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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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EDYN INCORPORATED and MICHAEL FINKELMAN,

Plaintiff(s),

-against-

EUROBUNGY ST. THOMAS LLC, ADVENTECH LLC and SHAWN LERNER,

Defendant(s).

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Index No. 17830/09

Motion Submitted: 12/3/10
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....XX

Plaintiffs move this Court for an Order granting a default judgment against defendants on the issue of liability, awarding plaintiffs liquidated damages on certain of their causes of action, and ordering an inquest on the issue of punitive damages. Defendants oppose the requested relief, and cross-move to dismiss the complaint pursuant to CPLR § 3012(b), based on plaintiffs' failure to timely serve a complaint.

This action arises as the result of an investment transaction between the parties. In mid-2007, plaintiff Finkelman and defendant Lerner met at a social gathering, at which time the parties discussed Finkelman investing a sum of money in Lerner's proposed bungee-jumping venture located in St. Thomas, U.S. Virgin Islands. It is undisputed that Finkelman, through his corporation (Edyn Inc.), eventually provided $90,000 to Lerner's company (Adventech LLC), in exchange for Finkelman receiving fifteen and one-half (15.5) shares

of the company's stock ("Eurobungy").[1] Finkelman expected to receive a monthly dividend of $900, or $10,800 annually, amounting to an annual rate of return of twelve per cent (12%).

It is further undisputed that plaintiff Finkelman received the first year's payments amounting to $10,800. In or about October or November 2008, the payments ceased, and plaintiff Finkelman has not received any further monies from Lerner since that time.

Plaintiffs have asserted six causes of action against defendants sounding in breach of contract, money had and received, unjust enrichment, fraud, failure to provide an accounting, and breach of fiduciary duty.

Defendants assert that the transaction was simply a business venture that, unfortunately, failed. Defendants further assert that plaintiffs' investment was not a loan, but an unsecured investment that was lost due to the worldwide economic downturn experienced in 2008. Defendants claim that the entire $90,000 was invested in Eurobungy, and that Adventech and Eurobungy contributed additional "substantial" monies in an attempt to make the venture a success, but that, in the end, all parties suffered "a heavy financial loss."

The instant action was commenced in September 2009 by the filing of a summons with notice. The complaint was not served at that time. After service of the summons with notice, defendants' attorney served a notice of appearance and a demand for the complaint, dated October 7, 2009. Thereafter, the parties apparently engaged in months of negotiations relative to settling this matter. No complaint was filed by plaintiff during the time period when negotiations were occurring.

According to defendants, plaintiffs' then-counsel requested, and received from defendants, an extension of the time to serve a complaint to December 4, 2009. Apparently, negotiations continued such that, on or about February 22, 2010, plaintiffs' counsel again requested, and received from defendants, a second extension of the time to serve a complaint to March 15, 2010 (defendants' cross-motion, Exhibit B).

The complaint was not served on or before March 15, 2010, and no further extensions were requested by plaintiffs. Plaintiffs eventually served the complaint on or about July 14, 2010, four months after the second extension expired.

According to plaintiffs, the reason for the delay in serving the complaint is the result of a combination of factors, including the extensive negotiations engaged in by the parties,

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[1]Plaintiff Edyn issued its check to Adventech, and Adventech apparently sold the bungee jumping equipment to Eurobungy for use in the subject venture. Although not confirmed by defendants, the price of the equipment, as claimed by plaintiffs, was in excess of $45,000.

and the departure from the law firm of the attorney handling plaintiffs' case. Whether the attorney's departure was voluntary or not, plaintiffs aver that, following his departure, the case file had to be located and transferred to a new attorney, which plaintiffs characterize as "law office failure."

Conversely, defendants assert that they have rejected plaintiffs' untimely complaint, and, therefore, cannot be considered to be in default of answering the complaint filed in violation of CPLR § 3012(b). Evidence of that rejection is supplied by plaintiffs, who submitted Lerner's August 23, 2010 e-mail to plaintiffs' attorney effectively repudiating the complaint (plaintiff's motion, Exhibits F and G). Defendants further assert that plaintiffs' excuse for the late filing is unreasonable, but that defendants are prepared to serve a timely and responsive pleading in the event that this Court denies defendants' cross-motion.[2]

In view of the fact that plaintiffs failed to serve the complaint by the extended date of March 15, 2010, and further failed to request an additional extension of time within which to do so, the Court finds that there was no pleading to which the defendants were required to respond. Thus, plaintiffs have failed to establish a true default by defendants within the meaning of CPLR § 3215.

Furthermore, the Court notes that a review of the submissions relative to the motion and cross-motion include detailed affidavits from plaintiff Finkelman and defendant Lerner regarding the terms of the transaction at issue, the factual circumstances surrounding the business venture, and its demise. Thus, plaintiffs and defendants appear to be able to prosecute and defend this action, respectively, on the merits.

In light of the public policy in favor of determining controversies on their merits, plaintiff's default motion is denied (see ***Joo Tae Kim v. 158 Plaza Corp.***, 35 A.D.3d 542, 826 N.Y.S.2d 654 (2d Dept., 2006); ***Scarlett v. McCarthy***, 2 A.D.3d 623, 768 N.Y.S.2d 342 [2d Dept., 2003]).

Defendants' cross-motion to dismiss the complaint is also denied. The Court finds that plaintiffs have demonstrated a reasonable excuse for the untimely filing of the complaint, and have offered an affidavit of merits sufficient to resist defendants' dismissal motion made pursuant to CPLR § 3012(b) (*see* ***Kel Management Corp. v. Rogers & Wells***, 64 N.Y.2d 904, 477 N.E.2d 458, 488 N.Y.S.2d 156 (1985); ***Egan v. Federated Department Stores, Inc.***, 108 A.D.2d 718, 484 N.Y.S.2d 883 [2d Dept., 1985]). Moreover, it does not appear that defendants have been prejudiced by the delay.

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[2]Defendants assert that they would have served a responsive pleading in December 2010, in exchange for plaintiffs' withdrawal of their default motion.

The parties engaged in negotiation of this matter for approximately six months prior to plaintiffs' second request for an extension of the time to file the complaint. Thus, the parties are undoubtedly aware of the facts and circumstances of this matter, probably to an even greater extent than demonstrated in their respective affidavits submitted in connection with the instant motion and cross-motion. Accordingly, defendants' conclusory statement that "they would be precluded from defending this case on the merits" is unpersuasive.

Whether to accept law office failure as a reasonable excuse for a delay in filing a complaint is within the sound discretion of the trial court (***Bardales v. Blades***, 191 A.D.2d 667, 595 N.Y.S.2d 553 [2d Dept., 1993]). As long as the law office failure does not constitute "a pattern of willful default and neglect" (***Roussodimou v. Zafiriadis***, 238 A.D.2d 568, 657 N.Y.S.2d 66 (2d Dept., 1997); ***Gannon v. Johnson Scale Company***, 189 A.D.2d 1052, 592 N.Y.S.2d 881 [3d Dept., 1993]), a "court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure" (***CPLR § 2005***).

There is no evidence presented here demonstrating a pattern of willful default and neglect. According to defendants themselves, the prior associate handling plaintiffs' case was "let go," which necessitated that the firm first locate the file, apparently accounting for a large part of the delay. This Court finds that the instance of law office failure in this case, combined with the fact that settlement negotiations had been ongoing from on or about September 2009 through approximately February 2010, constitutes a reasonable excuse for the four-month delay in filing the complaint in this matter.

The Court further finds that plaintiffs' affidavit of merits submitted in support of the motion for default judgment sets forth sufficient evidentiary facts to defeat defendants' motion.

Accordingly, defendants are directed to accept plaintiffs' complaint pursuant to CPLR § 3012(d).

Plaintiffs are directed to serve a copy of this Order, with Notice of Entry, upon defendants on or before March 16, 2010. Defendants may serve a responsive pleading on or before thirty days from service of this Order, with Notice of Entry.

The foregoing constitutes the Order of this Court.

Dated: February 23, 2011
Mineola, N.Y.

Karen V. Murphy
J.S.C.

ENTERED

FEB 28 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE