SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

CLARA DRAIMAN,

Plaintiff,

INDEX NO.: 17825/10

-against-

MOTION DATE: 10/21/11

TOMMASO NACCHIA,

MOTION SEQ. NOS: 001, 002

Defendant.

The following papers read on the motion (numbered 1-4):

Notice of Motion 1
Notice of Cross Motion.....2
Attorney Affirmation in Opposition and in Support.....3
Affirmation in Reply.....4

Plaintiff CLARA DRAIMAN moves for a default judgment against defendant TOMMASO NACCHIA pursuant to **CPLR §3215** based upon the failure of defendant to answer or appear within the requisite statutory time period. Defendant cross moves (i) to extend his time to answer and for an Order compelling plaintiff to accept defendant's late answer previously served pursuant to **CPLR §3012(d)**; (ii) for an Order permitting him to defend on the merits pursuant to **CPLR §317**; and (iii) for an Order pursuant to **CPLR §602(a)** transferring this matter to Supreme Court, Suffolk County and consolidating this action for trial with the action currently pending there. The motion and cross motion are determined as follows.

Plaintiff alleges that on or about October 1, 2008, a vehicle operated by defendant came into contact with a vehicle operated by plaintiff. The accident occurred on South Oyster Bay Road, Town of Oyster Bay.

Plaintiff's motion for a default judgment

Plaintiff's application is wholly defective. Most critically, plaintiff has failed to submit proof that he properly served the Summons and Complaint upon defendant in

accordance with the **CPLR.** Plaintiff proffers only an affirmation of his counsel as to defendant's failure to appear or answer and a proposed Order of default. Plaintiff also fails to submit an "affidavit made by the party of the facts constituting the claim" as required by **CPLR §3215(f)**. Although **CPLR §3215(f)** provides that a verified complaint may be used as the affidavit of fact if verified by the party, the Court notes plaintiff has even failed to submit the Complaint filed in this action. The contention by plaintiff's counsel, in what is purportedly an affirmation, although not labeled as such, that the claim in the Complaint is for a sum certain or a sum that can be made certain by computation, is entirely misplaced in the context of this action. Accordingly, plaintiff's motion for a default judgment is denied.

Defendant's cross motion to compel plaintiff to accept a late answer

Defendant submits plaintiff's Affidavit of Service, sworn to on October 15, 2010, attesting to service on October 4, 2010 of the Summons and Complaint upon defendant by service on defendant's son at defendant's residence pursuant to **CPLR §308(2)**. In an affidavit, sworn to on August 26, 2011 [Cross Motion Exh. D], defendant avers that he immediately gave the Summons and Complaint to his attorneys, Siben & Siben ("Siben"), who were representing him in an action arising out of the same accident defendant had commenced approximately one year prior thereto against plaintiff in Suffolk County. In an affidavit, sworn to August 25, 2011, Ellen Gibson, a claims representative for Allstate Insurance Company ("Allstate"), defendant's auto liability insurer, attests that Siben inadvertently sent a copy of the Summons and Complaint to Allstate at a Georgia address (the "Gibson Affidavit") [Cross Motion Exh. F]. The Gibson Affidavit states, however, that the address in Georgia is the location of a facility operated by 'ACS' which processes no-fault bills for insurance companies, including Allstate. The Gibson Affidavit attests further that, as a result of inadvertent error, ACS never forwarded the Summons and Complaint to Allstate.

By letter dated July 29, 2011, Siben correctly forwarded plaintiff's motion for a default judgment to Allstate's Buffalo office [Cross Motion Exh. G]. The Gibson Affidavit states that within one week of receipt of the motion, Allstate assigned counsel to represent defendant. On or about August 11, 2011, defendant's counsel interposed a Verified Answer to the Summons and Complaint [Cross Motion Exh. H] which was rejected by plaintiff's counsel by letter, dated August 17, 2011 [Cross Motion Exh. I]. The Gibson Affidavit attests that at no point did defendant or Allstate intend to allow a default to occur.

Defendant now seeks to vacate his default in answering and to compel plaintiff to accept his late answer previously served [Cross Motion Exh. H]. A party opposing a

motion for a default judgment based on failure to timely answer must demonstrate a reasonable excuse for the delay and a meritorious defense. **Shapouri v. Molinelli**, 74 AD3d 1048; **Thompson v. Steuben Realty Corp.**, 18 AD3d 864; **Freulich-Woodruff v. B.A. Auto Repair, Inc.**, 14 AD3d 593; **Dinstber v. Fludd**, 2 AD3d 670; **Singh v. Friedson**, 288 AD2d 292. The Court has discretion in determining what constitutes a reasonable excuse. "In making its determination, the court should consider relevant factors such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." **Thompson v. Steuben Realty Corp.**, *supra* at 865.

Defendant's attorney argues that defendant has two reasonable excuses, namely law office failure on the part of Siben when it originally sent the Summons and Complaint to Allstate at an incorrect address, and failure by ACS, the third-party contractor for Allstate, which received the Summons and Complaint, to properly forward the pleadings to Allstate at the correct address. In opposition, plaintiff citing **Krieger v. Cohan**, 18 AD3d 823, alleges that a delay by an insurance company does not constitute a reasonable excuse. Plaintiff alleges further that neither defendant nor Siben timely followed up with Allstate. The Court finds that plaintiff's additional claim that defendant was attempting to evade service of the motion for a default judgment, to be immaterial in the context of these motions.

With respect to law office failure, "the Court has the discretion to accept law office failure as a reasonable excuse (*see CPLR* 2005), where the claim of law office failure is supported by a 'detailed and credible' explanation of the default." **Kohn v. Kohn**, 86 AD3d 630 *citing* **Remote Meter Tech. of NY, Inc. v. Aris Realty Corp.**, 83 AD3d 1030; **Winthrop University Hospital v. Metropolitan Suburban Bus Authority**, 78 AD3d 685. The Court finds that the Gibson Affidavit, together with a letter, dated October 8, 2010 from Siben addressed to a purported Georgia office of Allstate requesting that Allstate interpose an Answer on behalf of defendant, provide a sufficiently detailed and credible explanation of the default [Cross Motion Exh. E].

With respect to the failure of ACS to forward the Summons and Complaint to the correct Allstate office, generally, an insurance company's delay in answering will fail to establish a reasonable excuse so as to avoid the entry of a default judgment. *See* **Toland v. Young**, 60 AD3d 754; **Grinage v. City of NY**, 45 AD3d 729; **Lemberger v. Congregation Yetev Lev D'Satmar, Inc.**, 33 AD3d 671; **Krieger v. Cohan**, 18 AD3d 823. In the case at bar, defendant's delay in answering was not occasioned by Allstate's failure to determine coverage. Rather defendant establishes through the Gibson Affidavit that the delay was caused by an inadvertent error of the third-party processor for Allstate in its failure to forward the Summons and Complaint once received from Siben to the

proper Allstate office. *See* **Merchants Insurance Group v. Hudson Valley Protection Co., Inc.**, 72 AD3d 762. The holding of **Krieger**, relied on by plaintiff, that a delay by an insurance company in determining coverage does not constitute a reasonable excuse for its failure to timely serve an answer, is inapposite to the facts alleged herein.

Moreover, even if the Court were to find that Allstate's delay is not sufficient to excuse defendant's default in this matter, the Court finds it is not precluded from considering such delay as only one factor in making the determination as to whether to excuse defendant's default. "Whether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*internal citations omitted*)" **Harcztark v. Drive Variety, Inc.**, 21 AD3d 876, 877. The Court in **Harcztark** stated further that "we find no basis to categorically exclude consideration of a delay by an insurance company in making such a determination." **Id.**

In the case at bar, the Court finds that plaintiff has failed to demonstrate prejudice caused by defendant's service of an answer approximately two weeks after plaintiff served his motion for default judgment. In addition, the Court notes that although the Summons and Complaint were filed on or about October 4, 2010, plaintiff waited until July 29, 2011 to serve a motion for a default judgment whereupon defendant interposed an Answer, within two weeks (on or about August 11, 2011), and filed a cross motion within two weeks of plaintiff's rejection of defendant's Answer. Moreover, lack of prejudice to plaintiff is further demonstrated by the previously commenced action in Suffolk County (filed on January 30, 2009), entitled *Tommaso Nacchia and Grazia Nacchia v. Clara Draiman* [Index No. 03637/09] arising out of the same accident and involving the same parties, together with defendant's wife also named as a plaintiff (the "Suffolk Action").

In addition, the Court finds that defendant has established the existence of a potentially meritorious defense through the submission of the deposition of defendant conducted on May 10, 2010, in connection with the Suffolk County action. Defendant testified that he was operating his vehicle southbound in the left lane for his direction of travel and did not move from that lane and enter the center turn lane, when the front driver's side, including the door, of his vehicle was struck by plaintiff's vehicle. Defendant's counsel also refers to the police accident report which notes that the collision occurred in the southbound lane (the lane defendant was traveling in). The Court notes, however, that it cannot consider the proffered police accident report to establish a meritorious defense. *See* **Baldwin v. Mateogarcia**, 57 AD3d 594; **Noakes v. Rosa**, 54 AD3d 317; **Almestica v. Colon**, 304 AD2d 508.

The Court finds that in view of a "lack of prejudice to the plaintiffs from the delay, the existence of potentially meritorious defenses, and public policy which favors resolving cases on the merits," [**Yonkers Rib House, Inc. v. 1789 Cent. Park Corp.**, 19 AD3d 687, 688; *See* **CPLR §2004**; **Crimmins v. Sagona Landscaping, Ltd.**, 33 AD3d 580; **Trimble v. SAS Taxi Co. Inc.**, 8 AD3d 557], the Court hereby vacates defendant's default in answering and grants defendant's motion pursuant to **CPLR 3012(d)** to compel plaintiff to accept defendant's answer previously served.

Defendant's motion to consolidate for trial in Suffolk County the within action with the Suffolk County action

The Court finds that, insofar as both actions arise out of the same motor vehicle accident, there are common questions of law and fact which warrant joining these actions for trial. *See* **CPLR §602(a)**. With respect to venue, the general rule is that, absent special circumstances, consolidated actions which were commenced in different counties should be placed in the county which has jurisdiction over the action first commenced. **Spector v. Zuckerman,** 287 AD2d 704; **Strasser v. Neuringer,** 137 AD2d 750. It is undisputed that the Suffolk Action was the first commenced and consequently venue of the within action (the "Nassau Action") should be placed in Suffolk. The Court notes that plaintiff has proffered no opposition to defendant's consolidation and change of venue request.

Based on the foregoing, it is

ORDERED, that plaintiff's motion for a default judgment pursuant to **CPLR §3215** is **denied**; and it is further

ORDERED, that defendant's motion seeking to relieve defendant of his default in answering is **granted**; and it is further

ORDERED, that defendant's motion seeking to compel plaintiff to accept defendant's answer previously served is **granted**; the Verified Answer in the form attached as Exhibit H to defendant's cross motion; and it is further

ORDERED, that defendant's motion to consolidate the Nassau Action and the Suffolk Action pursuant to **CPLR §602** is **granted**, insofar as both actions shall be joined for trial purposes only, and the Nassau Action shall be removed from Nassau County, to be tried together with the Suffolk Action in Suffolk County; and it is further

ORDERED, that the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

TOMMASO NACCHIA and GRAZIA NACCHIA,

Plaintiffs,

- against -

CLARA DRAIMAN,

Defendant.

Action No. 1
INDEX NO.: 03637/09

CLARA DRAIMAN,

Plaintiff,

-against-

TOMMASO NACCHIA,

Defendant.

Action No. 2
INDEX NO. _____
[Suffolk County Index No.]

and it is further

ORDERED, that the Clerk of the Supreme Court, County of Nassau, is directed to turn over all of the files in the Nassau Action to the Clerk of the Supreme Court, County of Suffolk.

The Court has examined the parties' remaining contentions and find them to be without merit.

This constitutes the Order of the Court.

Dated: Jan 31, 2012

J.S.C.

ENTERED
FEB 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE