

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
**FOREMOST GLATT KOSHER CATERERS,
INC.,**

Plaintiff,

- against -

**CHABAD LUBAVITCH OF RIVERDALE,
INC., and LEVI SHEM TOV, an individual,**

Defendants.

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The following papers numbered 1, read on this motion, noticed on 5/6/2022, and duly submitted as no. 3 on the Motion Calendar of 5/6/2022.

	<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: 6/7/22


 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

-----X
**FOREMOST GLATT KOSHER CATERERS,
INC.,**

Plaintiff,

DECISION AND ORDER

- against -

Index No. **20388/2020E**

**CHABAD LUBAVITCH OF RIVERDALE,
INC., and LEVI SHEM TOV, an individual,**

Defendants.

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Plaintiff Foremost Glatt Kosher Caterers, Inc. (“Plaintiff”) moves for default judgment against Defendants Chabad Lubavitch of Riverdale, Inc. and Levi Shem Tov (“Defendants”) pursuant to CPLR § 3215. Defendants do not oppose.

For the reasons which follow, Plaintiff’s motion is denied.

BACKGROUND:

On January 9, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, which alleges causes of action for breach of contract, unjust enrichment, and book account. The complaint is verified by Randy Zablo, the Chief Executive Officer for Plaintiff.

The complaint alleges that Plaintiff is engaged in the business of kosher catering (Compl. ¶ 1). Plaintiff alleges that Defendant Chabad Lubavitch of Riverdale, Inc. (“Defendant Chabad”) is a not-for-profit corporation, and that Defendant Levi Shem Tov (“Defendant Levi”) is a director who operates Defendant Chabad and enters into agreements on its behalf (Compl. ¶ 3-4).

The complaint alleges that the parties entered into an agreement for catering services, pursuant to which Plaintiff agreed to provide certain catering services to Defendants for an event on January 14, 2017, with 225 guaranteed attendees (the “Agreement”) (Compl. ¶ 8). Pursuant to the terms of the Agreement, Defendants agreed to make payment to Plaintiff “based upon the price per person and other charges” stated in the Agreement. Defendants agreed to make full payment “no later than fourteen (14) days prior to the function date”. Plaintiff alleges that the minimum number of guaranteed attendees was 225, at a cost of \$90.00 each (Compl. ¶ 9). Pursuant to the

terms of the Agreement, Defendants agreed to pay a service charge and “interest at a rate of one and one-half percent (1.5%) per month on all amounts which remain unpaid after the due dates”, along with the costs of collection and attorney’s fees in the amount of \$175.00 per hour in the event that the matter is turned over to an attorney for collection (Compl. ¶ 10).

The complaint alleges that Plaintiff performed all services pursuant to its obligations under the Agreement (Compl. ¶ 11). The complaint alleges that Defendants have failed to pay Plaintiff in full for the services provided. Plaintiff alleges that after consideration of all credits, Defendants owe the sum of \$27,435.00 (Compl. ¶ 13). Plaintiff alleges that despite serving Defendants with an invoice dated January 14, 2017, and a demand letter on August 16, 2019, Defendants have not paid the outstanding balance (Compl. ¶ 15-16).

Attached to the complaint are the Agreement dated December 22, 2016, invoice dated January 14, 2017, and a demand letter dated August 16, 2019.

On May 28, 2020, Plaintiff filed a motion for default judgment against Defendants. On June 25, 2021, the Court (McShan, J.) denied the motion, without prejudice to renewal upon proper papers, finding that Plaintiff had failed to comply with CPLR 3215(g)(3)(i) and CPLR 3215(g)(4)(i).

On April 1, 2022, Plaintiff filed the instant motion. On May 6, 2022, the motion was marked fully submitted.

DISCUSSION:

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).

The affidavit of service dated January 13, 2020, states that Defendant Chabad was served with the summons and verified complaint on January 13, 2020, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306.

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 reach[es] the corporate defendant” (*Fisher v Lewis Construction NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020]).

Here, Defendant Chabad was served with the summons and verified complaint on January 13, 2020, the date on which the Secretary of State was served with the summons and verified complaint (BCL § 306[b][1]). As such, it had until February 12, 2020, to serve an answer. (CPLR 320[a]). Defendant Chabad did not serve an answer by that date and is thus in default. As such, Plaintiff had until February 11, 2021, to move for default judgment. (CPLR § 3215[c]).

The affidavit of service dated February 28, 2020, states that Defendant Levi was served with the summons and verified complaint pursuant to CPLR 308(2) by delivering a copy of the

summons and verified complaint to a person of suitable age and discretion on February 26, 2020, and by mailing a copy of the summons and verified complaint on February 28, 2020. The affidavit of service was filed with the Court on March 6, 2020. As such, Defendant Levi had until April 15, 2020, to answer (CPLR 308[2] [“proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing”]; CPLR 320[a] [“if the summons was served . . . pursuant to . . . subdivision two . . . of section 308 . . . the appearance shall be made within thirty days after service is complete”]). Defendant Levi did not serve an answer by that date and is thus in default. As such, Plaintiff had until April 15, 2021, to move for default judgment. (CPLR § 3215[c]).

Here, the instant motion was made approximately a year past the one-year deadline set forth in CPLR 3215(c), and the record is bereft of any reason for the failure to timely move. While it is true that Plaintiff’s initial motion seeking identical relief was timely, the Court (McShan, J.) denied it and the relevant inquiry is whether this motion is timely and if not, why. Even if the denial of the prior motion was the reason for this untimely motion, the record is bereft of any explanation as to why Plaintiff waited over nine months after the Court’s decision to make this motion.

As such, 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)].

Accordingly, Plaintiff’s motion is denied, and the complaint is dismissed.

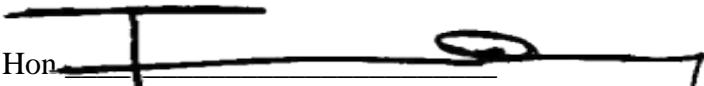
It is hereby

ORDERED that the Clerk dismiss the complaint. 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: _____
6/2/22

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