Exhibit E-Communications log. Exhibit F-NYC Department of Buildings Records. (UNCERTIFIED). Exhibit G-Letter dated July 24, 2018 from NYC Buildings Dept. (UNCERTIFIED). Exhibit H-Deed dated May 11, 2016. Exhibit I-NYC Department of Buildings Records. (UNCERTIFIED).	

Exhibit J-Letter dated September 19, 2018. Exhibit K-Letter dated "December __, 2018" from Gillen Scali, PLLC to Mark J. Nussbaum, Esq. Exhibit L-Affidavits of Service. Exhibit M-NYS Department of State, Division of Corporations, re: 235 A Madison LLC. (UNCERTIFIED). Exhibit N-NYS Department of State, Division of Corporations, re: The Stuyvesant Group LLC. (UNCERTIFIED).....	1
Defendant's Cross-Motion dated July 12, 2019; Attorney Affirmation of Irena Shternfeld, Esq. affirmed on July 12, 2019; Attorney Affidavit of Adam Cohen, sworn to on July 11, 2019; Attorney Affidavit of Mark J. Nussbaum, Esq., sworn to on July 11, 2019; Exhibit A-Summons and Complaint. Exhibit B-Contract of Sale. Exhibit C-Survival Escrow Agreement. Exhibit D-Proposed Verified Answer. Exhibit E-Email Communications.	2
Plaintiff's attorney affirmation of Chad T. Harlan, Esq., affirmed on August 13, 2019, in Opposition to Cross-Motion; Exhibit A-Emails. Exhibit B-Email.....	3

MONTELIONE, RICHARD J., J.

The plaintiffs move for default judgment against the defendants based on breach of a residential real estate contract of sale and breach of the terms of a post closing escrow agreement. The subject real estate contract is dated May __, 2017[1] and involved the transfer of fee ownership from defendant 235 A Madison LLC to plaintiffs regarding the property address of 165 Halsey #2, Brooklyn, NY 11216.[2]

[1] There is no day of the month in the contract of sale.
[2] There is no Schedule "A" legal description attached to the contract of sale (there is a schedule "A" regarding the punch list), but the court accepts the legal description of the property attached to the deed (Plaintiff's Exhibit D).

Paragraph 17 of the Rider to the contract of sale agreement, meant to survive closing, along with the Survivor Escrow Agreement, reflects the following:

> 17. ***In addition, prior to closing the Seller agrees that*** Seller shall, in a workmanlike manner, at Seller's sole cost and expense finalize the items as per of the punch list attached to this rider as Exhibit A. ***All items Listed in Exhibit A will be addressed prior to the closing, with the exception of Schedule A item 16 and Item H. 2 ***for which $75,000.00 shall be held in escrow by the Seller's attorney pending the completion by Seller post closing. Purchaser and their agents shall be permitted to inspect the premises at least every three (3) weeks from the date hereof to assess work completion and quality (emphasis added)***.

Schedule A, Item 16 (***emphasis added***):

Floor	Timing	Item #	Description	Buyer's addition/modification
1st Floor (parlor)	After Closing	16	Outdoor access + deck + NanaWall Style Widows to deck: supported by posts and not on extension, proper bearings, bolts through the wall of the house to support deck and protect roof beneath.	1) Seller to provide pictures/examples/website links of deck/material/design that is envisioned to be done 2) ***Seller will provide architect drawings and all documentations needed (pictures, plans) to secure DOB and Landmark permits and buyer will pay for the associated filing costs*** (Items list to be defined with cost breakdown, estimation, architect fees and material needed to file to be ***paid by Seller.***)

Pertinent section of Schedule A, Item H:

Floor/Timing	Item #	Description	Buyer's addition/modification
Interior and Appliances	H	1-9… 10. Front door is to be replaced. All exterior doors require proper weather stripping. OK, besides the front door. We will make sure it is fully operable and has	1… 2. Door to be replaced post-closing ***at Sellers cost once Landmark/DOB permits in place (see above)***. Seller to

Floor/Timing	Item #	Description	Buyer's addition/modification
		proper weather stripping. All unfinished items will be finished.	provide photo of door pre-closing to support permit application process.

Under the contract rider, seller will provide architect drawings and all documents needed to secure DOB and Landmark permits and buyer will pay for the filing costs. In other words, the seller pays for everything to obtain the permits except for the filing costs only "(u)pon completion of the work listed above (see Surviving Escrow Agreement), or earlier pursuant to a written agreement, seller and purchasers shall direct the funds to the seller."

As part of the contract of sale, there is an escrow agreement (Plaintiffs' Exhibit C) that requires the following:

> Mark J. Nussbaum & Associates PLLC ("Escrow Agent") agrees to hold $75,000.00 in escrow (the "Escrow") from the Seller's proceeds pending the following:
>
> 1. Outdoor access + deck + Nana Wall Style Windows to deck; supported by posts and not on extension, proper bearings, bolts through the wall of the house to support deck and protect roof beneath.
>
> a) Seller to provide pictures/examples/website links of deck/material/design that is envisioned to be done;
>
> b) Seller will provide architect drawings and all documentations needed (pictures, plans) to secure DOB and Landmark permits and Buyer will pay all fees associated with the architect's drawings and filing costs.

2. Door to be replaced at Seller's costs once Landmark/DOB permits in place (see above). Seller to provide photo of door pre-closing to support permit application process.

Seller shall use best efforts time ***complete these items within 9 months from the date hereof subject to issuance of permits, signoffs, certificates of completion and building supplies being available in a professional and workman-line manner. Upon completion of the work listed above***, or earlier pursuant to a written agreement, Seller and Purchaser shall direct Escrow Agent to release the funds to the Seller. In the event item #1 is completed prior to item #2, $50,000.00 shall be released from the Escrow. In the event item #2 is completed prior to item #1, $25,000.00 shall be released form the Escrow. (***Emphasis Added***).

The affidavit of service of the summons and complaint upon 235 A Madison LLC and defendant Mark J. Nussbaum and Associates, PLLC, indicates that service was made against both defendants through the New York State Department of State on April 2, 2019. Service was also made upon Mark J. Nussbaum and Associates, PLLC through a "co-worker" by the name of Hanna Kirschenbaum, as a person of suitable age and discretion on April 2, 2019. The is also proof of mailing of the Summons and complaint upon Mark J. Nussbaum, Esq. on April 2, 2019. There is no need for proof of additional notice of mailing of the summons and complaint upon defendant 235 A Madison LLC pursuant to CPLR § 3215(g)(4)(i) because this defendant is an LLC. (*See Tan v AB Capstone Development, LLC*, 163 AD3d 937 (AD 2d Dept. 2018).

The defendants cross-move pursuant to CPLR 3012 (d), 2004 and 2005 to compel plaintiffs to accept defendants' late answer and in opposition to the plaintiffs' motion. The defendants claim that the two-month delay in answering was the result of law office failure inasmuch as a separate firm was engaged to answer the summons and complaint and they failed to do so. As to the merits, the defendants claim that "time of essence" was not part of the agreement and the buyers were responsible for "expense attendant to the preparation and filing of architectural drawings, as well as the cost of any filing fees, shall be borne by the buyers."

The plaintiffs, in opposition to the cross-motion, claim that no affidavit was received from the attorney who is alleged to have been entrusted to serve and file the answer and therefore "good cause" because of "law office failure" has not been stated. Regarding the merits, plaintiffs' counsel argues that defendant 235 A Madison LLC breached the agreement and made no showing of any continuing efforts to complete work especially in light of the requirement for "best efforts."

Applicable Law

The standard for granting a motion for default judgment is stated in *L & Z Masonry Corp. v Mose*, 167 AD3d 728, 729 [2d Dept 2018],

> On a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of

> action, and proof of the defendant's default (*see* CPLR 3215 [f]; *Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 784-785, 11 NYS3d 623 [2015]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651, 932 NYS2d 109 [2011]; *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032, 903 NYS2d 424 [2010]).

CPLR § 3012, in pertinent part, reflects:

> (d) Extension of Time to Appear or Plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

CPLR § 2004. Extensions of time generally:

> Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

CPLR 2005. Excusable delay or default:

> Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.

A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to

answer or to compel the acceptance of an untimely answer (*see Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 58, 970 N.Y.S.2d 260, 262; *Ennis v. Lema*, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Mid–Hudson Props., Inc. v. Klein*, 167 A.D.3d 862, 864, 90 N.Y.S.3d 264; *White v. Inc. Vill. of Hempstead*, 41 A.D.3d 709, 710, 838 N.Y.S.2d 607, 608). "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, 876–877, 800 N.Y.S.2d 613).

Legal Analysis

Here, there is no excuse offered by defendants' prior counsel and no "credible and detailed" explanation as to the default due to prior counsel; however, the instant motion is similar to the facts in *Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914 [2d Dept 2013]), where the appellate court affirmed the trial court's discretion and vacated the default because there was no evidence that the defendants were aware of their attorneys' default and where a motion was brought

promptly to vacate the default.[3] In this matter, the affidavit of service of the summons and complaint was filed on April 9, 2019 and the time to answer was therefore April 29, 2019. The proposed answer was annexed to the cross motion which was served on July 12, 2019, about two and one-half months later. There is no pattern of delays or abuse which would result in the denial of the cross-motion. *See Joseph v GMAC Leasing Corp.*, 44 AD3d 905 [2d Dept 2007]). Except for the default itself, there is no evidence that defendants ever intended to abandon this litigation.

This court finds that good cause to vacate the default has been shown notwithstanding the lack of direct proof of prior counsel's failure to serve and file an answer given the relatively short delay in serving the answer. *Cf. Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914 [2d Dept 2013]). The court also finds that it is in the interest of justice to vacate the default in light of no prejudice to the plaintiffs. However, the issue of meritorious defense must be carefully considered in light of the rider pertaining to a post-closing punch list and the "Survival Escrow Agreement."

First, regarding defendant Mark J. Nussbaum & Associates, PLLC, the court rejects plaintiffs' argument that attorneys' fees may be awarded pursuant to the escrow agreement found within the form contract which involves the *down*

[3] The plaintiffs properly point out that that it took the defendants more than a month to respond to the motion.

payment. The post-closing "Survival Escrow Agreement" does not contain any provision for attorneys' fees and the terms of the escrow agreement in the form contract are not incorporated by reference into the post-closing Survival Escrow Agreement. Liability for attorneys' fees are only mandated when there is a statute or contract or court rule that provides for such fees. (*See RAD Ventures Corp. v Artukmac*, 31 AD3d 412, 414 [2d Dept 2006]), "As a general rule, the award of an attorney's fee as part of a recovery in an action is not permitted, unless the right to such an award has been established by agreement, statute, or court rule [*see U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597, 822 NE2d 777, 789 NYS2d 470 (2004)]; *Chapel v Mitchell*, 84 NY2d 345, 349, 642 NE2d 1082, 618 NYS2d 626 [1994]; additional citations omitted). Under the Survivor Escrow Agreement, the escrow agent:

> shall not be liable for any error in judgment or any act done or omitted by it in good faith or pursuant to court order, or for any mistake of fact or law. Escrow Agent is hereby released and exculpated from all liability hereunder, except only for willful misconduct or gross negligence.

There are no facts that rise to the high level of "willful misconduct" or "gross negligence" in light of the escrowee's shelter from liability "for any error in judgment" or "mistake of fact or law." The defendant Mark J. Nussbaum & Associates, PLLC, through its principle, has stated a potentially meritorious defense regarding causes of action against this defendant provided escrow funds

are deposited with the court as shall be directed.

Second, regarding defendant 235 A Madison LLC's potential meritorious defense(s), the affidavit submitted on behalf of this defendant denies liability under the contract, and cites the provision in the Survivor Escrow Agreement, "Seller will provide architect drawings and all documentations needed (pictures, plans) to secure DOB and Landmark permits and Buyer will pay all fees associated with the architect's drawings and filing costs" implying that the buyer failed to pay all fees associated with the architect's drawings and filing costs. Assuming *arguendo* that plaintiffs were responsible for such fees, defendant 235 A Madison LLC provides no facts as to any demand made of the plaintiffs to do so. Moreover, the responsibility is upon defendant who "will provide architect drawings and all documentations needed... to secure DOB and Landmark permits." Under the Rider to the contract, ¶ 17, which was also meant to survive "post-closing," the defendant Seller was responsible for all costs except filing costs. Although the language in the Surviving Escrow Agreement that "Buyer will pay all fees associated with the architect's drawings and filing costs" is at variance with the Rider to the Contract, ¶ 17, which indicates that only the filing fees be paid by plaintiffs[4] (buyers), both the Rider to the Contract, ¶ 17, and the Surviving Escrow

[4] "Seller will provide architect drawings and all documentations needed (pictures, plans) to secure DOB and Landmark permits and buyer will pay for the associated filing costs (Items list to be defined with cost breakdown, estimation, architect fees and material needed to file to be paid by Seller.)"

Agreement were meant to survive closing. (Rider to the Contract, ¶ 17, "All items were to be completed on the punch list before closing "with the exception of Schedule A, Item 16 and Item H.2." Seller agreed "at Seller's sole cost and expense to finalize the items as per of the punch list attached to this rider as Exhibit A.") Both the Rider to the Contract, ¶ 17, and the Survival Escrow Agreement were breached by the defendant 235 A Madison LLC.

There is a *potentially* meritorious defense of mistake regarding the illegal status of prior alterations made on the purchased property. This affirmative defense can come under the fourth affirmative defense of "impossibility" because it is not possible to obtain permits without legalizing the prior work and alterations done on the premises. The current use and occupancy is not in compliance with the records on file with the building department and the communication from Jeff Akerman, R.A, AIA, NCARB, an architect, on August 15, 2018, to the plaintiffs, makes that plain (Plaintiff's Exhibit C):

> First of all I would like to apologize for not doing research into the work done on your property prior to filing the deck and window. I took for granted that all existing conditions were legal.
>
> The following are my findings after a few weeks of looking into this.
>
> 1. The extension at rear doors not show up on any old maps.

2. The conversion from the way the house is set up now to what it was as per old records was also not filed for. The conversation I am talking about is the change from having the two units set up as 2 above 2 vs as it's today 3 above 1.

3. The interior renovations of the building has not been filed for.

I will be going in to the examiner to withdraw the application for the rear window as right now that is the only option.

As to your question about legalizing all your conditions, the following is required;

1. Topo survey

2. File a alteration type one (legalization) for the conditions you have now.

3. Tr-1 Tr-8 inspection report

4. Tr-4 report

5. New Certificate of Occupancy

Possible a few more requirements.

The cost associated with such a process can be upward of $25,000 to $30,000 dollars.

The plans were rejected by the NYC Department of Buildings by letter dated July 24, 2018 (Plaintiff's Exhibit G) because, *inter alia*:

Current C of O #138383 indicates an existing four story building with a two-family occupancy. Consisting of one family in basement and first floor (duplex apartment) and one family in second and third floor (deplex apartment.)

> Approved plans indicate an open stair connecting basement, first and second floor with no entrance to second apartment. A change/rearrangement in occupancy is being performed. Scope of work cannot be performed under this application. Filed (sic) a proper application to establish new occupancy and use as per AC §28-118.3.1.

In other words, prior work was completed on the premises resulting in a triplex without NYC Department of Building approval and a proper application had to be made for these prior changes.

Neither party seeks rescission. Under the contract, although the purchase was "AS IS" and there was a $500 credit to purchasers in lieu of a "Property Condition Disclosure Statement," the seller nonetheless undertook to commit itself post-closing, to obtain the proper permits in order to complete punch list items and it may be the party ultimately responsible for first legalizing the premises ("[t]he purpose of the building and related codes is to protect the public," *Korik v. Gallo*, 2004 NYLJ LEXIS 912).

But defendants' burden of showing a meritorious defense is not as great as the burden in opposing a motion for summary judgment as long as some potential meritorious defense is shown. *Bilodeau-Redeye v. Preferred Mutual Ins. Co.*, 38 AD3d 1277 (4th Dept. 2006). There is no question that defendant 235 A Madison LLC has breached the terms of the agreement and there is no evidence of "best efforts" being expended to accomplish the completion of the punch items.

However, best efforts or not, no permits would be approved without legalizing the premises.

The Rider makes reference to, "(i)n any conflicts between the Rider and Contract, this Rider shall supersede over the Contract." The Survival Escrow Agreement also states, "(w)hereas, pursuant to the Schedule A 'Punch List' annexed to the Contract, Seller was to complete certain work at the Premises" and this work was not completed. It appears, at least on the surface, that both parties may have made a mutual mistake regarding the legality of the premises and this may provide the slim reed of a potentially meritorious defense. The court need not look at 235 A Madison LLC's failure to obtain the proper permits and to "finalize the items as per of (sic) the punch list" because the burden on a motion to vacate is not as heavy as one for summary judgment. *See Bilodeau-Redeye v. Preferred Mutual Ins. Co.*, 38 AD3d 1277 (4th Dept. 2006). To the extent there is any variance between the Survival Escrow Agreement and the Rider to the contract, such variance does not change the fact of a potentially meritorious defense.

To the extent that no individual members of the 235 A Madison LLC have been named as defendants, or proof provided of any service upon individual members of the 235 A Madison LLC, the motion and cross-motion are denied without prejudice because this court does not have jurisdiction over these defendants.

Based on the foregoing, it is

ORDERED that that the defendant Mark J. Nussbaum & Associates, PLLC's cross-motion to compel acceptance of its answer and vacate default is granted to the extent that upon its deposit of the escrow funds of $75,000.00 with the Clerk of the Court, within 20 days of this order, its default is vacated and the answer shall be deemed served as to this defendant; plaintiff may move again for default judgment if defendant Mark J. Nussbaum & Associates fails to do so and it is further

ORDERED that the plaintiff's motion for default judgment as to defendant 235 A Madison LLC is denied and defendant 235 A Madison LLC's cross-motion to compel acceptance of its answer and vacate its default is granted; and it is further

ORDERED that the defendant 235 A Madison LLC's cross-motion to compel acceptance of its answer and vacate default on behalf of its unnamed members of the LLC is denied as unnecessary because jurisdiction was never obtained over these defendants; and it is further

ORDERED that a preliminary conference is scheduled for 12/2/19.

This constitutes the decision and order of the court.

A copy of this order must be served on all sides within fifteen (15) days hereof with notice of entry.

Dated: Brooklyn, NY
OCT 15 2019

RICHARD J. MONTELIONE, A.J.S.C.

KINGS COUNTY CLERK
FILED
2019 OCT 21 AM 9:35