

**Hart v Taboada**

2024 NY Slip Op 32204(U)

June 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 517619/2023

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of June 2024

HONORABLE FRANCOIS A. RIVERA

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MARAE HART

Plaintiff,

- against -

DIEGO TABOADA, NORIKO JIMBO,  
FAMILY NEGOCIO CORP., D.B.A. KOKO’S and  
LAST CALL,

Defendants.

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**DECISION & ORDER**

Index No.: 517619/2023

Ms. 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on November 15, 2024, under motion sequence number one, by Marae Hart (hereinafter plaintiff) for an order: (1) granting default judgment against defendant Noriko Jimbo pursuant to CPLR 3215; (2) granting dismissal of the affirmative defenses asserted by defendants Diego Taboada, Family Negocio Corp., d/b/a Koko’s and Last Call pursuant to CPLR 3211(b), and (3) imposing sanctions on defendants Diego Toboada and Family Negocio and their attorney pursuant to 22 NYCRR 130-1.1. The motion is unopposed.

- Notice of motion
- Affirmation in support
- Memorandum of law in support
- Exhibits a-i<sup>1</sup>

**BACKGROUND**

On June 15, 2023, plaintiff commenced the instant action by filing a summons and complaint with the Kings County Clerk’s office (KCCO). On September 26, 2023, defendants Diego Taboada, and Family Negocio Corp interposed and filed a joint answer with the KCCO. On January 3, 2024, defendants Diego Taboada, Noriko Jimbo, Family

<sup>1</sup> These exhibits are filed under NYSCEF filing numbers 12-24.

Negocio Corp., d/b/a Koko's and Last Call filed a document denominated as an amended answer with the KCCO. As relevant to the instant motion, the amended answer asserted six affirmative defenses.

## LAW AND APPLICATION

### *Motion for a Default Judgment*

On May 30, 2024, the date set for oral argument of the instant motion, the plaintiff withdrew this branch of the motion seeking a default judgment pursuant to CPLR 3215 and accepted the amended answer filed by all the defendants.

### *Motion to Strike all Affirmative Defenses*

The defendants did not oppose the branch of the plaintiff's motion seeking to strike the affirmative defenses asserted in the amended answer. The affirmative defenses are deemed abandoned by the defendants' failure to oppose the motion to strike them (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019], citing *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

### *Motion for Sanctions*

The third branch of plaintiff's motion seeks sanctions against the defendants and against their attorney for filing a frivolous and dilatory answer.

22 NYCRR 130–1.1 states:

- (A) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expense reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130–1.3 of this Subpart.

For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Plaintiff contends, among other things, that the defendants' unsupported blanket denials of nearly all the factually specific allegations in the verified complaint are frivolous. Plaintiff also contends that the defendants delay in interposing and filing the amended answer is also frivolous conduct.

The fact that the defendants' answer is unverified and contains general denials of the allegations of fact in the verified complaint does not constitute frivolous conduct within the intendment of 22 NYCRR 130-1.1. Plaintiffs are free to prove the truth of the facts in their verified complaint at trial or in a motion for an accelerated judgment. It is not frivolous conduct for a defendant to put a plaintiff through the burden of proving their case without the defendants' voluntary help.

Furthermore, by the plaintiff's voluntary acceptance of the defendants' late amended answer, plaintiff gave up the right to claim that the late filing of the answer constituted frivolous conduct. Moreover, the filing of a late answer does not support a claim of frivolity because a plaintiff is always free to promptly reject same and to move for a default judgment as the plaintiff originally did here.

## **CONCLUSION**

The branch of the motion by plaintiff Marae Hart for an order granting default

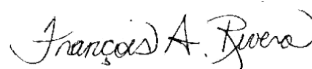
judgment against defendant Noriko Jimbo pursuant to CPLR 3215 is withdrawn.

The branch of the motion by plaintiff Marae Hart for an order dismissing the affirmative defenses asserted by defendants Diego Taboada, Family Negocio Corp., d/b/a Koko's and Last Call pursuant to CPLR 3211(b) is granted.

The branch of the motion by plaintiff Marae Hart for an order imposing sanctions on defendants Diego Toboada and Family Negocio and their attorney pursuant to 22 NYCRR 130-1.1 is denied

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.