

<b>Knight v United Pharm. Network</b>
2017 NY Slip Op 33116(U)
July 20, 2017
Supreme Court, Saratoga County
Docket Number: 20163115
Judge: Thomas D. Nolan
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**ORIGINAL**

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

THOMAS J. KNIGHT a/k/a TIM KNIGHT,

Plaintiff,

-against-

UNITED PHARMACY NETWORK a/k/a PHARMACY PLUS NETWORK,

Defendant.

**PRESENT: HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice**

**APPEARANCES: COOPER, ERVING & SAVAGE, LLP  
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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY**

**FILED**

The issues in this employment related dispute are whether plaintiff is entitled to enter a default judgment against defendant based on its failure to timely answer the complaint or whether defendant should be granted permission to serve a late answer.

First the background keying on the procedural aspects leading to the pending motion and cross motion.<sup>1</sup> Plaintiff commenced this action on November 22, 2016. Defendant was served with a summons and complaint on December 6, 2016. Subsequently, the litigants stipulated to

<sup>1</sup>The underlying facts pertaining to the employment relationship between plaintiff and defendant were outlined in the court's decision and order dated April 27, 2017 denying defendant's motion to compel arbitration of the dispute.

extend to February 3, 2017 defendant's time "to move, answer or otherwise respond" to the complaint. On February 3, 2017, defendant filed a motion under CPLR 7503 (a) to stay the litigation and compel arbitration. Following both the court's decision on April 27, 2017 denying that motion and service of a copy of the order with notice of entry on defendant on May 8, 2017, defendant on May 10, 2017 served its answer. On May 19, 2017, following unfruitful negotiations to settle the litigation, plaintiff formally rejected defendant's answer as untimely and concomitantly served its motion for a default judgment. Defendant opposes plaintiff's motion and cross-moves pursuant to CPLR 3012 (a) to extend its time to answer or alternatively to vacate its default and compel plaintiff to accept its late answer. Plaintiff opposes the cross motion.

In its motion, plaintiff asserts that defendant's motion to compel arbitration did not extend its time to answer or otherwise appear and thus there was no excuse for defendant's three month delay in serving its answer thus entitling plaintiff to a default judgment based on defendant's pleading default. In opposition and in support of its cross motion, defendant urges, regardless of its failure to specifically move to dismiss the action under CPLR 3211 (a), that its motion under CPLR 7503 (a) was one akin to a dismissal motion and should be considered as having extended its time to answer until the motion was decided. Moreover, in the event the court finds defendant in default, defendant contends its delay in answering was excusable and that it possesses a meritorious defense to plaintiff's claim sufficient to warrant an order allowing a late answer to be filed particularly noting plaintiff articulates no demonstrable prejudice from the three month delay.

Initially, plaintiff is correct. Defendant's pre-answer CPLR 7503 (a) motion, unlike one

under CPLR 3211 (a), did not automatically extend its time to answer. Duprac v BMW Financial Services, N.A., LLC, 142 AD3d 946 (2<sup>nd</sup> Dept 2016). Moreover, defendant's argument that its motion could be construed as one under the mantle of a CPLR 3211 (a) (5) dismissal motion based on the defense of "arbitration" lacks merit since defendant's argument ignores the fact that a motion to dismiss under CPLR 3211 (a) may be based on the defense of "arbitration and award" (emphasis added), requirements which are not in this case.

The court first considers defendant's cross motion. Under 3012 (d) and CPLR 2004, a court may extend a party's time to answer or compel the acceptance of an answer untimely served upon a showing of a reasonable excuse for the delay and a meritorious defense to the complaint. Puchner v Nastke, 91 AD3d 1261 (3<sup>rd</sup> Dept 2012); Dinstber v Allstate Ins. Co., 75 AD3d 957 (3<sup>rd</sup> Dept 2010). The court's determination is discretionary and sui generis and should consider several factors: the extent of the delay; whether there has been prejudice to plaintiff; and whether there was willfulness on defendant's part. Judicial policy favors resolution of legal disputes on the merits. Rickert v Chestara, 56 AD3d 941 (3<sup>rd</sup> Dept 2008). And, as well, law office failure is excusable. CPLR 2005; Luderowski v Sexton, \_\_AD3d\_\_ (3<sup>rd</sup> Dept, July 13, 2017); Dinstber v Allstate Ins. Co., *supra*; Watson v Pollachi, 32 AD3d 565 (3<sup>rd</sup> Dept 2006).

Here, although defendant does not expressly state that it is relying on law office error, that excuse can be teased from defendant's counsel's affidavit. Defendant also articulates a meritorious defense based on the language of the offer letter and the other writings leading to plaintiff's termination. Here, the delay was relatively brief; and plaintiff offers no specifics to support a claim of prejudice stemming from the time that defendant's motion was sub judice. Moreover, the delay does not appear intentional, and the defendant promptly moved to cure its

default. see Luderowski v Sexton, supra.

Defendant's cross motion is granted, without costs and defendant's time to serve an answer is extended to August 4, 2017.

Plaintiff's motion to enter a default judgment is denied, without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for defendant. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

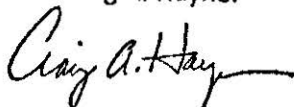
So Ordered.

DATED: July 20, 2017  
Saratoga Springs, New York



HON. THOMAS D. NOLAN  
Supreme Court Justice

ENTERED  
Craig A. Hayner

  
Saratoga County Clerk

SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTOWN, NY

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ENTERED