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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: YORK Justice PART 2

WILLIAMSON, FRANCES

-v-

FRANKLIN POST ARCHITECTS INC. ET AL.

INDEX NO. 103176/07

MOTION DATE

MOTION SEQ. NO. 04

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/2/09

LOUIS B. YORK J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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FRANCES WILLIAMSON

Plaintiff,

Index No. 103176/07

- against-

FRANKLIN PLAZA APARTMENTS, INC. and KAREN OBEY

Defendants.

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Louis B. York, J.

Defendant Franklin Plaza Apartments, Inc. (Franklin Plaza) moves by an order to show cause pursuant to CPLR 5015(a)(1), CPLR 3215 (g)(4)(i), CPLR 317, CPLR 2004 and CPLR 3012 (d), for an order relieving Franklin Plaza from its default in this action, vacating the non-final disposition order of this court dated December 12, 2007, and permitting Franklin Plaza to serve and file a late verified answer. Defendant also requests that any upcoming proceedings relevant to the action be stayed until the determination of this application.

BACKGROUND AND FACTUAL ALLEGATIONS

This personal injury action stems from an incident in which plaintiff fell as a result of becoming tangled in three dog leashes while in the defendant's court yard. Two of the dogs belonged to Defendant Karen Obey. According to plaintiff, she was viciously attacked by one of the dogs, and this caused her to trip, become entangled in the leashes and fall.

Plaintiff served copies of the summons and complaint upon Franklin Plaza by delivering

two copies to the legal clerk at the New York Secretary of State, who is authorized to accept service on behalf of Franklin Plaza as a domestic business corporation. The firm representing defendant did not have an updated address on file with the Secretary of State. As a result, it did not receive copies of the summons and complaint from the Secretary of State. Defendant also claims that it never received a copy of the summons and complaint at any other time before it learned of the default. Plaintiff was aware of the defendant's actual place of business, yet did not additionally serve defendant at that address. Defendant failed to appear in court on the return date and, as a result, plaintiff was granted a default judgment against defendant on December 12, 2007. Plaintiff states that it filed and served a copy of the default judgment order with notice of entry upon defendant, and attaches an affidavit of service with a service date of July 2, 2008. Defendant alleges that it never received a copy of this default judgment, and only became alerted to this matter when it received a notice of a special referee hearing on damages from the New York State Supreme Court, scheduled for October 15, 2008.

DISCUSSION

Excusable Default:

A defendant seeking to vacate a default judgment pursuant to CPLR 5015 (a) (1) must demonstrate both a "reasonable excuse for the default and the existence of a meritorious claim or defense." CPLR 5015 (a)(1). *See, JP Morgan Chase Bank, N.A. v. Bruno,* 57 AD2d 362, 363 (1st Dept. 2008). Whether to relieve a party of an order entered on default is a matter left to the sound discretion of the court. *Fierro v Fierro*, 211 AD2d 676, 678 (2d Dept 1995)(citing *M.D. & Son Contr. v American Props.*, 179 AD2d 519 (1st Dept 1992)). Furthermore, there is a strong public policy which favors settling cases for their merits where the plaintiff has shown no

prejudice to its cause. *Nunez v Campana* 97 AD2d 734, 735 (1st Dept 1983) citing to *Roth & Sons v National Kinney Corp.*, 67 AD2d 621 (1st Dept 1979).

Initially, defendant asserts that it has an excuse for its default. Defendant claims that following an office relocation and address change, due to a "clerical error within the firm," the Secretary of State did not have the correct address on file for Franklin Plaza. Therefore, the firm never received copies of the summons and complaint in time to make an appearance in this cause of action.

In its opposing papers, plaintiff mentions *Paul Conte Cadillac, Inc. v C.A.R.S. Purchasing Service, Inc.*, (126 AD2d 621 [2d Dept 1987]), in which the Appellate Court, Second Department, held that since a "[c]orporation's failure to receive copies of process was due to a breach of its obligation to keep a current address on file with the Secretary of State there was no reasonable excuse for its delay in appearing and answering the complaint." Defendant is mandated under Business Corporation Law § 306 to maintain an updated correct address with the Secretary of State.

While the court may consider law office failure as an excuse, the movant must set forth "[d]etailed factual allegations which explain the reason for such failure." *Grezinsky v Mount Hebron Cemetery*, 305 AD2d 542, (2d Dept 2003), citing to *Morris v Metropolitan Tranp. Auth.*, 191 AD2d 682, (2d Dept 1993). It is defendant's obligation to have a correct address on file and failure to have a correct address is not a reasonable excuse. *See Crespo v A.D.A. Mgmt.*, 292 AD2d 5, (1st Dept 2002). Although excusable law office failure cannot be established from this defendant's failure to have a correct address on file with the Secretary of State, other factors set out below militate towards finding excusable default.

Improper Service of Default Judgment CPLR §3215

In particular, defendant has shown that plaintiff did not satisfy the additional mailing requirement of the Business Corporation Law. Business Corporation Law § 306 states, in pertinent part, that "[s]ervice of process on such corporation shall be complete when the secretary of state is so served." To obtain a default judgment against a corporation which has been served with process pursuant to Business Corporation Law § 306, an "[a]ffidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." CPLR 3215 (g) (4) (i). In a recent case, it was determined that, since plaintiffs failed to submit proof of their compliance with CPLR 3215 (g) (4) (i), "[t]heir application for leave to enter a default judgment ... was defective, and should have not been granted." *Schilling v Maren Enterprises*, 302 AD2d 375 (2d Dept 2003). Similarly here, plaintiff has submitted no proof or affidavit showing that she mailed an additional copy to the defendant corporation's last known address. Moreover, it is undisputed that plaintiff knew defendant's actual business address yet failed to mail the summons and complaint to that address. Therefore, as in *Schilling*, it is proper to vacate the default judgment. *See, e.g., Tselikman v Martin Court, Inc.*, 33 AD3d 908 (2d Dept 2006); compare with *Crespo v A.D.A. Mgmt.*, 292 AD2d 5, 10 (1st Dept 2002) (default not vacated where defendant did receive service by mail and plaintiff simply failed to file the affidavit of additional mailing).

Intentional Default

Plaintiff also argues that defendant intentionally defaulted on the Complaint. According to plaintiff, defendant cannot rely on its allegedly reasonable excuse because it had actual

knowledge of the claim and did not take steps to ensure that its address was correct with the Secretary of State. Where a defendant intentionally avoids service of the complaint or other court papers and ignores notices of default, its misconduct should not be excused. *See, New York Tel. Co. v. Don Siegel Const. Co., Inc.*, 1 AD 3d 329, 329 (2nd Dept 2003)("Don Siegel"); *Eden Park Health Serv. Inc. v. Estes*, 2 AD 3d 1186, 1188 (3rd Dept 2003)("Eden Park").

Here, however, plaintiff's argument must fail. First of all, plaintiff did not comply with the additional mailing requirement of CPLR 3215 (g) (4). Therefore, there was no right to default in the first place. Accordingly it is not dispositive that defendant should have updated its address with the Secretary of State. Moreover, plaintiff has not shown that defendant's failure to update its mailing address, though negligent, was designed to avoid service in this case.

In addition, as defendant points out, plaintiff has not established that defendant knew of the case at all. Plaintiff submitted a claim to the defendant and instructed it to send it to the defendant's insurance carrier. The letter does not indicate that a lawsuit against Franklin Plaza in particular was imminent but instead states that "[t]his office has been retained as counsel for Frances Williamson in an action for personal injuries sustained at the above-mentioned premises." Defendant Exhibit F. Thus, although defendant presumably thought a case might ensue, it did not have specific knowledge of the lawsuit based on the letter.

Finally, defendant's conduct once it received notice of the litigation is distinguishable from those of defendants who were found to be in intentional default. Unlike the defendants in *Don Siegel* and *Eden Park*, defendant did not ignore numerous notices of default from plaintiff or otherwise engage in conduct suggesting that it intended to avoid the litigation. Instead, as soon as defendant received the notice of the default judgment order and the order of reference

contained therein, defendant promptly contacted plaintiff by letter dated September 2, 2008. This motion followed shortly thereafter, once defendant realized that it could not resolve the problem by stipulation of the parties.

Meritorious Defense:

As stated, defendant also must show that it has a meritorious defense to the Complaint. Plaintiff argues that defendant's rules and regulations include a "no dog rule" and that, had defendant enforced this rule, the incident would have never happened. The pertinent part of the regulations read, "[no] dogs or other animals requiring to be let outdoors shall be harbored on the demised premises." Plaintiff Exhibit 8.

First, defendant argues that in 2001 it tried to evict Karen Obey from her apartment on the basis that she owned a dog. Defendant further asserts that HPD held that defendant Karen Obey had the right to keep the dog in her apartment. However, defendant has not submitted any evidentiary support for this contention, which it makes entirely "on information and belief." Rivkin Aff at ¶¶ 5-6. This unsubstantiated allegation is insufficient to raise a meritorious defense.

However, defendant has raised some arguments of merit. It submits the affidavit of Paul Rivkin, the building manager, who asserts that defendant had no knowledge of the dog's alleged vicious propensities. In addition, defendant submits a log book entry indicating that plaintiff sustained injuries when she tripped over the dog's leash, which became entangled with the leashes of two other dogs. It does not mention that plaintiff was attacked by any of the dogs. The log book entry also raises an issue of fact as to the cause of plaintiff's injuries.

The Court does not evaluate the strength of defendant's arguments. It also does not need to discuss the parties' other contentions, all of which it has considered. In light of the above and of "the policy favoring disposition of controversies on the merits," the default judgment should be vacated. *Kreppein v. Linda Kleban Management,* - AD2d -, 819 NYS2d 233, 234 (1st Dept 2006). Accordingly, the court grants the defendant's motion to vacate the default judgment pursuant to CPLR 5015.

CPLR 317

Pursuant to CPLR 317, a person served with a summons other than by personal delivery to him or to his agent for service designated under CPLR 318 (which the Secretary of State is not) can be relieved of a default upon a finding of the court that he did not personally receive notice of the summons in time to defend, and that he has a meritorious defense. *Meyer v Chas. Fisher & Sons Dental Laboratory, Inc.*, 90 AD2d 889, 890 (3d Dept 1982) citing to *Cecelia v Colonial Sand & Stone Co.*, 85 AD2d 56 (3d Dept 1982). This is different than CPLR 5015, which requires an explanation for the default. Therefore, under CPLR 317, plaintiff's contention that defendant failed to demonstrate a reasonable excuse for not filing a change of address with the Secretary of State is irrelevant. It is undisputed that defendant did not receive notice of the complaint in time to defend and the court finds that defendant has put forth a meritorious defense. Therefore defendant will be entitled to relief pursuant to CPLR 317, as well as CPLR 5015 (a), to vacate the default judgment.

As a result of this decision, the defendant's other arguments need not be addressed. However, the Court notes that plaintiff and co-defendant Karen Obey already have conducted substantial discovery, and by vacating the default the Court does not intend to substantially delay

the litigation. Plaintiff shall therefore provide all previously exchanged discovery to defendant/movant. Defendant/movant is entitled to seek discovery not previously exchanged, and it is entitled to depose plaintiff and defendant Obey on issues not already covered in their prior depositions.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the motion is granted and the default judgment is vacated; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff is to provide defendant with copies of all previously exchanged discovery; and it is further

ORDERED that the parties are to appear in Part 2, 71 Thomas Street, room 205, at 2:00 pm on April 1, 2009 to set up an expedited timetable for any supplemental discovery.

Dated: 3/2/09

ENTER:

Louis B. York, J.S.C.