

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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F&S PETROLEUM CORP.,

Plaintiff,

- against -

Index No. **20658/2018E**

Hon. **FIDEL E. GOMEZ**

Justice

**FOXWOOD HOUSE ASSOCIATES AND
BL MANAGEMENT, INC.,**

Defendants.

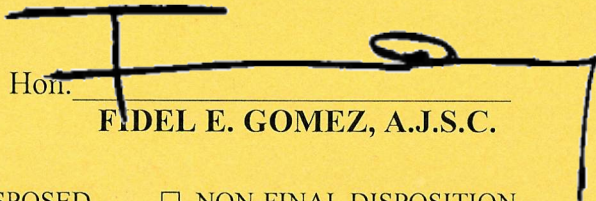
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The following papers numbered 1 to 4, read on these motions, noticed on 5/5/2021 and 3/17/22, and duly submitted as no. 1 on the Motion Calendar of 4/25/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion and Defendants' cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 5/4/22


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

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED (cross-motion) DENIED (motion) GRANTED IN PART
3. CHECK IF APPROPRIATE..... OTHER
- 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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F&S PETROLEUM CORP.,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **20658/2018E**

**FOXWOOD HOUSE ASSOCIATES AND
BL MANAGEMENT, INC.,**

Defendants.
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Plaintiff F&S Petroleum Corp. (“Plaintiff”) moves for default judgment against Defendants Foxwood House Associates and BL Management, Inc. (“Defendants”) pursuant to CPLR § 3215. Defendants cross-move for dismissal of the complaint pursuant to CPLR § 3215(c), or in the alternative, for leave to serve an answer.

For the reasons which follow, Plaintiff’s motion for default judgment is denied, and Defendants’ cross-motion is granted.

BACKGROUND:

On January 18, 2018, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, which alleges causes of action for breach of contract and unjust enrichment. The complaint is verified by Shameeza Hatim, Plaintiff’s president.

The complaint alleges that from November 1, 2014, through March 24, 2015, Plaintiff provided Defendants with petroleum fuel oil in the amount of \$61,695.49 (Compl. ¶ 5). Plaintiff alleges that despite written demand, Defendants have not paid any of the amount due and owing (Compl. ¶ 6). The complaint seeks a judgment against Defendants in the amount of \$61,695.49, plus interest.

On March 24, 2021, Plaintiff filed the instant motion. On February 9, 2022, Defendants filed the instant cross-motion.

On March 17, 2022, the motions were marked fully submitted.

DISCUSSION:

Plaintiff's Motion for Default Judgment:

CPLR § 3215(c):

As Plaintiff did not move for default judgment within one year of Defendants' default, 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 [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, the affidavit of service dated February 15, 2018 states that Defendant BL Management, Inc. ("BL Management") was served on January 18, 2018, by personal delivery to Robin Harasimowicz, who is authorized to accept service of process on behalf of BL Management (Plaintiff's Exhibit B). Presumably, the service was effectuated pursuant to CPLR § 311(a).

CPLR § 311(a) provides, in relevant part, that:

Personal service upon a corporation . . . shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation

may also be served pursuant to section three hundred six or three hundred seven of the business corporation law.

“A process server’s affidavit stating that personal service was effected by delivering a copy of the summons with notice to an authorized agent, and providing a description of that person, constitutes prima face evidence of proper service pursuant to CPLR 311(a)(1)” (*Purzak v Long Island Housing Services, Inc.*, 149 AD3d 989, 991 [2d Dept 2017]; *Rosario v NES Medical Services of New York, P.C.*, 105 AD3d 831, 832 [2d Dept 2013]).

Here, BL Management was served with the summons and verified complaint on January 18, 2018, by personal delivery. As such, BL Management had until February 7, 2018 to answer (CPLR 320[a]). As such, Plaintiff had until February 7, 2019 to move for default judgment. Plaintiff did not bring the instant motion until March 24, 2021, over two years past the one-year deadline set forth in CPLR § 3215(c).

The affidavit of service dated May 8, 2018 states that Defendant Foxwood House Associates (“Foxwood”) was served on May 8, 2018, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306 (Plaintiff’s Exhibit C).

BCL § 306(b)(1) states, in relevant part, that:

Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served.

Service upon the Secretary of State as agent for a defendant corporation constitutes valid service (*Union Indem. Ins. Co. of New York v 10-01 50th Ave. Realty Corp.*, 102 AD2d 727, 728 [1st Dept 1984]; *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881, 881 [2d Dept 2007]). Service of process is complete when plaintiff serves the Secretary of State, “irrespective of whether the process subsequently reache[s] the corporate defendant” (*Fisher v Lewis Construction NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020]).

Here, Foxwood was served with the summons and verified complaint on May 8, 2018, the date on which the Secretary of State was served with the summons and verified complaint (BCL § 306[b][1]). As such, Foxwood had until June 7, 2018 to serve an answer (CPLR 320[a]). As

such, Plaintiff had until June 7, 2019 to move for default judgment. Plaintiff did not bring the instant motion until March 24, 2021, over one year and 9 months past the one-year deadline set forth in CPLR § 3215(c).

In its moving papers, Plaintiff did not provide any excuse for its failure to move for default judgment within one year of Defendants' default. As such, the Court may not excuse the lateness and must dismiss the claim 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)].

Counsel for Plaintiff affirms in reply that he had personal hardships in 2018 through 2020 because his wife was diagnosed with pancreatic cancer, which caused difficulty in the operation of his law practice. He affirms that the Covid-19 pandemic has added to these circumstances. He argues that since Defendants have not been prejudiced, the Court should extend Plaintiff's time to file the motion for default judgment pursuant to CPLR 2004.

Although the Court is sympathetic to counsel's hardships, Plaintiff's excuse of law office failure does not constitute a reasonable excuse for its delay in timely moving for a default judgment, as it is vague, conclusory and unsubstantiated (*See Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 963 [2d Dept 2018] [“While a court has the discretion to accept law office failure as a reasonable excuse, such excuse must be supported by detailed allegations of fact explaining the law office failure”]; *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 752 [2d Dept 2014] [“law office failure should not be excused ... where allegations of law office are conclusory and unsubstantiated”] [internal quotation marks omitted]; *CEO Business Brokers, Inc. v Alquabili*, 105 AD3d 989 [2d Dept 2013]).

The Court notes that Plaintiff's failure to timely move for default is not excused by Executive Order 202.8, which tolled “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding”, as the Order was effective from March 20, 2020, until November 3, 2020. Plaintiff's time to make the motion had already expired prior to this toll.

In light of Plaintiff's failure to provide a reasonable excuse for its delay, the Court need not consider whether it has demonstrated the merits of its action.

The Court also notes that a party may not make new arguments in reply papers (*Lee v Law Offices of Kim & Bae, P.C.*, 161 AD3d 964, [2d Dept 2018] [“The function of reply papers is to

address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion. Here, the plaintiff's reply papers include new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in her original motion. Therefore, those contentions, and the grounds and evidence in support of them, were not properly before the Supreme Court"; *Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). As such, Plaintiff's request, submitted in its reply papers for the first time, to extend its time to move for default judgment pursuant to CPLR § 2004 is denied.¹

Accordingly, Plaintiff's motion for default judgment is denied. Defendants' cross-motion for dismissal pursuant to CPLR 3215(c) is granted.

It is hereby

ORDERED that the Clerk dismiss the complaint; and it is further

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

This constitutes the Decision and Order of this Court.

Dated:

5/4/22

Hon.

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

¹ The Court notes that even if Plaintiff's belated request for an extension of time to make its motion pursuant to CPLR § 2004 was considered, it would be denied. CPLR § 2004 requires a showing of "good cause" (CPLR § 2004; *Judith S. v Howard S.*, 46 AD3d 318, 319 [1st Dept 2007]). Law office failure, which Plaintiff's counsel's affirmation essentially alleges, can constitute good cause (*Tewari v Tsoutsouras*, 75 NY2d 1, 12-13 [1989]; *Lyubomirsky v Lubov Arulin, PLLC*, 125 AD3d 614, 615 [2d Dept 2015]; *Brusco v Davis-Klages*, 302 AD2d 674, 674 [3d Dept 2003]). However, case law is well settled that allegations of law office failure must be specific and detailed (*National Loan Investors, LP v Bruno*, 191 AD3d 999, 1001 [2d Dept 2021] ["Here, the Supreme Court improvidently exercised its discretion in extending the time for the defendant to answer the complaint pursuant to CPLR 2004. The defendant failed to provide a detailed and credible explanation for the law office failure that he alleged caused his default"]; *CEO Business Brokers, Inc. v Algabili*, 105 AD3d 989, [2d Dept 2013] ["Although the Supreme Court has the discretion to accept law office failure as a reasonable excuse, the excuse must be supported by detailed allegations of fact explaining the law office failure"]; *Byers v Winthrop University Hosp.*, 100 AD3d 817, 818 [2d Dept 2012]). As stated above, Plaintiff has not set forth a specific and detailed explanation of its failure to move for default judgment within a year of Defendants' default. Additionally, the delay here was not minimal and there is no indication that Plaintiff diligently pursued this matter. Moreover, Plaintiff did not seek to extend its time to make its motion until well after its time to make the motion had expired, and only after Defendants pointed out the issue in their cross-motion.