

255 W. 131 St., LLC v Richardson

2021 NY Slip Op 32373(U)

November 18, 2021

Supreme Court, New York County

Docket Number: Index No. 650532/2021

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

255 WEST 131 STREET, LLC,

Plaintiff,

- v -

RALPH RICHARDSON, RALPH RICHARDSON,
INDIVIDUALLY AND D/B/A TEN COMMANDMENTS
CHURCH, INC, ADVENT SABBATH CHURCH D/B/A AND
A/K/A TEN COMMANDMENTS CHURCH INC., ADVENT
SABBATH CHURCH, INC, and TEN COMMANDMENTS
CHURCH INC,

Defendants.

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INDEX NO. 650532/2021

MOTION DATE 11/18/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for LEAVE TO FILE.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff (motion sequence number 001) for a default judgment against defendants Ralph Richardson, individually, Ralph Richardson d/b/a Ten Commandments Church, Inc., Advent Sabbath Church d/b/a and a/k/a Ten Commandments Church, Inc., Advent Sabbath Church, Inc, and Ten Commandments Church Inc is DENIED; and it is further

ORDERED that the motion of defendant Advent Sabbath Church Inc. (motion sequence number 002) to extend its time to serve and

file an answer to the complaint is GRANTED and the answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the motion of defendants Ralph Richardson, individually, and Ralph Richardson d/b/a Ten Commandments Church, Inc (motion sequence number 002) to dismiss the complaint is DENIED; and it is further

ORDERED that defendants Ralph Richardson, individually, Ralph Richardson d/b/a Ten Commandments Church, Inc., Advent Sabbath Church d/b/a and a/k/a Ten Commandments Church, Inc. and Ten Commandments Church Inc are directed to serve an answer to the complaint within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference orders on January 14, 2022.

DECISION

"The motion court providently exercised its discretion in denying plaintiffs' motion and granting defendants' cross motion to compel plaintiffs to accept their answer (CPLR 3012[d]), which was served two weeks late.

Although the affidavit of merit provided by defendants' executive lacked any detail concerning their potential defenses to plaintiffs' claims for payment for work performed

on three subcontracts, an affidavit of merit is 'not essential to the relief sought' by defendants before entry of a default order or judgment (DeMarco v. Wyndham Intl., 299 A.D.2d 209, 209, 749 N.Y.S.2d 139 [1st Dept. 2002]; see Nason v. Fisher, 309 A.D.2d 526, 765 N.Y.S.2d 32 [1st Dept. 2003]). Accordingly, given the shortness of the delay and absence of evidence of willfulness or prejudice to plaintiffs, as well as the State's policy of resolving disputes on the merits, defendants were properly granted an opportunity to defend plaintiffs' claims on the merits (see e.g., Artcorp Inc. v. Citirich Realty Corp., 140 A.D.3d 417, 30 N.Y.S.3d 872 [1st Dept. 2016]).

Naber Electric v Triton Structural Concrete, Inc, 160 AD3d 507, 508 (1st Dept 2018) (Emphasis supplied.)

In the action at bar, prior defense counsel served and filed a notice of appearance on April 4, 2021, approximately one- and one-half months late, given that the response time accrued from the filing of proof of service of the complaint (see Rosato v Ricciardi, 174 AD2d 937 [3d Dept 1991]), which took place on February 11, 2021.¹ This court finds such notice of appearance established that the delay was not willful. Nor does plaintiff demonstrate any prejudice by such delay, which was not inordinate. Further, counsel's representation that the individual defendant Ralph Richardson is suffering from

¹The court sua sponte takes judicial notice that the summons at bar states "This action will be heard in the Supreme Court of the State of New York and in the County of Kings", which conflicts with the caption that designates New York County and the statement "Plaintiff designates New York County as the place of trial". Such mistake is not a fundamental error, but a curable irregularity, which is not jurisdictional. See Hull v Canandaigua Electric Light & R Co, 56 AD 419, 421 (4th Dept 1900).

Alzheimer's disease and bedridden constitutes a reasonable excuse for such delay. See Loucks v Klimek, 108 AD3d 1037, 1038 (4th Dept. 2013).

Moreover, though an affidavit of merit is not essential in that defendant religious corporation sought the extension of its time to answer before entry of a default judgment, the proposed answer, which has been verified by an officer of the defendant religious corporation, serves as such an affidavit. CPLR § 105(u). When coupled with the affidavit, sworn to on December 4, 2015, of defendant Ralph Richardson, which refers to contracts of sale between the parties that are superseded by the Contract of Sale date December 4, 2015, the subject of this lawsuit, such verified answer states defenses that are meritorious.

This court disagrees with defense counsel that the deed dated June 3, 2016 irrefutably establishes the defense, as a matter of law, that defendants Ralph Richardson, individually, and Ralph Richardson d/b/a Ten Commandments Church, Inc cannot be liable as sellers under the Contract of Sale dated December 4, 2015 (Contract). In its complaint, plaintiff has sufficiently alleged a cause of action to pierce the corporate veil, with its claims that the individual defendant commingled funds, engaged in self-dealing and failed to adhere to corporate formalities with respect to defendant religious corporations.

See International Credit Brokerage Co, Inc, 249 AD2d 77, 78 (1st Dept 1998). Nor does the absence of any evidence of Attorney General approval of the sale of religious property establish that defendants performed their obligations under such Contract.

This court agrees with plaintiff that, in his affidavit, defendant Richardson raises no issue of fact with respect to the prima facie evidence of proper service upon him. Such prima facie evidence is in the form of the affidavit of the process server, who states under oath that on January 28, 2021, he delivered the summons and complaint to such defendant personally. Therefore, to the extent the individual defendant seeks dismissal for a lack of personal jurisdiction, such application must be denied.

Debra A. James
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<u>11/18/2021</u> DATE					<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	