MSJ #1

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

JOSEPH RUIZ,

Plaintiff,

-against-

ANTHONY ARMSTRONG, LISA PERLSTEIN, DANIELLE GUINTA, AND NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

Index No.: 508834/2017

DECISION/ORDER
HON. KATHERINE A. LEVINE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Plaintiff's Notice of Motion with Accompanying Affidavits and Exhibits	1
Plaintiff's Memorandum of Law in Support	2
Defendants' Affirmation in Opposition to Plaintiff's Motion	3
Memorandum of Law in Reply	4
Supplemental Brief in Support of Defendants' Motion to Dismiss the Amended Complaint and In Opposition to Plaintiff's Motion for Default	5
Supplemental Memo of Law in Further Support of Motion for Default and Opposition to Motion to Dismiss	6

Plaintiff Joseph Ruiz ("plaintiff" or "Ruiz"), a teacher previously employed by the New York City Department of Education ("DOE"), initially filed a complaint against Principal Anthony Armstrong, Assistant Principal Lisa Perlstein, Superintendent Danielle Guinta and the DOE ("defendants") with this court on May 1, 2017, asserting federal and state claims of employment discrimination and retaliation, defamation, tortious interference with business relations, fraud, and intentional infliction of emotional distress. On June 21,2017, the DOE removed the case to the U.S. District Court for the Eastern District of New York ("EDNY"). On July 17, 2017, plaintiff filed an amended complaint in this court which waived his federal causes of action, and the parties stipulated on July 21, 2017 to remand the case back to this court. On July 27, 2017, District Court Judge Carol Bagley Amon issued an order remanding the case back to this Court; said order was entered by the Clerk's Office of this Court on August 11, 2017.

Defendants never answered the original complaint and failed to answer the amended complaint upon remand. Plaintiff therefore moved, on September 11, 2017, for a default judgment against defendants pursuant to CPLR § 3215(a). This provision provides that set forth: "When a defendant has failed to appear, plead or proceed to trial of an action reached ... the plaintiff may seek a default judgment against him." On November 22, 2017, defendants moved

pursuant to CPLR §3211(a)(5) to dismiss plaintiff's race and national original discrimination claims based on statute of limitations, and his remaining claims, including NYSHRL and NYCHRL claims, pursuant to CPLR § 3211(a)(7) based on failure to state a cause of action.

The first issue is whether defendants' failure to interpose an answer constituted a default within the meaning of CPLR § 3215(a). Pursuant to CPLR § 320(a), defendants had 30 days from the date on which service of the amended complaint was completed to "serv[e] an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." Defendants concede that they did not filed an answer to the amended complaint within 30 days of service. Pursuant to CPLR § 3211(f), a § 3211(a) motion to dismiss extends a defendant's time to answer the complaint, but only if the motion was made "before service of the responsive pleading is required" pursuant to CPLR § 3211(e). *Deutsche Bank Natl. Trust Co. v Hall*, 185 A.D.3d 1006, 1008 (2d Dept. 2020); *Bennett v. Hucke*, 64 A.D.3d 529, 530 (2d Dept. 2009). Since defendants made the § 3211(a) motion to dismiss only after the time to answer had expired, said motion did not serve to extend its time to answer.

To prevail on his motion for leave to enter a default judgment against a defendant, the plaintiff must submit proof of service of the summons and amended complaint pursuant to CPLR § 3215, proof of the facts constituting the cause of action, and proof of the defendant's default. *L & Z Masonry Corp. v Mose*, 167 A.D.3d 728, 729 (2d Dept. 2018); *Jing Shan Chen v R & K 51 Realty, Inc.*, 148 A.D.3d 689, 690 (2d Dept. 2017). To prove the "facts constituting the cause of action," the plaintiff "need only submit sufficient proof to enable a court to determine if the cause of action is viable." *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70-71 (2003). The court finds that plaintiff satisfied all of the requirements for demonstrating his entitlement to enter a default judgment.

To defeat a motion for leave to enter a default judgment based on failure to timely serve an answer, a defendant must demonstrate a reasonable excuse for its delay and a potentially meritorious defense. CPLR § 5015(a)(1); *Jing Shan Chen, supra*, 148 A.D.3d at 690. The determination as to whether an excuse is reasonable is within the court's discretion. *Young Su Hwangbo v Nastro*, 153 A.D.3d 963, 965 (2d Dept. 2017); *New York Hosp. Med. Ctr. of Queens v Nationwide Mut. Ins. Co.*, 120 A.D.3d 1322, 1323 (2d Dept. 2014). Law office failure may be accepted by the court as an excuse. CPLR § 2005. The court's determination as to reasonableness depends on several factors, including the length of the delay, whether the mistake was inadvertent or willful, whether there was an intent to abandon the proceeding, and whether the default prejudiced the opposing party. *See, Hayden v Vevante*, 179 A.D.3d 1032, 1034 (2d Dept. 2020); *Government Employees Ins. Co. v Avenue C Med., P.C.*, 166 A.D.3d 857, 859 (2d Dept. 2018); *Fried v Jacob Holding, Inc.*, 110 A.D.3d 56, 60 (2d Dept. 2013). The court must also consider the strong public policy in favor of resolving cases on the merit. *Hayden, supra*, 179 A.D.3d at1034; *Artcorp Inc. v Citirich Realty Corp.*, 140 A.D.3d 417, 418 (1st Dept. 2016)

This courts finds that defendants have a reasonable excuse. As set forth in defendants' papers, the failure to timely respond to the complaint was caused by defendants' attorneys'

inadvertent error in calendaring a response date due to the prior removal to federal court, receipt of an amended complaint after defendants removed the case to federal court, and the parties' consequent stipulation remanding the matter to state court. Plaintiff does not even claim that defendant's failure to timely answer was willful. Furthermore, defendants' actions in removing and remanding this matter between this court and the federal court demonstrate active engagement in this matter and an intent to defend the matter on the merits. *Pricher v. City of New York*, 251 A.D.2d 242, 242 (1st Dept. 1998) (default judgment properly vacated where it was clear that defendant "always intended to defend the action" and had meritorious defense): *Wyly v Milberg Weiss Bershad & Schulman LLP*, 2005 NY Slip Op 30545(U); 2005 N.Y. Misc. LEXIS 8570, *5-6 (Sup. Ct. N.Y. Co. 2005) (respondents demonstrated active engagement by filing papers for removal to federal court, appearing in federal court, and, after remand, requesting that petitioner withdraw the proceeding). This court also finds that defendants' evidentiary submissions demonstrate potentially meritorious defenses.

The second issue is whether the court may consider defendants' motion to dismiss on CPLR §§ 3211(a)(5) and (7) grounds when it was filed following the time period within which they were supposed to answer. Pursuant to CPLR § 3211(e), a motion to dismiss based on failure to state a cause of action under § 3211(a)(7) may be made at any time. *M&E 73-75, LLC v 57 Fusion LLC*, 2020 NY Slip Op 04372, 2020 N.Y. App. Div. LEXIS 4459, *7 (1st Dept. 2020); *Stolarski v Family Servs. of Westchester, Inc.*, 110 A.D.3d 980, 982 (2d Dept. 2013). Accordingly, this court will consider defendants' motion to dismiss solely to the extent that it is based on failure to state a cause of action. Defendants concede that §3211(e) preclude them from bringing a motion to dismiss based on statute of limitations grounds since such motion must be made before or at the time the answer is required to be served, and any defense based upon 3211(a)(5) is waived unless raised in a timely motion or in the responsive pleading. *Wan Li Situ v MTA Bus Co.*, 130 A.D.3d 807, 807-808 (2d Dept. 2015).

This constitutes the decision and order of the court.

DATED: September 28, 2020

KATHERINE A. LEVINE, J. S.C.

HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT

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KINGS COUNTY CLERK
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