SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

METIN ERKULA,

Plaintiff,

- against -

JARIO B. SANCHEZ and RONNYBROOK FARM DAIRY, INC.,

Defendants.

- x

Index No.: 19436/2011

Motion Date: 03/29/11

Motion No.: 13

Motion Seq.: 2

The following papers numbered 1 to 14 were read on this motion by defendant RONNYBROOK FARM DAIRY, INC. for an order pursuant to CPLR 5015(a)(1) vacating a judgment entered on default:

	Papers Numbered
Order to Show Cause-Affidavits-Exhibits	1 - 6
Affirmation in Opposition-Affidavits-Exhibits	7 - 11
Reply affirmation	12 - 14

This is a personal injury action in which plaintiff, METIN ERKULA, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on October 20, 2010 on Route 22 near the intersection with Ballyhack Road in the Town of Paterson, Putnam County, New York. Plaintiff was allegedly injured when his vehicle collided with the vehicle operated by Jario B. Sanchez and owned by defendant Ronnybrook Farm Dairy, Inc.

Plaintiff commenced the instant action by filing a summons and complaint on August 17, 2011. Defendant Ronnybrook Farm Dairy, Inc. was served with the summons and verified complaint on August 24, 2011 by delivering a copy of the summons and complaint

to the Office of the Secretary of State. Defendant failed to serve an answer.

In December 2011, the plaintiff moved for an order granting a default judgment against defendant, Ronnybrook Farm, based upon their failure to answer the summons and complaint. Although duly served with the motion, the defendant failed to respond. By decision dated January 11, 2012, this Court granted a default judgment against defendant Ronnybrook Farm without opposition and stated that the action would be placed on the calendar for an assessment of damages at the time of the trial of the remaining defendant.

By motion dated February 29, 2012, defendant Ronnybrook Farm now moves, pursuant to CPLR 5015(a)(1), to vacate the Court's order dated January 11, 2012 granting a default judgment in favor of the plaintiff. Defendant moves on the ground that defendant has a reasonable excuse for the default and a meritorious defense.

With respect to a potentially meritorious defense, defendant Jario B. Sanchez, submits an affidavit, dated February 23, 2012, in which he states that at approximately 3:30 am on October 20, 2010 he was operating a truck owned by Ronnybrook Farms. He states that he was driving the truck southbound on Route 22 near Ballyhack Road in Paterson, New York. Route 22 is a two-lane roadway that runs north/south with one lane of traffic in each direction. He states that, "as I was operating the vehicle southbound on Route 22, I observed a motor vehicle (operated by plaintiff) traveling northbound towards me in the southbound lane of travel. Although I attempted to avoid contact with the vehicle I was unsuccessful. The sole cause of the contact between the vehicles was the operation of the northbound car (plaintiff) in the southbound lane in which I was traveling."

With respect to a reasonable excuse for the default, defendant submits the affidavit of Linda C. Murphy a Senior Casualty Claim Representative for Farm Family Insurance Co. She states that in April 2011 she was assigned the claim of plaintiff, Metin Erkula. She stats that upon receipt of the claim she spoke with plaintiff's attorneys, "The Petroff Law Firm PC," and stated that she could not negotiate a settlement without the plaintiff's medical records. She states that "on numerous occasions over the course of the next several months I spoke with representatives of the firm requesting medical documentation." She states that "throughout our conversations it was expressly communicated to me that the firm was interested in negotiating the matter prior to instituting a lawsuit." She states that "on

January 11, 2012 the Petroff Law Firm forwarded to me a copy of the summons and complaint for the first time." She states that "I spoke with Arthur Futoryan at the firm on January 11, 2012, confirmed receipt of the suit papers and that an extension was still open to answer pending receipt of the medicals and settlement negotiations... I was informed for the first time by Mr. Futoryan in that conversation that his firm had instituted a default motion. Per Mr. Futoryan, however, the motion was not being pursued and that settlement was still hoped for." She states that she again spoke with Mr. Futoryan on January 20, 2012, and was again told that an extension to answer was still n place. Ms. Murphy states, "throughout my handling of the file I received repeated assurances from plaintiff's firm that formal legal activity on the file such as the filing of an answer and or response to the default motion would not be necessary while settlement negotiations were being pursued. I relied on these representations in my handling of the file. Specifically, the file was not forwarded to a law firm to submit an answer and/or respond to the default motion since I was assured same was unnecessary while the file was being reviewed for settlement purposes. Had plaintiff's counsel informed me that they were actively pursuing a default motion and or were unwilling to extend the time for the insured's time to answer, the file would have been immediately sent to legal counsel to submit an answer and or oppose the default. It was never Farm Family's intention to abandon the defense of the action."

Counsel cites cases which hold that an oral representation referable to an extension of time which his relied upon is a proper predicate to demonstrate an excusable default and to vacate a default motion (citing Gerdes v Canales, 74 AD3d 1017 [2d Dept. 2010]; DiIori v Antonelli, 240 AD2d 537 [2d Dept.1997]). Counsel also claims that the initial motion for a default judgment was defective as it failed to contain an affidavit of the plaintiff or a complaint verified by the plaintiff.

In opposition to the motion, plaintiff's counsel states that the assertions contained in Ms. Murphy's affidavit are untrue and refuted by the affidavit of Arthur Futoryan, a paralegal at plaintiff's law firm who had been in negotiations with Ms. Murphy. In his affidavit dated March 23, 2012, Arthur Futoryan states that he first contacted Farm Family Insurance on July 21, 2011, prior to the service of the summons and complaint. He states that he faxed Ms. Murphy a copy of the default motion and warned that the defendant was in danger of default. He states, "I was never contacted by an attorney from Farm Family and I never received any sort of correspondence or stipulation whatsoever

requesting an extension of time to answer." He states that he always identified himself as a paralegal and "at no time in my communication with defendant's insurance provider did I portray myself as being capable of entering into an agreement to extend defendants' time to answer." Plaintiff also submits a copy of a letter sent by Mr. Futoryan to Ronnybrook Farm Dairy dated November 3, 2011 stating that they had failed to respond to the summons and complaint and that if they did not submit an answer to the summons and complaint within 20 days they would file a motion for a default judgment.

The Courts have held that as a general rule, a defendant seeking to vacate a default judgment entered upon his failure to answer or appear, must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (see CPLR 5015[a][1]; 3012 [d]; U.S. Bank Nat. Assn. v Slavinski, 78 AD3d 1167 [2d Dept. 2010]).

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds that Defendant Ronnybrook Farm Dairy, Inc. has presented a reasonable excuse for the default and a meritorious defense. The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (see Adolph H. Schreiber Hebrew Academy of Rockland, Inc. v Needleman, 90 AD3d 791[2011]; Star Indus., Inc. v Innovative Beverages, Inc., 55 AD3d 903[2008]; Antoine v Bee, 26 AD3d 306 [2006]). Although Mr. Futuyan states that he did not portray that he had authority to extend the time to answer, he did not deny Ms. Murphy's statement that he made representations which led Ms. Murphy to believe that plaintiff agreed to extend the time to answer and would not pursue a default judgment while the settlement negotiations were being pursued. Based upon Ms. Murphys's affirmation it was reasonable for the insurance company to believe that the plaintiff would not pursue a default judgment and would not object to the late filing of an answer should the settlement negotiations not succeed (see Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737 [2nd Dept. 2009]). This Court finds that the parties were actively engaged in attempting a settlement and defendants, during this time, did not evince an intent to willfully ignore or neglect to defend the action (see Performance Constr. Corp. v Huntington Bldg., LLC, supra; Armstrong Trading, Ltd. v MBM Enters., 29 AD3d 835 [2d Dept. 2006]; Scarlett v McCarthy, 2 AD3d 623[2d Dept 2003]; Lehrman v Lake Katonah Club, 295 AD2d 322[2d Dept. 2002]).

In addition, this Court finds that the affidavit of the defendant Jario B. Sanchez provides a potentially meritorious

defense to the action. Lastly, a strong public policy exists favoring the disposition of matters on their merits (see Berardo v Guillet, 86 AD3d 459 [1st Dept. 2011]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that defendant's motion to vacate the default judgment pursuant to CPLR §5015(a)(1) is granted, and the default judgment entered on January 11, 2012 is hereby vacated. Defendant is granted leave to serve and file an answer to the summons and complaint within 20 days of service of a copy of this order with notice of entry thereof.

Dated: April 30, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.