SHORT FORM ORDER **ORIGINAL** INDEX No. 621062116

SUPREME COURT- STATE OF NEW YORK

lAS PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN Justice of the Supreme Court

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PONCE DE LEON FEDERAL BANK,

Plaintiff,

-against-

IGLESIA MISION CRISTIANA RESTAURACION: INC. alk/a RESTORATION CHRISTIAN MISSION: CHURCH, INC. f/k/a IGLESIA PENTACOSTAL REFUGIO DE SALVATION alk/a IGLESIA PENTECOSTAL REFUGIO DE SALVACION,

and FIFTH AVENUE PAVING INC.,

Defendants.

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MOTION DATE 6/26/20

SUBMIT DATE 10/30/20

Mot. Seq. # 004- MD (moot) Mot. Seq. # 005- MG

Mot. Seq.# 006 - MD Mot. Seq.# 007 - XMD CDISP Y\_x\_ N

MARGOLIN & WEINREB Attys. For Plaintiff

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Syosset, N Y 11791

ADAM, LEITMAN, BAILEY, PC Attys. For Defendant Iglesia Dell Dios

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DAVID NAMM, PC

Attys. For Defendant Iglesia Mision

250 Mineola Blvd. Mineola, N Y 11501

U pon the following papers contained in the court's e-filing system numbered 79- 102 read on these motions for writ of assistance, nunc pro tunc relief. extend time to answer and impose sanctions ; Notice.of Motion/Order to Show Ca use and supporti ng papers ; Notice of Cross Motion and supporting papers: ; Opposing papers: ; Repl y papers ; Other ; (and aftet hem ing eottmel in sttppot t a nd oppo5ed to the motion) it is,

***ORDERED*** that this motion (#004) by non-party, Avail 1 LLC, brought by way of Order t o

Show Cause seeking a writ of assistance is denied as moot; and it is further

***ORDERED*** that the branches of the motion (#005) by non party Iglesia Del Dios Vivo Columina Y Apoyo De La Verdad "La Luz Del Mundo" (Church of the Living God Column and Support the Truth "Light of the World") (hereinafter, "Iglesia Del Dios") seeking to substitute itself

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as plaintiff is granted, without opposition; and it is further

***ORDERED*** that the branches of the motion (#005) by Iglesia Del Dios seeking a judgment of possession and writ of assistance is granted, without opposition; and it is further

***ORDERED*** that the motion (#006) by defendant, Iglesia Mision Christiana Restauracion, Inc. a/k/a Restoration Christian Mission Church, Inc. f/k/a Iglesia Pentacostal Refugio De Salvation a/k/a Iglesia Pentecostal Refugio De Salvacion ("IMCR") seeking leave to interpose a late answer is denied; and it is further

***ORDERED*** that the cross motion (#007) by Iglesia Del Dios seeking sanctions is denied. Familiarity with this Court's Order dated September 19, 2018 is presumed, wherein

plaintiff's motion to confirm the referee's report and for judgment of foreclosure and sale was granted in its entirety. On November 12, 2018, plaintiff served a copy of the Order with notice of entry upon defendant's counsel. A foreclosure sale was scheduled to take place on December 13,

2018. On December 6, 2018, defendant IMCR presented a proposed order to show cause to the Court for signature seeking a stay of the sale of the property, as well as vacatur of its default and leave to file a late answer. The Court declined to sign the application noting, *inter alia,* that the application failed to set forth a reasonable excuse to vacate the default and otherwise provided insufficient grounds to stay the sale. Defendant subsequently filed a bankruptcy petition on the day of the scheduled sale and, as a result, the sale was cancelled. After the bankruptcy case was dismissed, plaintiff scheduled another foreclosure sale to take place on May 8, 2019. Again, defendant filed a bankruptcy petition, and plaintiff was forced to cancel the sale. Plaintiff subsequently scheduled a third foreclosure sale to take place on November 18,2019. On November

14, 2019, defendant IMCR presented a second proposed order to show cause to the Court for signature seeking vacatur of the September 19, 2018 Order, as well as a stay of the action. The Court declined to sign the application noting that the defendant's submission was not "new evidence" pursuant to CPLR 5015(a)(2), and that the judgment of foreclosure and sale is final to all issues that could have been raised in the action. The foreclosure sale took place as scheduled on November 18,

2019, and the premises was purchased by the plaintiff, who thereafter assigned the bid to Avail LLC.

On December 10, 2019, defendant IMCR, through newly retained counsel, presented a third proposed order to show cause to the Court for signature seeking, as it did in its first application, vacatur of its default and leave to file a late answer, as well as an injunction preventing any attempts by plaintiff to interfere with IMCR's quiet use and enjoyment of the premises. Again, the Court declined to sign the application, repeating that no reasonable excuse has been offered, and that there was insufficient ground for an injunction.

On May 4, 2020, Avail LLC moved by way of order to show cause (#004) for a judgment of possession and writ of assistance. While the motion was pending, non-party Iglesia Del Dios filed a motion (#005) seeking to substitute Iglesia Del Dios in place of Avail LLC in the prior motion, as Avail LLC transferred its interest in the property to Iglesia Del Dios by deed recorded in August,

2020. No opposition was filed in connection with either motion (#004; #005).

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Shortly thereafter, defendant IMCR made a motion (#005) seeking to vacate its default pursuant to CPLR 5015(a)(l) and leave to interpose a late answer. Plaintiff Ponce de Leon Federal Bank opposed the motion, as did owner Iglesia Del Dios who also cross moved (#007) for sanctions against IMCR. IMCR has opposed the cross motion. The Court notes that the prohibition of the commencement or enforcement of an eviction proceeding against a commercial tenant, instituted by Governor Andrew Cuomo's Executive Order 202.28 on May 7, 2020 and which had been extended several times, was lifted as of January 31, 2021, as noted in Executive Order 202.81. As such, the Court now considers the pending motions.

The Court will first consider the motion (#006) by defendant IMCR as determination thereof may render determination of the plaintiff's motion, academic.

In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(l ), a party must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion *(see Hudson City Sav. Bank v Bomba,* 14 AD3d 704, 51 NYS3d 570 [2d Dept 2017]; *Bank of New York v Young,* 123 AD3d I 068, 2 NYS3d 127 [2d Dept 2014]; *Citibank [South Dakota/, N.A. v Baron ,* 115 AD3d 90,982 NYS2d 396 [2d Dept 2014]). Likewise, to successfully vacate the default in answering the complaint and to compel plaintiff to accept service of an untimely answer pursuant to CPLR 3012(d), defendant must establish both a reasonable excuse for his/her failure to answer and the existence of a potentially meritorious defense to the action *(see* CPLR 3012[d],

5015[a][1]; *USBankN.A.vSamuel,* 138AD3d 1105, 30NYS3d305 *[2dDept2016];SDF8CBK, LLC v 689 St. Marks Ave., Inc.,* 131 AD3d 1037, 16 NYS3d 463 [2d Dept 2015]; *Chase Home Fin., LLC v Minott,* 115 AD3d 634,981 NYS2d 757 [2d Dept 2014]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Court *(see Hudson City Sav. Bank v Bomba,* 14 AD3d *at* 705, *supra; Aurora Loan Servs. LLC v Ahmed ,* 122 AD3d 557, 996

NYS2d 92 [2d Dept 2014]).

Where, as here, a party asserts that the failure to appear is the result oflaw office failure, the Court has the discretion to accept such as a reasonable excuse "where the claim ... is supported by a 'detailed and credible' explanation of the default" *(Kim v Bishop,* 2017 WL 6504625 [2d Dept

2017], *Kohn v Kohn,* 86 AD3d 630, 630, 928 NYS2d 55 [2d Dept 2011]; *see* CPLR 2005; *see also*

*Strunk v Revenge Cab Corp.,* 98 AD3d 1029, 950 NYS2d 595 [2d Dept 2012]). However, "it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted

as a reasonable excuse"*(Incorporated Vii.of Hempstead v Jablonsky ,* 283 AD2d 553, 553-554, 725

NYS2d 68 [2d Dept 2001]; *Onishenko v Ntansah ,*145 AD3d 910, 43 NYS3d 504 [2d Dept 2016]).

Here, IMCR acknowledges that service in 2016 when this action was commenced, but asserts that prior counsel, Michael Oziel, Esq., failed to answer the complaint and instead filed a bankruptcy petition. As a result, defendant opines, he is entitled to an extension of time to answer the complaint.

The Court finds the defendant's proffered explanation unavailing. Initially, the Court notes that a review of the Court's docket indicates no record of a notice of appearance or answer being filed on defendant's behalf, although a Consent to Change Attorney was filed in February, 2018 substituting attorney Oziel for an attorney not of record in the case. Nevertheless, the bankruptcy filing took place almost two years after defendant was served with process, and ten months

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subsequent to the filing of the Consent to Change Attorney. Bare allegations "oflaw office failure based upon [a] prior counsel's unspecified negligent acts, errors, and omissions does not constitute a reasonable excuse for their default" *(Carillon Nursing and Rehabilitation Ctr., LLP v Fox,* 118

AD3d 933, 934, 989 NYS2d 68 [2d Dept 2014], *citing Vardaros v Zapas,* 105 AD3d 1037, 1038,

963 NYS2d 408 [2d Dept 2013]; *Bazoyah v Herschitz,* 79 AD3d 1081, 1082,913 NYS2d 769 [2d

Dept 2010]; *Kolajo v City of New York ,* 248 AD2d 512, 670 NYS2d 52 [2d Dept 1998]).

Based on the above, the Court finds that the defendant has again failed to demonstrate a reasonable excuse *(see U.S. Bank, Nat/. Assn. v Smith,* 132 AD3d 848, 19 NYS3d 62 [2d Dept

2015]; *Community W. Bank, N.A. v Stephen,* 127 AD2d 1008, 9 NYS3d 275 [2d Dept 2015]; *HSBC Bank, USA v Dammond ,* 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]). Inasmuch as the defendant failed to advance a reasonable excuse in support of his application to vacate the default

in answering and for leave to extend his time to answer pursuant to CPLR 3012(d), it is unnecessary to address whether defendant has demonstrated a potentially meritorious defense *(see BAC Home Loans Serv., LP v Readon,* 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]; *Citimortgage, Inc. v Kowalski,* 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]; *Emigrant Bank v Wiseman,* 127 AD3d

1013,6 NYS3d 670 [2d Dept 2015]). I CR's motion (#006) is thus denied in its entirety.

In considering Avail LLC's (#004) motion for substitution, the Court notes that Iglesia Del Dios' has demonstrated the property transfer from Avail LLC to Iglesia Del Dios and, therefore, the motion (#004) is rendered moot. With respect to Iglesia Del Dios' motion (#005), its motion to be substituted as plaintiff is granted. Additionally, that branch of the motion for an order directing the Sheriff to put the Iglesia Del Dios into possession of the mortgaged premises is considered under RPAPL § 221, and granted. The unopposed moving papers demonstrate the movant's entitlement to an order directing the Sheriff to put the movant into possession of the mortgaged premises is considered under RPAPL § 221 *(see Federal Home Loan Mtge.Corp. v O'Brien,* 228 AD2d 548,

644 NYS2d 328 [2d Dept 1996], *citing Lincoln First Bank v Polishuk,* 86 AD2d 652, 446 NYS2d

399 [2d Dept 1982]).

In consideration oflglesia Del Dios' motion for sanctions, the Court hereby warns IMCR that any further or continued filings which raise arguments that appear to be "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law" (22 NYCRR 130-1.1[c]) may be deemed frivolous and subject to a sanctions hearing. Defendant IMCR is directed to act accordingly.

The Judgment of Possession and Writ of Assistance, submitted herewith, has been signed simultaneously with this order.

This constitutes the decision and order of the Court.

*3L .r 1* '

Dated

T-F' AN, J.S.C.