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**SHORT FORM ORDER** **INDEX NO.: 03892/2016**

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 38 - SUFFOLK COUNTY**

COPY

***PRESENT:***

**HON. WILLIAM G. FORD**
**JUSTICE SUPREME COURT**

**Motion Submit Date: 03/30/17**
**Motion Seq #: 001 MG; CASE DISP**

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**GOVERNMENT EMPLOYEES INSURANCE COMPANY as Subrogee of M. MANGIARACINA & J.P. MANGIARACINA,**

**Plaintiffs,**

**-against-**

**SHALANDA DONALDSON & LASHECA LEWIS,**

**Defendants.**

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**PLAINTIFF'S ATTORNEY:**
**Law Office of Ricky J. Lucyk**
**By: Evan Przebowski, Esq.**
170 Froehlich Farm Blvd.
Woodbury, NY 11797

**DEFENDANTS' *PRO SE*:**
**SHALANDA DONALDSON**
313 E. 14th Ave., Apt. #B
Cordele, GA 31015

**LASHECA LEWIS**
296 Parkway Blvd.
Wyandanch, NY 11798

The Court has considered the following in reaching a determination on the pending unopposed motion by plaintiff seeking entry of default judgment pursuant to CPLR 3215:

1. Plaintiffs' Notice of Motion and Affirmation in Support and supporting papers dated February 6, 2017, and supporting papers; it is

**ORDERED** that plaintiff's motion seeking default judgment as against defendants Shalanda Donaldson & Lasheca Lewis is **GRANTED** as more thoroughly discussed below.

Plaintiff the Government Employees Insurance Company ("GEICO" or "plaintiff") as subogree to M. and J.P. Mangiaracina commenced this subrogation action on behalf of its insureds to recover as money damages payment for insureds' property damage claims pursuant to their motor vehicle liability insurance policy arising out of an alleged property damage loss due to a motor vehicle accident.

As pled in the complaint, the accident giving rise to this litigation occurred on July 13, 2015 at or near the intersection of New York State Route 454 and Old Willet's Path in Smithtown, Suffolk County, New York. Insured/subrogor J.P. Mangiaracina was operating his 2015 Honda Accord and at a full and complete stop in traffic at a red light when he was rear-ended by the 2007 Acura vehicle owned by Donaldson, and operated by Lewis. From that

accident, the Mangiaracinas' filed a claim with plaintiff for property damage in the amount of $15,944.01 for the replacement cost of their vehicle, in addition to $750.00 for loss of use of the same. Plaintiff paid out on its insureds' claim and commenced this action as a result seeking compensation.

Plaintiff commenced the action filing their summons and complaint on April 14, 2016. The defendants Lewis and Donaldson have neither answered, appeared or responded to the complaint in any way. Thus at the present time, plaintiff moves seeking entry of default judgment as against all defendants.

" 'A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215' " (***U.S. Bank, N.A. v. Razon***, 115 AD3d 739, 740, 981 NYS2d 571, *quoting* ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314; *see* ***Todd v. Green***, 122 AD3d 831, 831–832, 997 NYS2d 155). "Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer" (*see* CPLR 3215[f]; ***Triangle Props. # 2, LLC v. Narang***, 73 AD3d 1030, 1032, 903 NYS2d 424; ***DLJ Mortg. Capital, Inc. v United Gen. Tit. Ins. Co.***, 128 AD3d 760, 761, 9 NYS3d 335, 336 [2d Dept 2015]).

Generally, where a defendant has defaulted in appearing or answering a complaint, he or she will be "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Mortgage Elec. Registration Sys., Inc. v. Smith***, 111 AD3d 804, 806, 975 NYS2d 121 [citations and internal quotation marks omitted]; ***Boudine v Goldmaker, Inc.***, 130 AD3d 553, 554, 14 NYS3d 405, 407 [2d Dept 2015]).

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

Having reviewed the moving papers, this Court finds that plaintiff has included in its submission proof of service of process on defendants. Plaintiff has done so with submission of its Affidavits of Service dated April 26 and June 11, 2016 respectively.

As regards defendant Donaldson, plaintiff submits proof that she was served via the New York Secretary of State pursuant to Vehicle & Traffic Law § 253 via personal service on designated agent for service of process at 123 William Street, New York, New York 10038 on April 25, 2016. Proof of service was filed with the Suffolk County Clerk on May 2, 2016. Follow up mailing by certified mail, return receipt requested to Donald's address at 313 E. 14th Avenue, Apt. B, Cordele, Georgia 31015 was done on April 28, 2016, as indicated in plaintiff's affidavit of mailing dated April 28, 2016, filed with the Suffolk County Clerk on May 2, 2016.

Concerning the defendant Lewis, plaintiff submitted proof by its affidavit of service that defendant was served with process by personal service on a person of suitable age and discretion pursuant to CPLR 308(2) at defendant's residence located at 296 Parkway Boulevard, Wyandanch, New York 11798 on May 28, 2016; with follow up first class mailing at the same

address on May 31, 2016. Proof of service was filed with the Suffolk County Clerk on June 8, 2016.

A process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; *see* ***NYCTL 2009–A Trust v. Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571; ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984, 912 NYS2d 96). Bare and unsubstantiated denials are insufficient to rebut the presumption of proper service (*see* ***Wachovia Bank N.A. v. Greenberg***, 138 AD3d 984, 985, 31 NYS3d 110; ***Wells Fargo Bank, N.A. v. Christie***, 83 AD3d 824, 825, 921 NYS2d 127; *Wachovia Mtge. Corp. v Toussaint*, 144 AD3d 1132, 1133, 43 NYS3d 373, 374 [2d Dept 2016]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" ( *see* ***Edwards, Angell, Palmer & Dodge, LLP v. Gerschman***, 116 AD3d 824, 825, 984 NYS2d 392; ***Simonds v. Grobman***, 277 AD2d 369, 370, 716 NYS2d 692; ***Mtge. Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 733, 5 NYS3d 112, 113 [2d Dept 2015]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (***Ennis v. Lema***, 305 AD2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Furthermore, as applicable here, it is settled that the mere denial of receipt of the summons and the complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (*see* Business Corporation Law § 306 [b] [1]; ***Commissioners of State Ins. Fund v. Nobre***, *Inc.*, 29 AD3d 511, 816 NYS2d 493; ***Truscello v. Olympia Constr.***, 294 AD2d 350, 741 NYS2d 709; ***De La Barrera v. Handler***, 290 AD2d 476, 736 NYS2d 249; ***Trini Realty Corp. v Fulton Ctr. LLC***, 53 AD3d 479, 480, 861 NYS2d 743, 744–45 [2d Dept 2008]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012]|" mere denial by corporate defendant of service of the summons and the complaint was insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service"]).

Moreover, a defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (***Ennis v. Lema***, 305 AD2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

As per VTL § 253, service of process is deemed complete upon filing. Under CPLR 320, defendant Donaldson had until June 1, 2016, 30 days after service was complete to answer the complaint. Pursuant to CPLR 308(2), service was deemed complete on defendant Lewis on June

20, 2016, 10 days after filing of service with the county clerk. Thereafter, Lewis had until July 11, 2016, 20 days from the completion of service to answer the complaint. Since that date has come and gone with no answer, response or appearance from defendants, plaintiffs' proof of default is adequate.

Pursuant to CPLR § 3215(c), a plaintiff must take proceedings for the entry of a default within one year of the default. Plaintiff's motion for a default judgment was filed within one year of defendant's failure to answer the Verified Complaint. It appears that defendant has been served with the Summons, Verified Complaint and Notice of this application.

When a defendant has failed to appear...the plaintiff may seek a default judgment against him." CPLR § 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557.

Pursuant to CPLR 3215(f), plaintiff is required to submit for judicial review the viability of the facts underlying movant's claims, either by affidavit or verification of the pleadings (*see e.g.* CPLR 3215[f]; ***Giovanelli v. Rivera***, 23 AD3d 616, 804 NYS2d 817; ***599 Ralph Ave. Dev., LLC v. 799 Sterling Inc.***, 34 AD3d 726, 726, 825 NYS2d 129, 129-30 [2d Dept. 2006][ Supreme Court properly granted the plaintiff's motion for leave to enter judgment against the defendant upon the plaintiff's submissions of proof of service of the summons and complaint, a factually-detailed verified complaint, and an affirmation from its attorney regarding the defendant's default in appearing and answering]; ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 70 [2003][CPLR 3215(f) requires that an applicant for a default judgment file "proof by affidavit made by the party of the facts constituting the claim." A verified complaint may be submitted instead of the affidavit when the complaint has been properly served]). Here, plaintiff has complied with this requirement submitting affidavits of merits swearing or attesting to the facts and circumstances underlying their claims against the defendants consistent with the pleadings from its subrogor J.P. Mangiaracina.

A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215 (*see* ***Reynolds Sec. v. Underwriters Bank & Trust Co.***, 44 NY2d 568, 572, 406 NYS2d 743, 378 NE2d 106), which requires that the plaintiff state a viable cause of action (*see* CPLR 3215[f]; ***Fappiano v. City of New York***, 5 AD3d 627, 774 NYS2d 773, *lv. denied* 4 NY3d 702, 790 NYS2d 648, 824 NE2d 49 [2004]; ***Green v. Dolphy Constr. Co.***, 187 AD2d 635, 636, 590 NYS2d 238). In determining whether a party has a viable cause of action, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff (*see* ***Woodson v. Mendon Leasing Corp.***, 100 NY2d 62, 71, 760 NYS2d 727, 790 NE2d 1156; ***Feffer v. Malpeso***, 210 AD2d 60, 619 NYS2d 46), ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314, 315 (2005). Judgment by default further requires "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due", or at least a verified complaint (***Zelnik v. Bidermann Indus. U.S.A., Inc.***, 242 AD2d 227, 228, 662 NYS2d 19, 19 (1997).

Having reviewed the unopposed application, this Court finds that plaintiff has complied with the requirements set forth in CPLR 3215(f) as indicated above.

Moreover, pursuant to CPLR § 3215(d), when one or more defendants have defaulted, the Court, upon timely application, may enter an order directing that the proceedings for the assessment of damages or entry of a judgment be conducted at the time of or following the trial or other disposition of the action.

Based upon all of the foregoing, this Court is satisfied with movant's submission and finds proof of defendant's default adequate. Thus, where, as here, plaintiff has satisfied the requirements for granting a default judgment, and requested such within one year of defendants' default, plaintiff's unopposed motion for the entry of a default judgment against defendants is **GRANTED.**

Accordingly, plaintiff's application for a default judgment in the aggregate sum of $16,694.01, plus interest from July 29, 2015, plus costs and fees, is hereby **GRANTED** as against each defendant, jointly and severally.

Therefore, it is

**ORDERED** that plaintiff shall serve a copy of this order with notice of entry upon the defendants herein by personal service by September 1, 2017; and it is further

**ORDERED, ADJUGED & DECREED** that plaintiff shall have judgment of the defendant in the amount of SIXTEEN THOUSAND SIX HUNDRED AND NINETY-FOUR DOLLARS AND ONE CENT ($16,691.01), with interest from July 29, 2015, plus costs and fees.

The foregoing constitutes the decision and order of this Court.

Dated: August 1, 2017
Riverhead, New York

**WILLIAM G. FORD, J.S.C.**

**__X__ FINAL DISPOSITION** **____ NON-FINAL DISPOSITION**