SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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MICHAEL BUONINCONTRO AND
BRANDON ELLER,

Plaintiffs,

-against-

EDISON BALLROOM, LLC,

Defendant.

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AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR DEFAULT JUDGMENT AND IN OPPOSITION TO CROSS-MOTION
Index No. 654844/2020
Return Date: 1/13/2021

LAURIE SAYEVICH HORZ, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am an attorney acting Of Counsel to the firm of Stuart M. Steinberg, P.C., attorneys for plaintiffs Michael Buonincontro and Brandon Eller in this action (the "Plaintiffs"). As such, I am fully familiar with the facts and circumstances set forth below, based upon the facts known to me to be true, my review of the books and records maintained by the plaintiffs and conversations had with the plaintiffs.

2. This affirmation is respectfully submitted (a) in further support of Plaintiffs' motion for an order, pursuant to CPLR §3215, directing the judgment clerk of the Supreme Court, New York County ("Judgment Clerk") to enter a default judgment in favor of Plaintiffs and against defendant Edison Ballroom LLC ("Defendant") in the amount of $39,999.71[1] plus costs and interest and (b) in opposition to Defendant's cross-motion to vacate its default and permit the filing of an answer.

3. It is well established and undisputed that, in order for Defendant to successfully oppose the instant motion, it must demonstrate a "reasonable excuse" for the failure to timely

[1] The amount of the deposit set forth in the complaint contains a typographical error, and should read $39,991.71 not $39,999.71.

appear and answer the complaint and that it holds a meritorious defense to Plaintiffs' causes of action. As set forth below, Defendant has not met either criteria. As such, Plaintiff's motion should be granted in its entirety, and the Defendant's cross-motion should be denied.

Defendant Has Not Demonstrated A Reasonable Excuse For Its Default

4. It is undisputed that Plaintiffs properly effectuated service upon Defendant by causing a true copy of the Summons and Complaint and Notice of Commencement of Action Subject to Mandatory Electronic Filing to be delivered to the New York Secretary of State pursuant to Section 303 of the Limited Liability Company Law, and further effectuated service on the Defendant pursuant to CPLR 3215 by serving on it a copy of the Summons and Verified Complaint together with a Notice to Corporation on November 18, 2020.

5. It is further undisputed that Defendant's time to plead, answer or move with respect to the Summons and Verified Complaint expired as of November 6, 2020 and that Defendant neither answered nor moved to extend its time to serve an answer and no extensions have been given prior to such deadline, and Defendant is in default in pleading.

6. Instead, Defendant admits that it failed to keep a current address on file with the New York Secretary of State for the corporation, as required by Business Corporation Law §306. Defendant claims that the address on file with the Secretary of State is that of its former counsel who passed away, however, Defendant does not claim that the passing was recent or that it was prohibited in any fashion to provide an updated, current address for service for the entity.

7. Furthermore, Defendant admits that it knew that its address on file with the Secretary of State was not current and that it relied upon its former attorney's widow to forward to the corporation any papers served to the former attorney through the New York State Secretary of State.

8. It is well settled that failure to comply with B.C.L. §360 does not constitute a reasonable excuse for a corporation seeking to vacate its default. *Lawrence v. Esplanade Gardens*, 213 A.D.3d 216, 623 N.Y.S.2d 586, 586 (1st Dep't 1995); *Baez v. Ende Realty Corp.*, 78 A.D.3d 576, 911 N.Y.S.2d 68, 69 (1st Dep't 2010). Nor does it constitute law office failure, as Defendant claims. For this reason alone, Plaintiffs' motion should be granted and Plaintiffs are entitled to a judgment in the sum of $39,999.71.

Defendant Lacks A Meritorious Defense

9. Default judgment in favor of Plaintiffs and the denial of Defendant's cross-motion is further warranted as the defendant fails to present this Court with a meritorious defense to plaintiffs' claims. There is no dispute that the parties' April 26, 2019 contract (hereinafter the "Agreement") to hold and cater the Plaintiffs' wedding (the "Event") at Defendant's venue contains an unambiguous provision providing the plaintiffs with a 100% refund of their deposit in the event that the wedding could not occur.

10. Thus, as set forth in the Plaintiff's moving papers, the Agreement provides that either party may terminate the Agreement "due to 'Force Majeure or Acts of God', including, but not limited to Force Majeure, *circumstances beyond its reasonable control*, strike, *governmental authority*, terrorism, war in the United States, or unavailability of mass transportation, that make it illegal, impractical or impossible for the affected party to hold the event or enjoy the benefits of this contract. . . . For the avoidance of doubt, in the event of an failure to perform or termination due to such Force Majeure or Acts of God, *Edison Ballroom shall promptly refund 100% of all payments made by Client to Edison Ballroom including the otherwise non-refundable deposit* and Client shall have no further obligations to Edison Ballroom *unless the Client wishes to reschedule* the event within 12 months of the event date as stated above." See, Plaintiffs' Moving Papers at Exhibit D (emphasis added). Defendant offers no defense to this plain and unambiguous language

other than to ask the Court to rewrite the parties' agreement and bind the Plaintiffs to hold the Event after the pandemic is over, effectively wiping out the negotiated terms of the Agreement concerning the deposit and the right to terminate the Agreement. This argument should be rejected.

11. Further, Defendant does not deny that the Agreement contains this language, nor does it dispute that the plaintiffs opted, after one attempt to reschedule the wedding, not to reschedule the wedding for a second time. As such, under the clear and unambiguous language of the Agreement, Defendant is obligated to return the Plaintiff's deposit.

12. Defendant's sole defense appears to be one grounded in equity – in that it believes that the economic hardship it claims it will endure should it be required to comply with the terms of its own Agreement and return the deposit to the Plaintiffs should override the Plaintiffs' contractual right to a refund of their deposit. This argument is not supported or grounded in any law or statute. Plain and simple, the parties contracted for the return of the deposit – all of the deposit – in such an event as the COVID-19 pandemic prevented the wedding from being held. The Plaintiffs are entitled to the benefit of their bargain, and this Court must enforce the same.

13. Furthermore, even if this Court were to consider the Defendants' equity argument, such argument ignores the economic hardship imposed upon the *Plaintiffs* – that their hard-earned funds that they saved for their wedding should be provided to the Defendant with nothing in return for the same. There is no end in sight presently for restrictions for indoor events in New York City; indeed, since the filing of this motion, New York City has imposed more restrictions on indoor dining. The Plaintiffs did not agree to, or contract for, their deposit to be used to fund the Defendant's operating expenses or to be used as a bankruptcy bail out or stimulus package. Indeed, according to public records, the Defendant received a $445,000 Paycheck Protection Program loan. See, Exhibit F annexed hereto. Thus, Defendant's counterclaim seeking "fairness

and practicality" and obligating Plaintiffs to continue under a contract that they were unambiguously provided the right to cancel should be rejected as meritless.

14. Resultantly, Plaintiffs are entitled to a refund of the entire deposit under its claims for breach of contract and unjust enrichment as interposed against Defendant. Plaintiffs should not be caused to incur additional attorneys' fees to litigate this action where it is clear that defendant holds no defense to the plaintiffs' claim.

WHEREFORE, Plaintiffs respectfully request that this Court grant this motion in its entirety and issue an Order, pursuant to CPLR §3215, (a) directing the Judgment Clerk of the Supreme Court, New York County to enter a default judgment in favor of the Plaintiffs and against the Defendants, jointly and severally, in the amount of $39,991.17 plus costs and interest; (b) denying defendant's cross-motion; and (c) awarding such other and further relief as this Court deems just and proper under the circumstances.

Dated: Edgewood, New York
January 11, 2021

/s Laurie Sayevich Horz
Laurie Sayevich Horz, Esq.