SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

LOUIS DEBATTISTA d/b/a IL MALTI,

Plaintiffs,

- v -

TAYLOR GROUP GENERAL CONTRACTING, INC., and NORRIS TAYLOR,

Defendants.

INDEX NO. 161424/2015
MOTION DATE
MOTION SEQ. NO. 2
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 ...	1-3
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

On November 15, 2015, plaintiff Louis Debattista d/b/a Il Malti ("Plaintiff") commenced this action against the defendants Taylor Group General Contracting, Inc. ("Taylor Group"), and Norris Taylor ("Mr. Taylor") (collectively, "Defendants") for failure to pay Plaintiff the balance due under the parties' contract. Defendants were served on November 17, 2015, and November 19, 2015. According to Plaintiff's counsel, on or about December 15, 2015, Defendants' counsel spoke with Plaintiff's counsel and the two agreed to extend Defendants' time to respond to the Complaint to January 5, 2016. Defendants thereafter failed to move, answer, appear or raise an objection to the Complaint.

On March 7, 2016, Plaintiff moved for default judgment against Defendants. Plaintiff's motion was granted without opposition on May 4, 2016.

In Plaintiff's supporting affidavit sworn to on March 7, 2016, Debattista stated that on April 10, 2009, he entered into a contract of sale with Defendants whereby he agreed to sell certain assets of his construction company, Il-Malti, to Defendants for an agreed upon sum of $100,000.00 ("the Purchase Price"). The assets being sold included the client list, tools, 1989 Ford Branco, list of subcontractors, designer and architect contracts, and three employees. Debattista stated that as required under the contract, he credited Defendants $12,765.00 against the Purchase Price for work that

Defendants previously performed for his business and transferred the corporate assets to Defendants. While Defendants paid him a total sum of $28,500.00 against the balance due, Debattista stated that Defendants had failed to pay the balance due and owing in the amount of $58,735.00 per the terms of the Contract.

Judgment was entered on August 10, 2016, and a copy of the Judgment was served on Defendants on the same date.

By Notice of Motion filed on December 28, 2016, Defendants move for an order vacating the default judgment and permitting the late filing of answering papers. Defendants submit the affidavit of Mr. Taylor and the attorney affirmation of Mahmoud Ramadan. Plaintiff opposes, and Mr. Debattista submits an affidavit, along with the attorney affirmation of Anna K. Mitchell. In reply, Mr. Taylor submits an affidavit, along with a proposed order.

Discussion

Pursuant to CPLR § 5015, the court which rendered a judgment or order may, on motion, grant relief from the judgment or order upon the ground of "excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." CPLR § 5015(a)(1). In order to prevail on a motion to vacate a default judgment upon the ground of excusable default under CPLR § 5015(a)(1), the moving party must satisfy the burden of showing a "meritorious claim or defense" and "a reasonable excuse for the default." *Sheikh v. New York City Transit Auth.*, 258 A.D.2d 347, 348 (1st Dep't 1999); *Pena v. Mittleman*, 179 A.D.2d 607, 609 (1st Dep't 1992); *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 (1st Dep't 2007).

Reasonable Excuse

The determination of what constitutes a reasonable excuse for a default lies within the motion court's discretion. (*Orimex Trading, Inc. v. Berman*, 168 A.D.2d 263 [1st Dept 1990]). "The determination whether a reasonable excuse has been offered is *sui generis* and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy

favoring the resolution of cases on the merits." (*Chevalier v. 368 E. 148th Street Associates, LLC*, 80 A.D.3d 411 [1st Dept 2011] [citations omitted]).

Pursuant to CPLR 2005, upon an application satisfying the requirements of CPLR 5015(a), "the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure." A claim of law office failure may be accepted as a reasonable excuse where the claim is supported by a "detailed and credible" explanation of the default at issue. (*Henry v. Kuveke*, 9 A.D.3d 476, 479 [2d Dept 2004]). Conclusory and unsubstantiated claims of law office failure are insufficient. *See Galaxy Gen. Contr. Corp. v. 2201 7th Ave. Realty LLC,* 95 A.D.3d 789, 790 [1st Dept 2012] (where the claimed law office failure is "conclusory and unsubstantiated" it cannot excuse default); *Piton v. Cribb*, 38 A.D.3d 741, 742 [2d Dep't 2007] ("[A] conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse."). In *Dave Sandel, Inc. v. Specialized Indus. Services Corp.*, 35 A.D.3d 790, 791 [2nd Dept. 2006], the Second Department held, "Under the circumstances presented in this case, the defendant's purported continued belief that its prior attorney was handling this case for it was unreasonable and, thus, does not excuse its default." The Second Department further held, "Moreover, where, as here, there is a pattern of default and neglect, the negligence of the attorney is properly imputed to the client." (*Id.*).

As for the reason for Defendants' failure to interpose an answer, Mr. Taylor states that in November 2015, Plaintiff served the summons and complaint at the offices of Taylor Group, which is Mr. Taylor's plumbing company. Mr. Taylor states that "[i]mmediately after learning of the service of papers," he met with a lawyer named Francisco Serrano Walker, Esq., who "took the papers that were served and said he would take care of it." Mr. Taylor states that he would "periodically" follow up with Mr. Walker, and when he did, Mr. Walker "said he was working on it." Mr. Taylor states that in August 2016, after his bank account was frozen, he went to Mr. Walker who advised him that his case had been lost. Thereafter, on September 23, 2016, Mr. Taylor met with another attorney Mr. Ramadan who advised him that would have to file a motion to vacate the default judgment. Mr. Taylor states, "Unfortunately, I did not have money to retain counsel. As soon as I got the money together to pay for an attorney, I returned to Mr. Ramadan to file the instant motion."

In his opposition, Plaintiff argues that Defendants have not presented a reasonable excuse for their delay in appearing. Plaintiff's counsel states that she provided "Defendants' alleged counsel" with an extension of time to respond to the

Complaint to January 5, 2016. She states that, despite the extension, "no attorney appeared on Defendants' behalf." Plaintiff argues, "Defendants now allege that their former counsel Mr. Francisco Serrano Walker simply failed to file any papers, however they do not provide any proof that they actually retained their former counsel, nor do they provide any proof that they took action to ascertain the status of this litigation as they allege they periodically followed up with Mr. Walker on the litigation." Plaintiff further argues, "Defendants should have been alerted as to the status of the litigation and Mr. Walker's failure to put in an answer when they were directly served with the Motion for Default Judgment and a copy of the Notice of Entry of the Decision and Order granting Default Judgment, so their excuse that they were unaware that their attorney failed to put in an answer and litigate the case until Taylor Group's bank account was frozen is untenable."

Here, Defendants have failed to demonstrate a reasonable excuse. Mr. Taylor alleges that Mr. Walker failed to properly defend the action on behalf of Defendants and failed to file opposition to plaintiff's motion for default judgment. However, Defendants do not provide any proof that they retained Mr. Walker nor do they submit an affidavit from Mr. Walker. A corporation is required to appear by counsel. (CPLR 321[a)]. While Mr. Taylor states that "[p]eriodically, [he] he would follow up with him and when he was available, he said that he was working on it," Defendants provide no specific dates or any other information concerning these alleged efforts to follow up with Mr. Walker concerning the status of their litigation. Furthermore, while Defendants allege that they did not learn of the default judgment until their bank account was frozen in August 2016, Defendants do not address Plaintiff's assertion that, "Defendants should have been alerted as to the status of the litigation and Mr. Walker's failure to put in an answer when they were directly served with the Motion for Default Judgment and a copy of the Notice of Entry of the Decision and Order granting Default Judgment, so their excuse that they were unaware that their attorney failed to put in an answer and litigate the case until Taylor Group's bank account was frozen is untenable." (*See* Plaintiff's Notice of Motion for summary judgment dated March 7, 2016 which reflects that the motion was mailed to Taylor Group and Mr. Taylor; Affidavit of Service dated May 23, 2016 which states that Notice of Entry of the Decision and Order granting Plaintiff's motion for default judgment was mailed directly to Taylor Group and Mr. Taylor on May 23, 2016 via first class mail). Defendants do not dispute that the motion papers and Notice of Entry of the Decision and Order were mailed to them. Even assuming that Defendants did not learn of the default until their bank account was frozen in August 2016, Defendants have failed to provide a reasonable excuse for their delay

in waiting until December 28, 2016, to file the instant motion to vacate the default judgment when they allegedly learned in August 2016 of the default judgment. In view of the lack of reasonable excuse, the court need not reach the issue of meritorious defense. (*Hodson v. Vinnie's Farm Market*, 103 A.D.3d 549, 959 [[st Dept 2013], *citing Aaron v. Greenberg & Reicher, LLP*, 68 A.D.3d 533, 534 [1st Dept 2009]).

Based upon the foregoing, it is hereby

ORDERED that defendants' motion to vacate the default judgment is denied.

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

DATED: October 18, 2017

EILEEN A. RAKOWER, J.S.C.