

**Ehrenkranz v 58 MHR LLC**

2016 NY Slip Op 32322(U)

November 21, 2016

Supreme Court, Suffolk County

Docket Number: 04444/2012

Judge: James Hudson

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Supreme Court of the County of Suffolk **COPY**  
State of New York - Part XLVI

**PRESENT:**  
**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*

X-----X  
JOHN EHRENKRANZ and  
ANDRA EHRENKRANZ

Plaintiffs,

-against-

58 MHR LLC, DIMITRI BOYLAN and  
JULIAN BOYLAN

Defendants.

X-----X  
58 MHR LLC and JULIAN BOYLAN,

Counterclaim-Plaintiffs,

-against-

JOHN EHRENKRANZ and ANDRA  
EHRENKRANZ

Counterclaim-Defendants.

X-----X  
58 MHR LLC and JULIAN BOYLAN,

Third-Party Plaintiffs,

-against-

MARTIN ANDERSON, LEPATNER &  
ASSOCIATES, LLP, CYNTHIA ROBINSON,  
ANDERSON BROTHERS CONSTRUCTION,  
INC. and 624 BUTLER LANE LLC,

Third-Party-Defendants.

X-----X

**INDEX NO.:04444/2012**

**SEQ. NO.:010-MOT D**

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Upon the following papers numbered 1 to 34 read on this motion for a Default Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-22; Notice of Cross Motion and supporting papers 0; Answering Affidavits and supporting papers 23-27; Replying Affidavits and supporting papers 28 -34; Other 0; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that Plaintiffs' motion (seq. no.:010) for a default judgment as against Defendant Dimitri Boylan is granted; and it is further

**ORDERED** that an inquest shall abide the trial on the matter; and it is further

**ORDERED** that the parties are directed to appear for a preliminary conference in Part XLVI on **January 10, 2017 at 10:00 am.**

In this action, Plaintiffs seek to enforce a judgment in the amount of \$2,211,000 which was awarded after a jury trial on January 10, 2014 in the matter of *Opus Vivir v Ehrenkranz*, Index No. 43523/2009 ("the Opus Action"). This action, commenced on February 14, 2012, alleges conversion, unjust enrichment, fraudulent conveyance and aiding and abetting fraudulent conveyance. The gravamen of the complaint is that the individual Defendants dissipated the assets of Opus Vivir and transferred the assets to the corporate Defendant, 58 MHR, LLC.

Procedurally, Defendants MHR and Julian Boylan were duly served with process in March, 2012. Defendants MHR and Julian Boylan served their answers in late September 2012. By Order dated September 6, 2012 (Mayer, J.), this Court granted Plaintiff more time to serve Dimitri Boylan. Plaintiff served Dimitri Boylan pursuant to the Hague Convention in Buenos Aires, Argentina on October 10, 2012. Pursuant to an Order by the Supreme Court of Justice of the Nation, General Department of Notifications on February 8, 2013, Mr. Luis M. Gerosi, Director General of the General Department of Notifications of the National Department of Justice avers the following:

\* \* \* This Court holds that the objective alluded to by the article in question has been achieved. Accordingly, the service was duly and properly performed pursuant to the aforementioned article 153 and to articles 339 and 141 of the National Code of Civil and Commercial Procedure. Let these presents be communicated to the jurisdiction concerned in order to complete the information supplied.

By Order dated September 5, 2012 (Mayer, J.), the Court granted Plaintiff's cross motion for consolidation of the instant action with the Opus action. The action was

transferred to the Commercial Division, Part XLVI. The record further reveals that Plaintiffs moved for a preliminary injunction and Defendants cross-moved to dismiss the complaint. By Order dated September 6, 2012 (Mayer, J.), Plaintiffs' motion was granted to the extent that Defendants 58 MHR, LLC, Dimitri Boylan and Julian Boylan are enjoined, restrained and prevented from assigning, disposing of, selling, encumbering, mortgaging, or removing or otherwise interfering with the Real Property from the State of New York, and are enjoined, restrained and prevented from assigning, disposing of, selling, encumbering, mortgaging, or removing or otherwise interfering with all right, titles and interest that Defendants 58 MHR, LLC, Julian Boylan and/or Dimitri Boylan have in the Real Property. The Court also granted Defendants' cross motion to dismiss as to the second and fifth causes of action. By Order dated May 6, 2013 (Pines, J.), the Court directed Plaintiffs to give an undertaking in the amount of \$2,300,000. This amount was later reduced \$500,000.00 by order dated June 27, 2014 (Pines, J.).

By Order dated April 23, 2013, (Pines, J.), counsel agreed to bifurcate the actions and try by a jury the Opus Action on the breach of contract claim and counterclaim first, to be followed by a court trial on veil piercing against Julian Boylan. Plaintiffs were awarded the amount of \$2,100,000.00 in a jury trial that was completed on January 10, 2014.

Plaintiff now moves for a default judgment against Dimitri Boylan, despite the fact that more than one year has passed since service of the summons and complaint. In support, Plaintiff submits, *inter alia*, the affidavit of Patricia Rosito Vago, Esq., copies of the summons and complaint, the affidavit of service by Monica Fiori, Notifying Officer, the documents related to service of the summons and complaint pursuant to the Hague Convention, and correspondence.

Inasmuch as Dimitri Boylan resided in Argentina, Plaintiff obtained the services of Patricia Rosito Vago, Esq., to serve Dimitri Boylan pursuant to the Hague Convention. In her personal affidavit, Ms. Vago avers that she is an attorney, duly licensed to practice law in Argentina, and that her law firm regularly assists foreign attorneys serve process upon domiciliaries of Argentina. Ms. Vago states that she petitioned the Ministry of Foreign Affairs and Worship, located in Buenos Aires, Argentina, which arranges to have process served on the Defendant. Ambassador Horacio A. Basabe, Head of International Assistance, for the Ministry of Foreign Affairs and Worship, Buenos Aires, Argentina, requested Dr. Miguel GT.J. Costa, the Judge in charge of the National Court of First Instance on Civil Matters No. 93, to authorize service of the complaint on Dimitri Boylan pursuant to Argentine Law. Judge Costa referred the matter to the National Justice's Service Office for the City of Buenos Aires appointing Notifying Officer, Ms. Monica Fiori to effect service on Dimitri Boylan of the summons and complaint in this action under the Hague Convention. Ms. Fiori duly served Boylan by delivering a copy of the papers to the building manager at

Dimitri Boylan's last known address. Ms. Vago states that pursuant to Argentine Law that service upon a building manager is considered to be proper and thus, Dimitri Boylan was properly served. Under Argentine law, Section 150 of the Civil and Commercial National Procedural Code, Dimitri Boylan had five days after the service to challenge the proceedings before Judge Costa and to contest the service as a nullity. Ms. Vago states that, to her knowledge, Dimitri Boylan failed to do so.

In the affidavit of service, Monica Fiori avers that she made a visit to the domicile of Mr. Boylan on September 9, 2012 and upon learning that Boylan was not present, left notice of service with the building manager. On October 10, 2012, Ms. Fiori returned to the domicile of Mr. Boylan and again asked for him, and upon learning from the building manager that Mr. Boylan did, in fact, live at the premises, and she delivered the papers to the building manager. Ms. Fiori further states that the domicile is No. 1499, 8<sup>th</sup> Floor.

In explanation for the delay in seeking a default judgment, Plaintiffs refer the Court to a so-ordered stipulation dated December 4, 2012 (Pines, J.), wherein the parties agreed to stay the consolidated action pending settlement. After attempts to settle failed, Plaintiffs' counsel affirms that Justice Pines bifurcated the two actions in order to first conduct the jury trial of the Opus action and, later determine whether the corporate veil could be pierced. The record reveals that the jury trial of the Opus Vivir action was conducted on August 13, 2013 and concluded on January 10, 2014, and the trial regarding the corporate veil was concluded by Order, dated July 1, 2014 (Pines, J.).

The record reveals that the Court then focused its attention to the instant action, and by Order, dated May 27, 2015 (Pines, J.), the Court granted Defendants' cross motion to dismiss the instant complaint with the exception of the claims for fraudulent conveyance and aiding and abetting fraudulent conveyance. The parties were directed to conduct a preliminary conference and begin discovery, however, the preliminary conference order was never executed by both parties. In the beginning of 2016, this action was transferred to the chambers of the undersigned. Plaintiffs contend that they did not intend to abandon this action, but were directed by the court to wait until the Opus action was tried and other issues were resolved.

In opposition, Defendants contend that Plaintiff should be prohibited from obtaining a default judgment against Dimitri Boylan. In opposition, Defendants submit, *inter alia*, the affidavit of Dimitri Boylan, and emails between counsel. Defendants dispute whether Dimitri Boylan was properly served. In his personal affidavit, Dimitri Boylan states that he did not live at the premises described by Ms. Vago and in October, 2012 had moved to another location, at Calle Arribenos. In addition, he states that he never received the

summons and complaint from his building manager, and that he did not know the building manager. Defendants further state that there was no agreement to stay the action, however do not dispute that the court bifurcated the trial of the two actions. Defendants further contend that discovery had been concluded at the time of the consolidation order. In emails as late as March and April, 2016, Defendants' counsel seeks the participation of Plaintiffs' counsel in settlement talks, and discuss discovery timelines.

In reply, Plaintiffs state that despite their objections to the motion, Defendants do not dispute the fact that the parties had suspended the usual timing and procedural requirements in the instant action pending two trials in the Opus Action. In addition, Defendants do not dispute their reticence to respond to Plaintiffs' discovery demands. Plaintiffs further state that the parties have engaged in settlement talks as to all parties, including Dimitri Boylan, despite his nonappearance, and that the settlement talks were conducted with the assistance of the prior presiding justice in both actions. Therefore, Plaintiffs claim, these procedural irregularities, informal suspension of normal procedure, delays on both sides in motion practice and settlement talks constitute sufficient cause under the case law to allow for this late motion for a default judgment. In addition, Dimitri Boylan has failed to oppose this motion, and the other Defendants lack standing with respect to the default motion.

Plaintiffs rely upon *LNV Corp v Forbes*, 122 AD3d 805, 996 NYS2d 696 (2d Dept 2014) and *BAC Home Loan Servicing, LP v Betram*, 51 Misc 3d 770, 30 NYS3d 483 (Sup Ct., Suffolk County, 2016) for the proposition that the sufficient cause standard is met where there is a showing that the Plaintiff had no intent to abandon the action. Plaintiffs also cite *Micheli v E.J. Builders, Inc.*, 268 AD2d 777, 702 NYS2d 402 (3d Dept 2000), whose facts are similar to the instant action, where the parties suspended normal procedural deadlines, allowed pleadings to be answered years later, failed to follow strict timing for discovery and otherwise handled the case informally, and as in this case, the parties were periodically engaged in settlement talks. There the Court allowed a motion for default judgment. Defendants rely upon *U.S. Bank v Dorvelus*, 140 AD3d 850, 32 NYS 3d 631 (2d Dept 2016), where the Court found unsubstantiated and conclusory claims of law office failure were insufficient to excuse delay in moving for default judgment, and likewise, in *Staples v Jeff Hunt Developers, Inc.*, 56 AD3d 459, 866 NYS2d 756 (2d Dept 2008), the court found law office failure an insufficient excuse for delay in moving for default in a foreclosure action. Defendants further rely upon *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 (2d Dept 2014) and *Kay Waterproofing Corp. v Ray Realty Fulton*, 23 AD3d 624, 804 NYS2d 815 (2d Dept 2005), and state that the Appellate Division, Second Department routinely reverses trial courts which "improvidently exercise" their discretion by failing to appropriately enforce 3215 (c)'s time limitation.

Initially, the Court has determined that Defendant Dimitri Boylan was properly served. Article 10 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague convention”) (November 15, 1965, art. 10, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163) is a multilateral treaty designed to simplify the methods for serving process abroad to assure that Defendants sued in foreign jurisdictions receive actual and timely notice of suit and to facilitate proof of service abroad (*see Fernandez v Univan Leasing*, 15 AD3d 343, 344, 790 NYS2d 155 ([2d Dept 2005]). Pursuant to the Hague Convention, the primary method of service is through the Central authority established by each member state. The use of the Central Authority, however, is not mandatory (*see Canizio & Sing*, Service of Process and the Hague Convention, NYLJ, Aug. 27, 2010).

Because Argentina is a member of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters since 1972, Defendant Dimitri Boylan is bound by the service terms of that Convention, as he could not be personally served in the United States. Consistent with the Convention, Argentina’s own declaration in the Convention, and due process requirements, service on Dimitri Boylan was proper. Therefore, Defendants’ arguments in opposition are without merit.

Turning next to Plaintiffs’ motion for a default judgment, pursuant to CPLR 3215 (c):

If the Plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. \* \* \*

“The one exception to the otherwise mandatory language of CPLR 3215 (c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if ‘sufficient cause is shown why the complaint should not be dismissed’” (*Giglio v NTIMP, Inc.*, 86 AD3d 301, at 308, 926 NYS2d 546 [2d Dept 2011], quoting CPLR 3215 [c]). “This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious” (*Giglio v NTIMP, Inc.*, *supra*; *Ryant v Bullock*, 77 AD3d 811, 811, 908 NYS2d 884 [2d Dept 2010]). “The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court” (*Giglio v NTIMP, Inc.*, *supra*; see *Staples v Jeff Hunt Developers, Inc.*, *supra*; *Costello v Reilly*, 36 AD3d 581, 828 NYS2d 172 [2d Dept 2007]). Ongoing settlement negotiations between a

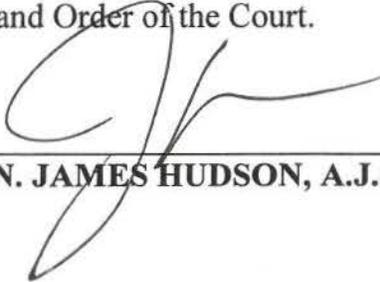
Plaintiff's attorney and the Defendants' insurance carrier during the one year period after the default has been considered a reasonable excuse for a delay (see *Thompson v Cohen*, 160 AD2d 1157, 554 NYS2d 746 ([3d Dept 1990])).

Here, Plaintiff failed to move for a default judgment for approximately 3½ years between Dimitri Boylan's default in appearing or answering and the Plaintiffs' July 5, 2016 motion. The Court finds, however, that Plaintiff's excuse for the delay is reasonable, inasmuch as the instant action, which was commenced three years after the Opus action, was delayed by Court Order to bifurcate the two related actions, complex litigation which ensued between the parties, numerous attempts to settle before the trial of the Opus action and after the jury awarded Plaintiffs a judgment, the complex issues that attended the jury trial of the Opus action, and the corporate veil trial. The Court further notes that this action was assigned to three different judges over its pendency. In addition, by denying Defendants' motion to dismiss Plaintiffs' remaining causes of action for fraudulent conveyance and aiding and abetting fraudulent conveyance the Court has already found that these remaining causes of action have merit and should proceed to trial. Therefore, the Court, in its discretion, finds that Plaintiffs have demonstrated both a reasonable excuse and meritorious causes of action.

Accordingly, Plaintiffs' motion for a default judgment is granted. An inquest shall abide the trial of the instant action. The parties are directed to appear for a preliminary conference at The New York State Supreme Court of Suffolk County, One Court Street, Riverhead, NY, on **Monday, January 10, 2017, at 10:00 am** in Part XLVI.

The foregoing constitutes the decision and Order of the Court.

**DATED: NOVEMBER 21, 2016**  
**RIVERHEAD, NY**

  
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**HON. JAMES HUDSON, A.J.S.C.**