

NEW YORK SUPREME COURT - COUNTY OF BRONX  
**PART 32**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
**JOSEPH ALBANESE, as Executor of the  
Estate of Kenneth Donohue,**

Plaintiff,

- against -

Index No. **30198/2020E**

Hon. **FIDEL E. GOMEZ**  
Justice

**MICHAEL CANDELA, ESQ., as Executor  
of the Estate of SUSAN BARRIS and JAMES  
BARRIS, Individually,**

Defendants.


-----X

The following papers numbered 1, read on this motion, noticed on 8/8/2022, and duly submitted as no. 3 on the Motion Calendar of 8/8/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion for default judgment is decided in accordance with the Decision and Order annexed hereto.

Dated: 10/5/22

  
 Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE.....  CASE DISPOSED     NON-FINAL DISPOSITION
2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     DO NOT POST  
 FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT  
 NEXT APPEARANCE DATE: \_\_\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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**JOSEPH ALBANESE, as Executor of the  
Estate of Kenneth Donohue,**

Plaintiff,

**DECISION AND ORDER**

- against -

Index No. **30198/2020E**

**MICHAEL CANDELA, ESQ., as Executor  
of the Estate of SUSAN BARRIS and JAMES  
BARRIS, Individually,**

Defendants.

-----X  
Plaintiff Joseph Albanese, as Executor of the Estate of Kenneth Donohue (“Plaintiff”) moves for default judgment against Defendant James Barris (“Defendant”) pursuant to CPLR § 3215. Defendant does not oppose.

For the reasons which follow, Plaintiff’s motion is denied, and this action is dismissed as against Defendant.

**BACKGROUND:**

On September 11, 2020, Plaintiff commenced the instant action by filing a summons and motion for summary judgment in lieu of complaint. The motion was made returnable on May 13, 2021.

On October 5, 2021, the Court (McShan, J.) denied the motion for summary judgment in lieu of complaint. In the Decision and Order, the Court indicated that Defendant did not oppose the motion or serve an answer.

On July 26, 2022, Plaintiff filed the instant motion. On August 8, 2022, the motion was marked fully submitted.

**DISCUSSION:**

CPLR § 3213 provides, in relevant part, that:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with

such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. . . . *No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion.* If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise (emphasis added).

Thus, if a motion for summary judgment in lieu of complaint is denied, a plaintiff's moving papers shall be deemed the complaint, and the plaintiff may move for default judgment against the defendant upon proper proof pursuant to CPLR § 3215 (*Cadle Co. v Ayala*, 47 AD3d 919, 920 [2d Dept 2008]).

The failure to oppose a motion for summary judgment in lieu of complaint is the equivalent of defaulting in answering a complaint (CPLR § 3213; *see also, Rogers McCarron & Habas, P.C. v Acker*, 189 AD3d 1487, 1488 [2d Dept 2020] ["Here, there were no answering papers to deem an answer"]; *Buchakian v Kuriga*, 138 AD3d 711, 712 [2d Dept 2016] ["Here, the Dellasperanzas have failed to proffer any reasonable excuse for their default. The fact that Kuriga had failed for protection under the federal bankruptcy laws neither precluded the action from going forward against the Dellasperanzas, nor provided any reasonable excuse for the Dellasperanzas' failure to submit opposing papers"]; *Counsel Financial Services, LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483, [4th Dept 2009] ["The court determined that defendants already were in default at that time, inasmuch as they had failed to submit opposing papers"]). However, a plaintiff may not move for default judgment until the return date of the motion (CPLR § 3213; Siegel, NY Prac § 291 [6th ed. 2022] ["The defendant's failure to serve answering papers within the required time does not authorize an immediate default, however. The plaintiff who wants a default judgment must ask for it on the return day, and the default may of course be excused by the court for good cause shown"]); Mark C. Dillon, Practice Commentaries, McKinney's Cons Law of NY, CPLR C3213:20 ["For motion-actions under CPLR 3213, the defendant is required to serve opposition papers when due before the return date. However, unlike in conventional actions, the failure to submit timely opposition papers does not necessarily require that the defendant be held in default, as the default does not actually occur until the return date itself. If there is no appearance and opposition by the defendant by the return date, the defendant will of course be in default and the court is authorized to enter a default judgment. If the defendant does not serve opposition papers

on time, or at all, but shows up at court on the return date of the CPLR 3213 motion, the court must decide whether to hold the defendant in default. The defendant's failure to submit timely opposition papers is not just a failure to oppose a motion, but a failure to appear in the first instance").

Here, it is undisputed that Defendant did not oppose Plaintiff's motion for summary judgment in lieu of complaint or appear on the return date of the motion. As such, Defendant is in default, and Plaintiff may move for default judgment against him pursuant to CPLR § 3215.

*CPLR § 3215(c):*

Plaintiff argues that Defendant has been in default since May 6, 2021, the date on which his opposition to the motion for summary judgment in lieu of complaint was due (Affirmation of John M. Murtagh, ¶ 13, 21). As indicated above, a defendant is not determined to be in default until he fails to oppose the motion and fails to appear on the return date of the motion. Here, the return date of the motion was May 13, 2021. Since it is undisputed that Defendant did not oppose the motion or appear on the return date of the motion, he is deemed to be in default as of May 13, 2021.

Contrary to Plaintiff's argument, Plaintiff did not move for default judgment within one year of Defendant's default. Defendant was in default as of May 13, 2021. As such, Plaintiff had until May 13, 2022, to make the instant motion. The instant motion was made on July 26, 2022. As such, the Court must first consider whether this action must be dismissed pursuant to CPLR § 3215(c).

CPLR § 3215(c) provides, in relevant part, that: "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 language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts "shall" dismiss claims for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned. Failure to take proceedings for entry of judgment may be excused, however, upon a showing of sufficient cause, which requires the plaintiff to demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action.

(*Myoung Ja Kim v Wilson*, 150 AD3d 1019, 1020 [2d Dept 2017]; *Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-308 [2d Dept 2011]; *Butindaro v Grinberg*, 57 AD3d 932 [2d Dept 2008]). Notably, even in the absence of a motion, the Court may dismiss an action *sua sponte* pursuant to CPLR § 3215(c) when the plaintiff fails to seek entry of judgment within the prescribed one-year period (*Perricone v City of New York*, 62 NY2d 661 [1984]).

“The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court” (*Giglio* at 307-308).

Here, Plaintiff incorrectly argues that this motion is timely. As explained above, it is not. To the extent that Plaintiff attempts to attribute his delay in making the instant motion to the Court’s issuance of a Decision and Order on the motion for summary judgment in lieu of complaint on October 5, 2021, the argument is without merit. As noted above, Plaintiff had until May 13, 2022, to make the instant motion. As such, Plaintiff had over seven months from the issuance of the Decision and Order to timely move for default judgment. Plaintiff did not make the instant motion until July 26, 2022, over nine months after the issuance of the Decision and Order.

To the extent that Plaintiff may be arguing that the court conferences held in November 2021 and February 2022 delayed the filing of this motion, the argument is without merit, as the court conferences did not preclude Plaintiff from filing this motion.

As such, Plaintiff has not proffered any reasonable excuse for his delay. Thus, the Court may not excuse the lateness and must dismiss this action pursuant to CPLR § 3215(c) (*Giglio*, 86 AD3d 301 at 308 [“Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and ‘shall’ dismiss the claim pursuant to CPLR 3215[c]”).

Accordingly, Plaintiff’s motion is denied, and this action is dismissed as against Defendant.


It is hereby

**ORDERED** that the Clerk dismiss this action as against Defendant James Barris. It is further

**ORDERED** that Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 10/5/22  
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Hon.   
FIDEL E. GOMEZ, A.J.S.C.