SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOHN BOBETSKY, INFANT UNDER THE AGE OF 13, BY HIS MOTHER AND NATURAL GUARDIAN, GINA BOBETSKY,

Plaintiff,

-against-

ROCCO LUCA, INDIVIDUALLY, ROCCO LUCA D/B/A ROCCO DESIGN & STYLING BARBER SHOP AND JOHN DOE,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 23419/10
Motion Seq. No.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

Plaintiff's Notice of Motion	01
Defendants Rocco Luca D/B/A Rocco Design's Notice of Cross-Motion	02
Plaintiff's Affirmation in Opposition	xx
Plaintiff's Supplemental Affirmation in Support	xx
Defendant Rocco Luca's Reply Affirmation	xx

In motion sequence number one, the plaintiffs move for an order granting a judgment by default against defendants, Rocco Luca, individually, Rocco Luca d/b/a Rocco Design & Styling Barber Shop and John Doe, as well as for an order directing an inquest as to damages.

In motion sequence number two, defendant, Rocco Luca, individually cross-moves for an order vacating his default in appearance and for an order pursuant to CPLR §3012[d], permitting him to serve a late answer.

On or about May 27, 2010, the infant plaintiff allegedly sustained personal injuries while receiving a haircut from defendant, John Doe, at the Rocco Design & Styling Barber Shop (*see* Odierno

Affirmation in Support at Exh. A at ¶¶ 4, 11, 14, 15, 18, 23, 26, 34, 35, 36, 37). Said establishment, which is located at 2550 Hempstead Turnpike, East Meadow, New York, is allegedly owned by defendant, Rocco Luca (*id.* at¶¶ 4,9).

In support of the application seeking a judgment by default, counsel for the plaintiffs has submitted the following: an affidavit from the infant plaintiff's mother, which attests to the facts underlying the within action; the affidavits of the process server, which indicate that on February 3, 2011, process was effected upon defendants, Rocco Luca and Rocco Luca d/b/a Rocco Design & Styling Barber Shop; an affidavit indicating that on February 3, 2011, defendant, John Doe, was served in accordance with the provisions of CPLR §308[2], and; an affirmation from plaintiffs' counsel in which it is averred that the time for the foregoing defendants to timely interpose an answer has expired (*id.* at ¶¶5,6; *see also* Exhs. A, B, C; *see also* Odierno Supplemental Affirmation at Exh. A).

In addition to the foregoing, by letters dated April 14 and April 28, 2011, counsel for the plaintiffs informed both Mr. Luca, as well as his counsel, that an answer to the summons and complaint was outstanding and in the event an answer was not forthcoming, the plaintiffs would be relegated to moving for a judgment by default (*see* Odierno Affirmation in Support at ¶5; *see also* Exh. C).

The plaintiffs' instant application is opposed by defendant, Rocco Luca[1], who cross-moves for an order vacating his default and for an order granting leave to file a late answer. In support of the cross-application, counsel for Mr. Luca contends that "the time for defendant to file an answer only expired less than thirty (30) days ago" and as such the plaintiffs will not be prejudiced by granting the relief herein requested (*see* Giordano Affirmation at ¶¶7,10). Counsel further contends that he has only

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[1] Defendant, Rocco Design & Styling Barber Shop, neither opposes the plaintiffs' application nor cross-moves for any affirmative relief (*see* Giordano Affirmation at ¶1).

recently learned the premises upon which Mr. Luca's barber shop is located is owned by an entity known as BLM Consulting, LLC [hereinafter BLM] and that the incident as described in the plaintiffs' complaint would necessarily involve impleading said entity (*id.* at ¶¶8,9; *see also* Giordano Reply Affirmation at ¶6). Particularly counsel asserts that "[t]he incident of injury referred to in the complaint was not caused by the defendant nor any employee, independent contractor or other person over whom defendant exhibited any supervision or control" and accordingly the within action "clearly falls under a certain insurance policy where BLM * * * is the insured" (*see* Giordano Reply Affirmation at ¶6; *see also* Luca Affidavit at ¶5,7).[2]

In Reply, counsel for the plaintiffs asserts that the defendant has failed to set forth why he has not timely filed an answer notwithstanding having been personally served therewith on February 7, 2011[3], and despite the two aforementioned letters sent to Mr. Luca and his counsel informing them of the default (*see* Odierno Reply Affirmation at ¶¶2, 3, 4, 10). Specifically, counsel contends that the allegation set forth by the defendant - that BLM may be a legally responsible party for the infant plaintiff's injuries - does not constitute a reasonable excuse as to why Mr. Luca himself did not interpose a timely answer (*id.* at ¶10).

In addition to the foregoing, counsel for the plaintiffs posits in Reply that the defendant has failed to put forth a meritorious defense to the action (*id.* at ¶¶2, 3, 11). To this point, counsel contends that the within action is not predicated upon premise liability and as such BLM is an unnecessary party

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[2] The Court notes that counsel for Mr. Luca states that while BLM's insurance company initially disclaimed any liability for the subject accident, by way of a letter annexed to the Reply papers, BLM's insurance carrier has "changed it's position as to potential liability and coverage since receiving the complaint from it's insured" (*see* Giordano Reply Affirmation at ¶6). However, no such letter is annexed to counsel's Reply Affirmation.

[3] The Court notes that while plaintiffs' counsel states that Mr. Luca was personally served on February 7, 2011, the Affidavit of Service indicates that process was served on February 3, 2011 (*see* Odierno Affirmation in Support at Exh. C).

and any attempts by defense counsel to implead said entity is insufficient to demonstrate a meritorious defense to the underlying complaint (*id.* at ¶3).

On an application for a judgment by default, CPLR §3215 requires that the movant provide the following: proof of service of the summons and complaint; evidence, via an affidavit by the party, which states the facts which underlie the complaint *or* a complaint verified by the party, and; an affidavit as to the defendants' default in the action. In the instant matter, having carefully reviewed the evidence submitted by the plaintiffs as is outlined herein above, this Court finds that the plaintiffs have provided the requisite proof entitling them to a judgment by default (*id.*). Moreover, in cross-moving for an extension of time in which to serve an answer, this Court finds that the defendant has failed to make the requisite showing.

Of particular relevance to the defendant's application and within the purview of CPLR §3012(d), "a defendant who has failed to timely appear in an action may move to compel the plaintiff's acceptance of an untimely answer 'upon such terms as may be just and upon a showing of reasonable excuse for [the] delay or default' " (*Stephan B. Gleich & Associates v Gritsipis*, 927 NYS2d 349, 2011 NY Slip Op 05483 [2d Dept 2011] quoting CPLR 3012 (d); *see also New York and Presbyterian Hospital v Auto One Insurance Company,* 28 AD3d 441 [2d Dept 2006]). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based upon all relevant factors including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876 [2d Dept 2005] at 876-877).

Here, the Court initially notes that while counsel for the defendant posits "the time for defendant to file an answer only expired less than thirty (30) days ago", said assertion is belied by the record. As

noted above, service was effected upon Mr. Luca, as well as upon Rocco Design & Styling Barber Shop on February 3, 2011, yet the defendant's within application was not even noticed until May 25, 2011. Additionally, even assuming *arguendo* that BLM is in fact a responsible party, this does not, in any respect, explain why Mr. Luca, in his individual capacity, did not interpose an answer to the plaintiffs' complaint after having been personally served on February 3, 2011 and having been notified of his default by way of the two aforementioned letters (*Stephan B. Gleich & Associates v Gritsipis*, 927 NYS2d 349, 2011 NY Slip Op 05483 [2d Dept 2011], *supra*). Accordingly, the plaintiffs' application, which seeks a judgment by default is hereby **GRANTED** as to defendants, Rocco Luca and Rocco Design & Styling Barber Shop (Sequence #001) and in accordance therewith the cross-motion interposed by defendant, Rocco Luca, is hereby **DENIED** (Sequence #002). However, that branch of the plaintiffs' application, which seeks a judgment by default against defendant, John Doe, is hereby **DENIED** for the reasons set forth hereinafter.

CPLR §1024 provides the following, in relevant part:[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known." In order to utilize the procedural mechanism as articulated in CPLR §1024, the plaintiff must establish that he or she undertook "genuine efforts to ascertain the defendants' identities prior to the running of the Statute of Limitations" (*Porter v Kingsbrook OB/GYN Assocs.*, 209 AD2d 497 [2d Dept 1994]; *Luckern v Lyonsdale Energy Ltd. Partnership*, 229 AD2d 249 [4th Dept 1997]). Additionally, "[w]hile CPLR §1024 allows a party who is ignorant of the name or identity of one who may properly be made a party to proceed by designating so much of his identity as is known, a summons served in a 'John Doe' form is jurisdictionally sufficient only if the actual defendants are adequately described and would have

known, from the description in the complaint, that they were the intended defendants" (*Thas v Dayrich Trading, Inc.*, 78 AD3d 1163 [2d Dept 2010] at 1165 quoting *Lebowitz v Fieldston Travel Bureau, Inc.*, 181 AD2d 481 [1st Dept 1992] at 481).

In the instant matter, the Court notes that the plaintiffs herein have not set forth what efforts, if any, they have employed to determine the true identity of "John Doe" (*Porter v Kingsbrook OB/GYN Assocs.*, 209 AD2d 497 [2d Dept 1994], *supra*). Further, a review of the complaint reveals that defendant, John Doe, is described therein as a "resident of New York," as well as "an agent, servant, employee, assign and/or 'a renter of a haircutter/barber chair' " at Rocco Design & Styling Barber Shop.[4] However, other than implying that "John Doe" is a male who worked for Mr. Luca, the plaintiffs have not set forth any other relevant information such as John Doe's race, height, weight, or age so as to apprise this individual that he was indeed the intended defendant (*Thas v Dayrich Trading, Inc.*, 78 AD3d 1163 [2d Dept 2010], *supra*). Thus, the Court finds that the plaintiffs' generic description with respect to John Doe renders the summons jurisdictionally insufficient and accordingly that branch of the plaintiffs' application, which seeks an order granting a judgment by default against defendant, John Doe, is hereby **DENIED**.

In accordance with the foregoing, it is hereby

ORDERED, that this matter with respect to the default judgment as granted herein in favor of the plaintiffs and against defendants, Rocco Luca and Rocco Luca d/b/a Rocco Design & Styling Barber Shop, is referred to the Calendar Control Part (CCP) for an Inquest as to damages to be held on October 5, 2011. It is further

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[4] *see* Verified Complaint at ¶¶20,21,30,32.

ORDERED, that the plaintiffs shall file and serve a note of issue, together with a copy of this Order on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of the Court, within twenty (20) days of the date of this Order. It is further

ORDERED, that the directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **Denied**.

DATED: September 2, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

F:\Bobetsky v Luca, et al MBS.wpd