SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

TATIANA SARKISIAN, DDS, PLLC,

Plaintiff,

- v -

823 LEX LLC et al.,

Defendants.

INDEX NO. 152483/2017

MOTION DATE 9/18/17

MOTION SEQ. NO. 003

The following papers, numbered 65–89, were read on this motion for entry of a default judgment.

Notice of Motion—Affirmation in Support—Exhibits A–F—Memorandum of Law in Support—Affidavit of Service	**Nos. 65–77**
Notice of Cross-Motion—Affirmation in Opposition to Motion and in Support of Cross-Motion—Exhibits A–D—Affidavit of Service—Memorandum of Law in Opposition to Motion and in Support of Cross-Motion	**Nos. 78–85**
Affirmation in Opposition to Cross-Motion and in Further Support of Motion—Exhibits 1–3	**Nos. 86–89**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Motion by Plaintiff Tatiana Sarkisian, DDS, PLLC pursuant to CPLR 3215 (a) for an order granting a default judgment against Defendants Water Waste Prevention Co., Inc. ("WWP") and New York Water Management Inc. ("NYWM") on the fourth cause of action of the verified complaint in the amount of $25,000.00, jointly and severally, for Defendants' failure to appear, answer, or move is denied. Defendants have appeared, submitted a proposed answer and offered a reasonable excuse for their delay in answering and a meritorious defense to the action. Defendants' cross-motion to compel Plaintiff to accept their answer pursuant to CPLR 3012 (d) is granted. Defendants' cross-motion to dismiss pursuant to CPLR 3211 (a) (7) is also granted.

The verified complaint fails to plead a cognizable cause of action against Defendants. Accordingly, the instant action shall be dismissed, unless Plaintiff moves within 30 days from service of a copy of this order with notice of entry for leave to amend its complaint and states in its proposed amended complaint a cause of action upon which relief can be granted.

BACKGROUND

In its complaint, Plaintiff sets forth six causes of action. The fourth cause of action is specifically related to Defendants and is entitled "Fraud" by Plaintiff. Plaintiff alleges therein that Defendants had a duty to inform both Plaintiff and Plaintiff's landlord as to an improper, backward installation of the cold-water meter and that Defendants failed to do so. Plaintiff began a commercial tenancy on April 1, 2010, at 139 East 63rd Street, New York, New York 10065. Plaintiff further alleges that Defendants submitted false and misleading bills for Plaintiff's alleged water use to the landlord knowing they were false and misleading.

Defendants allege that WWP and NYWM are separate companies owned by the same person. Defendants further allege that NYWM is paid based upon budgetary services it provides and WWP is paid based upon reading meters and reporting findings. Defendants further allege that WWP reads meters and does not do any billing. Defendants further alleges that WWP and NYWM contracted with co-defendant Brown Harris Stevens Residential Management, LLC ("BHS") for services to be rendered by Defendants, had no contract with Plaintiff, and sent nothing to Plaintiff. Defendants further allege that WWP noted the water meter was running backward in 2010 and 2011, information which it gave to BHS.

Plaintiff, in a letter sent to Defendants, stated that it "has no contractual relationship or privity with [Defendants]." (Schwartz affirmation, exhibit A, at 118.) NYWM, in an email to Plaintiff, stated that it has no contractual obligation to Plaintiff. (Curtis affirmation, exhibit E, at 2.)

Plaintiff alleges that, on March 17, 2017, it served Defendants pursuant to Business Corporation Law [BCL] § 306 through the secretary of state. Pursuant to CPLR 3215 (g) (4), "[w]hen a default judgment based upon non-appearance is sought against a domestic . . . corporation which has been served pursuant to paragraph (b) of [BCL 306], an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." It is not disputed by Plaintiff that it has not served Defendants as such.

ARGUMENT

Although the instant motion is for a default judgment, Defendants have submitted opposition papers. Defendants state that they were served with the

summons and complaint on March 17, 2017 and were informed that their answer was due by April 17, 2017, which fell on Passover. Defendants state that, due to the holiday, they were not able to respond and requested additional time from Plaintiff but were denied such request unless Defendants had retained an attorney who would then make the request.

Defendants state as an additional reason they did not timely answer that they were in communication with BHS and were under the impression that the matter was to settle. Eventually, BHS did in fact settle their portion of the action for $2,000 and Defendants believed they were included in the settlement because they had been giving information to BHS and co-defendant Mt. Pleasant Management Corp. ("Mt. Pleasant") and believe they were released as "agents" of BHS.

Defendants now cross-move pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss Plaintiff's fourth cause of action. Defendants argue that they were released as part of the settlement with BHS and Mt. Pleasant. Defendants further argue that the statute of limitations has expired to the extent that the fourth cause of action states a cause of action sounding in negligence. Defendants further argue that Plaintiff has failed to plead a cause of action sounding in fraud with sufficient particularity. Specifically, Defendants argue that "Plaintiff notably does not even allege, let alone particularize, that [Defendants] intended to deceive anyone." (Memorandum of law of Schloss at 10.)

Plaintiff argues in its reply papers that Defendants have not shown they were in a principal-agent relationship with BHS. (Reply affirmation of Curtis ¶¶ 30–31.) Plaintiff then states that it will "not dispute all of the allegations of the cross-motion" due to its beliefs both that Defendants have not shown a reasonable excuse for not answering the complaint prior to the instant motion and that Defendants may not have their affidavit of merit or motion to dismiss considered. (*Id.* ¶ 32.)

Plaintiff attaches to its reply papers a transcript from proceedings before this Court on May 9, 2017, in which Plaintiff's counsel states that by settling with the other defendants in this action Plaintiff does not intend to "impair the claims again[st] [Defendants] who have not appeared or moved with regard to the complaint." (Curtis reply affirmation, exhibit 3, at 3, lines 4–21.)

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Ave. I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Here, Plaintiff has established presumptively valid proof of service of process on the Defendants. Plaintiff has also established Defendants were not timely in answering. Nevertheless, Defendants have since appeared in the instant action and have submitted a proposed answer, opposition to Plaintiff's motion, and a cross-motion to dismiss.

A party seeking to vacate its default (in answering a complaint) would be required to show a reasonable excuse for the delay in answering and a meritorious defense to the action. Further, "there exists a strong public policy in favor of disposing of cases on their merits." (*Johnson-Roberts v Ira Judelson Bail Bonds*, 140 AD3d 509, 509 [1st Dept 2016].)

Under the circumstances of the instant case, the Court finds that the Defendants have submitted a reasonable excuse for not answering the complaint in a timely fashion. Furthermore, considering the lack of prejudice to Plaintiff resulting from the delay in serving an answer, the lack of willfulness on the part of Defendants, the existence of a potentially meritorious defense, and the preference for resolution of cases on their merits, Plaintiff's motion for an order granting a default judgment is denied.

Further, upon review of the papers, the cross-motion pursuant to CPLR 3012 (d) to compel Plaintiff to accept the late answer is granted. (*See Spence v Davis*, 139 AD3d 703 [2d Dept 2016].) As such, the Court will now consider Defendants' cross-motion to dismiss.

On a motion addressed to the sufficiency of a complaint, the complaint is liberally construed, the facts pleaded are presumed to be true, and the allegations are accorded every favorable inference. (*Demir v Sandoz Inc.*, 155 AD3d 464, 465 [1st Dept 2017].) Pursuant to CPLR 3016 (b), where a cause of action is based upon common-law fraud—intentional misrepresentation—the circumstances constituting the wrong shall be stated in detail. "The essential elements of a cause of action sounding in fraud are [1] a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, [2] justifiable reliance of the other party on the misrepresentation or material omission, and [3] injury." (*Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]; *see also Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406–407 [1958]; *Desideri v D.M.F.R. Group [USA] Co.*, 230 AD2d 503, 505 [1st Dept 1997]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976], *affd* 43 NY2d 779 [1977].) Further, if the alleged fraud is that of negligent misrepresentation, the plaintiff must allege some contract, privity, or "'a special relationship, i.e., 'a relationship so close as to approach that of privity.'" (*Sykes v RFD Third ave. 1 Associates, LLC*, 67 AD3d 162, 165 [1st Dept 2009], citing *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 [2000]; *see also Ossining Union Free School Dist. V Anderson LaRocca Anderson*, 73 NY2d 417 [1989].)

The Court finds that the fourth cause of action, which plainly states that it is for "fraud," is insufficiently pled as negligent misrepresentation. Plaintiff has stated that it that "has no contractual relationship or privity with [Defendants]," which means Defendants have no duty to Plaintiff. (*See Sykes*, 67 AD3d at 165.)

The Court finds further that the complaint also fails to allege intentional misrepresentation with sufficient particularity—a misrepresentation or material omission of fact which was false and known to be false by Defendants which was made for the purpose of inducing Plaintiff to rely upon it. Specifically, the Court finds in the fourth cause of action in the complaint no allegation of "deception," an "essential element[]" of a cause of action for fraud. (*See New York University v Continental Ins. Co.*, 87 NY2d 308, 318 [1995].)

Further, the reply papers submitted by Plaintiff do not address the issue raised by Defendants as to their CPLR 3211 (a) (5) or (7) arguments. As to Defendants' CPLR 3211 (a) (1) argument, Defendants do not show by documentary evidence for purposes of the instant motion that Defendants were the "agents" of BHS and released by the limited release. As such, the fourth cause of action shall be dismissed per CPLR 3211 (a) (7).

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff Tatiana Sarkisian, DDS, PLLC's motion pursuant to CPLR 3215 (a) for an order granting a default judgment against Defendants Water Waste Prevention Co., Inc. and New York Water Management Inc. on the fourth cause of action of the verified complaint in the amount of $25,000.00, jointly and severally, for Defendants' failure to appear, answer, or move is denied; and it is further

ORDERED that Defendants' cross-motion to compel Plaintiff to accept their answer pursuant to CPLR 3012 (d) is granted; and it is further

ORDERED that Defendants' cross-motion to dismiss the fourth cause of action pursuant to CPLR 3211 (a) (7) is granted; and it is further

ADJUDGED that the fourth cause of action is dismissed; and it is further

ORDERED that the instant action is dismissed in its entirety, with costs and disbursements to Defendants as taxed by the Clerk of the Court upon presentation of a bill of costs, and the Clerk is directed to enter judgment accordingly in favor of Defendants, unless, within 30 days from service of a copy of this order with notice of entry, Plaintiff moves for leave to amend its complaint and states in its proposed amended complaint a cause of action upon which relief can be granted.

The foregoing constitutes the decision and order of the Court.

Dated: January 17, 2018
New York, New York

HON. ROBERT D. KALISH, J.S.C.
J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE