

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

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MICHAEL BUONINCONTRO and BRANDON  
ELLER

Index No. 654844/2020

Plaintiff,

**AFFIRMATION IN REPLY  
TO OPPOSITION TO  
CROSS-MOTION**

-against-

EDISON BALLROOM LLC,

Defendant.  
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Nathan M. Ferst, an attorney at law of the State of New York, makes the following  
Affirmation under the penalties of perjury:

1. I am the attorney for Defendant Edison Ballroom LLC. I make this Affirmation  
from my personal knowledge in reply to the Affirmation in Further Support of Motion for  
Default Judgment and in Opposition to Cross-Motion of Laurie Sayevich Horz, Esq., dated  
January 11, 2021.

2. Ms. Horz argues that Defendant has failed to demonstrate excusable neglect and a  
meritorious defense. However, it is respectfully submitted that Defendant in its prior papers  
demonstrated both.

3. On November 29, 2016, the Appellate Division, First Department in *Cheri  
Restaurant Inc. v. Eoche*, 2016 NY Slip Op. 07985, vacated a default judgment, stating:

To obtain relief from a default judgment, a party is required to demonstrate both a  
reasonable excuse for the default and a meritorious claim or defense to the action.  
Here, defendant has adequately demonstrated a reasonable excuse, namely,  
inadvertent law office failure. Defendant's new counsel, in an affirmation  
submitted to the motion court, stated that there was a misunderstanding between  
her and defendant's former counsel, and that she was unaware of the scheduled  
deposition and the compliance conference when she took over representation in  
early April 2015, approximately a month before the May 5th conference date,  
which she missed. Shortly after receiving part of defendant's case file – which

only contained plaintiff's discovery responses and discovery demands – defendant's new counsel became very ill and lost approximately two weeks from work. Additionally, new counsel affirmed that she was informed by defendant's former counsel that he had received an extension of time to respond to plaintiff's discovery demands. In fact, plaintiff's counsel confirmed that she agreed to the extension. Lastly, defendant's new counsel affirmed that she was unaware that this was an e-filed case as she had never appeared in the New York County Supreme Court, Commercial Division, before, and her practice involved cases mainly in Queens and Kings County, where e-filing was not mandated.

4. In light of the foregoing, it is respectfully submitted that the prior listing with the Secretary of State of New York as agent for service of process of the home address of the attorney who had formed Defendant, Sol Orbuch, Esq., and all papers received at his home after his death having been routinely forwarded to Your Affirmant by Mr. Orbuch's widow, and the failure to change that listing as a result, constitute law office failure, particularly as upon the making of Plaintiff's instant motion for a default, the agent for service of process was changed with the Secretary of State of New York.

5. It is further respectfully submitted that, under the circumstances of the current pandemic, and Defendant's willingness to perform the contract between the parties when the current emergency limitations are lifted, Defendant has shown a meritorious defense. In light of the facts at bar, the proper remedy is to suspend performance of the contract. Thus, in *Reade v. Stoneybrook Realty, LLC*, 882 NYS2d 8 (2<sup>nd</sup> Dep't, 2009), the landlord was delayed in delivering possession owing to the landlord's having been prevented from continuing with construction of the building as a result of a temporary restraining order issued by Supreme Court. A dispute arose as to the timing of a rent abatement clause and the Appellate Division held that the rent abatement period would take into account the period of prohibited construction resulting in a delay of delivery of possession.

6. The attention of the Court is respectfully directed to the accompanying Affidavit of William Kaelblein, the Manager of Defendant, sworn to on January 12, 2021.

7. In light of the foregoing, the Court is respectfully requested to deny the instant motion of Plaintiff for a default judgment against Defendant and to grant Defendant's instant cross-motion for an order vacating the default of Defendant in answering the Complaint herein and permitting Defendant to serve and file its Answer if the form annexed to as Exhibit B to Defendant's cross-motion papers.

Dated: New York, New York  
January 12, 2021



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Nathan M. Ferst