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

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

JOHN SWANN HOLDING CORP., ZEDIA MEDIA GROUP, LLC, and MARCO ANTONIO MUNIZ p/k/a MARC ANTHONY,

Plaintiffs,

- v -

CLUBCREATE, INC.,

Defendant.

INDEX NO. 654166/2013

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: Yes X No

This is an action for breach of contract, unjust enrichment, and equitable accounting based on, *inter alia*, various alleged shareholder and loan agreements between Plaintiffs, John Swann Holding Corp. ("Swann Holding"), Zedia Media Group, LLC ("Zedia") and Marco Antonio Muniz p/k/a Marc Anthony ("Mr. Anthony") (collectively, "Plaintiffs"), and defendant Club Create, Inc. ("CCI" or "Defendant"). Plaintiffs claim that Defendant mismanaged corporate funds, failed to repay more than one million dollars in loans, and failed to issue CCI common stock and/or appoint Plaintiffs or their representatives to executive-level positions within CCI, as allegedly required under the claimed agreements.

Plaintiffs commenced the instant action on December 4, 2013. Plaintiffs now move for an Order, pursuant to CPLR § 3215, entering a default judgment

against Defendant. Plaintiffs submit the attorney affirmation of John Rosenberg, the affidavit of John Swann, the affidavit of Bigram Zayas.

Defendant filed a notice of appearance by its attorney on May 13, 2014. Defendant requests leave to file a late answer, and submits a proposed answer along with the affidavit of Corey Simmons ("Simmons"), Defendant's president and founder.

Pursuant to CPLR §3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In order to be permitted to serve an untimely answer as timely, Defendant must provide both a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. *Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008].

Simmons avers that Defendant has a reasonable excuse for the delay because the parties—who are also involved in litigation in a related action in Federal Court—were engaged in settlement negotiations, which ultimately were unsuccessful. Additionally, Simmons avers that Defendant, which lacks capacity to proceed *pro se*, did not have the financial ability to obtain an attorney to appear in this action until recently. Defendant's attorney submits a letter confirming that Defendant lacked the funds necessary to retain him as counsel until recently.

Simmons avers that Defendant has a meritorious defense to Plaintiffs' claims based on the statute of frauds and Defendant's non-execution of the contracts at issue, which are not annexed to Plaintiff's complaint. These defenses are asserted as proposed affirmative defenses in Defendant's proposed answer. Additionally, Simmons avers that Plaintiffs failed to comply with the terms of their respective shareholder agreements with Defendant. Additionally, with respect to the purported loan agreement, Simmons avers that Anthony advanced money to CCI for bills and vendors, that this money was to be managed by Zayas and repaid from CCI's first round of investments, and that Plaintiffs' actions prevented CCI from raising such investments. Simmons further avers that Zayas diverted funds belonging to CCI, and improperly transferred funds designated for bills and marketing events to Anthony's bank account without knowledge or consent of CCI's board of directors.

Defendant's proposed answer also asserts proposed counterclaims for breach of contract and breach of fiduciary duty against non-party Craig Swann ("Swann"), based on Swann's alleged failure to deliver certain software he was contractually obligated to provide to CCI, causing CCI to lose business opportunities, and disclosing CCI's private corporate information to Anthony and Zayas, a consultant for Zedia, who sought to take over CCI's business.

Settlement negotiations are in themselves an insufficient excuse for default. (*Krell v. Pelham Syndicate, Inc.*, 220 N.Y.S.2d 966 [1st Dep't 1961]).

However, in certain circumstances, settlement negotiations may constitute a reasonable excuse for a defendant's delay in answering. (*Finkelstein v. East 65th St. Laundromat*, 215 A.D.2d 178 [1st Dep't 1995] [finding that "settlement negotiations between plaintiff and defendant landowner's insurer constitutes a reasonable excuse for defendant's delay in answering"]; *Mendoza v. Bi-County Paving*, 227 A.D.2d 302, 302-03 [1st Dep't 1996] [granting motion for leave to serve a late answer and vacating default where "settlement negotiations then made it prudent to delay service of an answer").

Additionally, "As a matter of general policy, disposition of controversies on the merits is favored" (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]).

Here, Defendant's delay was relatively short, and Plaintiffs have not shown that they have been prejudiced. "Under these circumstances, defendants' excuse for the default is reasonable and will be accepted." (*Pieretti v. Flair De Art, Inc.*, 99 A.D.2d 980, 981 [1st Dep't 1984]; *Mendoza v. Bi-County Paving*, 227 A.D.2d 302, 302-03 [1st Dep't 1996]).

Additionally, Defendant appears to raise a potentially meritorious defense to Plaintiffs' complaint. Accordingly, in view of the relatively short delay and lack of prejudice to Plaintiffs, as well as the "settlement negotiations evincing defendant['s] interest in resolving the dispute, and the potential merit of a defense to the claim, and especially in view of our policy preference for resolving disputes on the merits, (*535 East 86th St. Corp. v. Mark*, 1998 N.Y. App. Div. LEXIS 13730, 1 [1st Dep't 1998]), permission to file a late answer is warranted.

Wherefore, it is hereby

ORDERED that Plaintiffs' motion for default judgment against Defendant CCI is denied; and it is further

ORDERED that the answer in the proposed form will be deemed filed and served upon service of a copy of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 2, 2014

EILEEN A. RAKOWER, J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE