

**Everest Reins. Co. v Galileo Weather Risk Mgt.  
Advisors, LLC**

2015 NY Slip Op 30309(U)

March 4, 2015

Supreme Court, New York County

Docket Number: 654349/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: Hon. EILEEN A. RAKOWER PART 15**  
*Justice*

**EVEREST REINSURANCE COMPANY,**  
  
**Plaintiff,**

INDEX NO. **654349/2013**

MOTION DATE

- v -

MOTION SEQ. NO. 2

**GALILEO WEATHER RISK  
MANAGEMENT ADVISORS, LLC,  
SCOTT EDWARDS, MARTIN  
MALINOW, and VIVEK PAWALE,**

MOTION CAL. NO.

**Defendants.**

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answer — Affidavits — Exhibits  
Replying Affidavits

1-3

**Cross-Motion: Yes X No**

This action involves claims for breach of contract and unjust enrichment relating to plaintiff Everest Reinsurance Company’s (“Plaintiff” or “Everest”) advance of a \$300,000 loan to corporate defendant Galileo Weather Risk Management Advisors, LLC (“Galileo”) and related claims for fraudulent conveyances against defendants Scott Edwards (“Edwards”), Martin Malinow (“Malinow”) and Vivek Pawale (“Pawale”).

Plaintiff now moves for an Order pursuant to CPLR §3215 for a default judgment against Defendants.

Everest commenced this action on December 18, 2013 with the filing of the Complaint. Defendants Edwards, Pawale, and Malinow, were served with the Summons and Complaint on December 23, 2013. Defendant Galileo was served on January 10, 2014.

On February 27, 2014, Bradley L. Mitchell, Esq., an attorney with the law firm of Stevens & Lee, P.C., filed a Notice of Appearance on behalf of all Defendants. On February 28, 2014, Constantine D. Pourakis, an attorney with the law firm of Stevens & Lee, P.C., filed a Notice of Appearance on behalf of all Defendants. On February 28, 2014, Defendants filed a Stipulation between the

parties extending Defendants' time to respond to the Complaint until February 28, 2014. In the Stipulation, Defendants expressly waived their right to assert defenses relating to sufficiency of service of process and lack of personal jurisdiction.

On February 28, 2014, Defendants filed a motion to dismiss the Complaint in its entirety. On July 18, 2014, the Court entered a Decision and Order granting in part and denying in part Defendants' motion to dismiss the Complaint. The Order provided that (1) the First Cause of Action (breach of contract), the Fourth Cause of Action (unjust enrichment) as to Galileo only, and the Sixth Cause of Action (fraudulent transfer) remain; (2) the Second Cause of Action (breach of implied covenant of good faith and fair dealing), the Third Cause of Action (promissory estoppel) and the Fifth Cause of Action (fraud) are dismissed; and (3) the Fourth Cause of Action (unjust enrichment) is dismissed as to Edwards, Malinow, and Pawale.

On September 23, 2014, Everest filed and served a Notice of Entry of the July 18, 2014 Order. Defendants' deadline to file an Answer to the Complaint was October 3, 2014. After Defendants failed to file an Answer to the Complaint on or before October 3, 2014, Plaintiff made the instant motion on November 7, 2014 for default judgment against them. Plaintiff submits the attorney affirmation of David Satine and the affidavit of merit of Erick Davidson, Plaintiff's Director, relating to Plaintiff's claims.

Defendants cross move for an Order, pursuant to CPLR 3012(d), compelling Plaintiff to accept Defendants' Answer, dated and filed on November 10, 2014. Defendants submit the attorney affirmation of Bradley L. Mitchell. Defendants contend that they have meritorious defenses, as shown in Defendants' motions to dismiss and the Court's July 17, 2014 Order, and a reasonable excuse in that:

Defendants have appeared through counsel since the inception of this action, and Defendants have actively litigated this matter since day one. After the Court entered its order partially granting Defendant' motion to dismiss, Jeff Leonard, one of the attorneys representing Plaintiff, called my office to discuss settlement. During that conversation, the prospect of default was never raised. In addition, my legal assistant of several years left on long-term disability, a new assistant was assigned to me, and there was a lack of coordination between the two regarding the docketing of relevant deadlines.

Plaintiff submits a reply, contending that Defendants have failed to demonstrate a reasonable excuse for failing to timely interpose an answer and has

not demonstrated a meritorious defense to the action. Plaintiff argues that Defendants' alleged excuse based on law office failure and settlement discussions are conclusory and unsubstantiated.

As a general rule, a defendant opposing a motion for a default judgment must demonstrate a reasonable excuse for not answering and a meritorious defense to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008]).

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 determining a motion for leave to serve a late answer pursuant to CPLR 3012(d), the court considers a number of factors including the length of defendant's delay, the excuse offered for the delay, the absence or presence of willfulness, the possibility of prejudice to plaintiff, the potential merits of the defenses, and the public policy favoring the resolution of disputes on their merits." *City Nat. Bank v. Bleecker Street Records, Inc.*, 2004 WL 110246, Supreme Court, New York, January 2, 2014. "Where as here, no default order or judgment has been entered, a showing of the potentially meritorious nature of the defenses is not an essential component of CPLR 3012(d) relief." [*Id.*]. See *Cirillo v. Macy's, Inc.*, 61 AD 3d 538 [1st Dept 2009].

"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, such negotiations may, in certain circumstances, constitute a reasonable excuse for a defendant's delay in answering. (*Finkelstein v. East 65th St. Laundromat*, 215 A.D.2d 178 [1st Dept 1995]).

"Under certain circumstances, law office failure may constitute a reasonable excuse, as required to avoid or vacate default judgment." *Galaxy Gen. Contr. Corp. v. 2201 7<sup>th</sup> Ave. Realty LLC*, 95 A.D. 3d 789, 790 [1st Dept 2012] (citations omitted). "However, claims of law office failure which are 'conclusory and unsubstantiated' cannot excuse default." (*Id.*)

Here, Defendant sites law office and settlement negotiations as the reasonable excuse and sites to a prior motion to dismiss for a meritorious defense.

Further, counsel belatedly cross moves to compel acceptance from Plaintiff of his late answer.

Here, Defendants' excuse for failing to timely serve its answer is deemed to be adequate since the delay was relatively brief, plaintiff has not demonstrated any prejudice as a result of the delay and public policy favors resolution of cases on the merits.

Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for default judgment against Defendants is denied; and it is further

ORDERED that Defendants' cross motion is granted and Defendants' Answer, dated and filed on November 10, 2014, will be deemed timely filed and served, *nunc pro tunc*, upon service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

Dated: MARCH 4, 2015  
MAR 04 2015

  
**HON. EILEEN A. RAKOWER** J.S.C.

Check one: FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE