

**Antenor v Nature Med. of N.Y., P.C.**

2018 NY Slip Op 33608(U)

March 22, 2018

Supreme Court, Nassau County

Docket Number: 606711/16

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

SONIE ANTENOR,

Plaintiff,

- against -

NATURE MEDICAL OF NEW YORK, P.C.,  
ARISTOCRAT PLASTIC SURGERY, P.C., KEVIN  
TEHRANI, FOREST DAY SPA, LLC and RIDGEWOOD  
HEALTH & BEAUTY CENTER, INC.,

Defendants.

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 606711/16  
Motion Seq. Nos.: 04, 05  
Motion Dates: 12/27/17  
01/31/18

**The following papers have been read on these motions:**

	Papers Numbered
<u>Notice of Motion (Seq. No. 04), Affirmations, Affidavit and Exhibits</u>	<b>1</b>
<u>Notice of Cross-Motion (Seq. No. 05), Affirmation, Affidavit and Exhibits</u>	<b>2</b>
<u>Affirmation in Opposition to Cross-Motion (Seq. No. 05) and in Reply to Motion (Seq. No. 04) and Memorandum of Law</u>	<b>3</b>
<u>Reply Affirmation to Cross-Motion (Seq. No. 05) and Exhibits</u>	<b>4</b>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 04), pursuant to CPLR § 3215(b), for an order granting a default judgment against defendants Forest Day Spa, LLC (“Forest”), Ridgewood Health and Beauty Center, Inc. (“Ridgewood”) and Nature Medical of New York, P.C. (“Nature”), and settling this matter down for an Inquest.

Defendant Forest opposes the motion and cross-moves (Seq. No. 05), pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against it; or, in the alternative,

cross-moves, pursuant to CPLR § 3025(b), for an order allowing it to file an Amended Answer or an Answer; and, pursuant to CPLR § 5015(a) and 317, for an order vacating any deemed default as against it. Plaintiff opposes the cross-motion.

The Court notes that no opposition to plaintiff's motion (Seq. No. 04) was submitted by defendants Ridgewood or defendant Nature.

In support of the motion (Seq. No. 04), counsel for plaintiff submits, in pertinent part, that, "[t]his action was commenced on September 1, 2016, by filing a summons and complaint with the Nassau County Clerk.... On December 29, 2016, a copy of the summons and complaint was served on the Defendant, Nature of Medical of New York, P.C.;.... On December 29, 2016, a copy of the summons and complaint was served on the Defendant, Ridgewood Health and Beauty Center, Inc.;.... On December 29, 2016, a copy of the summons and complaint was served on the Defendant, Forest Day Spa, LLC;.... The Defendants' time to answer expired at (*sic*) latest January 30, 2017. To date the Defendants Nature of Medical of New York, P.C., Forest Day Spa, LLC and Ridgewood Health and Beauty Center, Inc., have not answered the complaint or otherwise appeared in this action." *See* Plaintiff's Affirmation in Support Exhibits 2-4.

Counsel for plaintiff submits that there has been compliance with additional service of the Summons and Verified Complaint pursuant to CPLR § 3215(g). *See* Plaintiff's Affirmation in Support.

Plaintiff submits her own Affidavit in further support of the motion (Seq. No. 04). *See* Plaintiff's Affidavit in Support.

In opposition to the motion (Seq, No. 04) and in support of the cross-motion (Seq. No. 05), counsel for defendant Forest argues, in pertinent part, that, "[a]s detailed herein, other than being tenants in the same building as DR. TEHRANI & his Medical Practices, at the time of the

alleged incident, FOREST DAY SPA had no other relationship with DR. TEHRANI & (*sic*) Medical Practices, and had no involvement with the plaintiff or any treatment of her. Furthermore, the newly concocted allegations against FOREST DAY SPA by the plaintiff, raised for the first time in an affidavit in support of (*sic*) default motion must be dismissed as a matter of law.... There is no reference to FOREST DAY SPA in [the First] cause of action, nor is there any allegation of any treatment, medical or otherwise of plaintiff by FOREST DAY SPA anywhere in the entire complaint.... In the **Second Cause of Action**, plaintiff realleges the allegations in the first cause of action, indicating negligence in the medical treatment. Once again, no reference is made to FOREST DAY SPA in said alleged cause of action. In fact, the only reference to FOREST DAY SPA in the entire complaint is in the **Third Cause of Action**, where the plaintiff alleges that FOREST DAY SPA operated, managed, controlled, maintained, performed repairs, and was a lessee of 'the aforementioned premises'. However, there is no indication of any relationship, duty, breach of duty or other connection between FOREST DAY SPA and Plaintiff! Thereafter, in said cause of action, the plaintiff makes the same exact statements about all other defendants, with the exception of defendant DR. TEHRANI AND ARISTOCRAT referring to them as owners and lessors of the property located at 6808-A Forest Avenue, Ridgewood, New York (hereinafter 'subject building'). Thereafter, in said cause of action, without any specifics whatsoever plaintiff alleges that on March 1, 2014 'she was caused to sustain serious and permanent injuries caused' by (*sic*) negligence of defendants in 'ownership, operation, management, supervision and maintenance and control of the aforesaid premises'. Firstly, it should be noted that the subject building is not and has not been owned by any of the named defendants herein at any time.... Secondly, said building is a multi-story building with many tenants. As indicated by the attached affidavit of president of FOREST DAY

SPA, HERMAN VANEGAS: DR. KEVIN TEHRANI was one of many doctors that throughout the years has rented a space in the first floor of the subject building. FOREST DAY SPA is also located in the subject building, but operates its spa in the basement, completely separate from any named defendant. Other than their separate receptionists sharing the same receptionist area on the first floor, there was no connection between FOREST DAY SPA and DR. KEVIN TEHRANI, and his medical practices, or treatment of his patients.” See Defendant Forest’s Affirmation in Opposition and in Support Exhibits A and B.

Counsel for defendant Forest adds that, “[b]y affidavit in support of Plaintiff’s default motion, the plaintiff newly claims negligence in ‘spa treatment’ by FOREST DAY SPA, alleging burns, which allegations were never raised in the complaint, and which are vehemently denied by FOREST DAY SPA.... Clearly the dismissal of the case as against DR. TEHRANI and his medical practice has prompted the plaintiff to come up with newly fabricated claims against FOREST DAY SPA, which if in fact had occurred would have certainly been alleged in the complaint by any prudent lawyer.” See Defendant Forest’s Affirmation in Opposition and in Support Exhibits A and G.

Counsel for defendant Forest further argues that, “[i]n this case, the Plaintiff’s Third Cause of Action alleges, in vague fashion, that Forest Day Spa and other defendants negligently operated, managed, controlled, maintained, performed repairs, and were lessee or owner of ‘the aforementioned premises’, and that on March 1, 2014 she was injured while on the premises! ... These allegations clearly do not conform to CPRL (*sic*) 3013 in that they do not give ‘notice of the transactions or occurrences, or duty that Forest Day Spa breached that resulted in such injury. Clearly, given the reading of the entire complaint, the only reasonable assumption is that plaintiff is wrongfully suing every tenant in the building for an alleged negligence medical treatment by one tenant, DR. TEHRANI! There is no claim (*sic*) the Plaintiff was owed a duty of care by the

FOREST DAY SPA, or that FOREST DAY SPA breached any duty by its acts or omissions, or that such breach caused the Plaintiff's injuries. Nor does the Complaint even state what the claimed 'serious injuries' are. Furthermore, the plaintiff's newly concocted allegations in an affidavit in support of (*sic*) default motion, stating that FOREST DAY SPA gave her spa treatments that burned her on the same date as her surgery, have no relationship whatsoever to the vague allegations in the complaint that FOREST DAY SPA and other defendants were negligence (*sic*) in management and maintenance of the building. Hence, the complaint against FOREST DAY SPA must be dismissed, as it lacks any specific facts giving notice of the transactions plaintiff must prove, and it lacks the essential elements of negligence as against FOREST DAY SPA. Furthermore, it should be noted that FOREST DAY SPA, not only denies ever having plaintiff as a customer, but also denies ever owning a body 'heating machine', which now plaintiff claims [in her affidavit] caused her blisters on the same date as her surgery with DR. TEHRANI."

With respect to plaintiff's motion (Seq. No. 04) for a default judgment against defendant Forest, counsel for defendant Forest asserts that defendant Forest's principal, Herman Vanegas, answered the Verified Complaint by sending a letter to counsel for plaintiff. *See* Defendant Forest's Affirmation in Opposition and in Support Exhibit C. Counsel alternatively argues that, "should the court find Defendant's letter could not (*sic*) deemed an Answer, any deemed default should be excused pursuant to CPLR 5015 (a) (1) and/or CPLR 317. In this case there was no willful or deliberate default by FOREST DAY SPA, and it has meritorious defenses, which in the interest of justice it should be allowed to present. There will be no prejudice to plaintiff by allowing such late Answer.... Here, FOREST DAY SPA's president believed its letter response was sufficient, and this belief was reasonable under the circumstances, especially as he did not hear from plaintiff's counsel for over a year after the letter was sent. Defendant has (*sic*)

meritorious defense, as the Complaint fails to state a cause of action for negligence by FOREST DAY SPA. Furthermore, defendant denies ever having any duty to the plaintiff that may have been breached, as she was never a customer of FOREST DAY SPA.” See Defendant Forest’s Affirmation in Opposition and in Support Exhibit H.

In opposition to the cross-motion (Seq. No. 05) and in further support of the motion (Seq. No. 04), counsel for plaintiff asserts, in pertinent part, that “[i]n this action, the letter sent by Forest Day Spa sent a letter (*sic*) to Plaintiff’s counsel by Defendant’s president does not constitute an appearance and it is a nullity. As Forest Day Spa has not presented any proof as to the efforts to retain counsel before the Plaintiff made this motion for default, the Court should find there is no reasonable excuse for the default. Rather, the Court should find Forest Day Spa disregarded its responsibility to answer or appear, including making any motion to dismiss the action within the time to answer this action, willfully and contumaciously.”

Counsel for plaintiff adds that, “[i]n this action, Forest Day Spa attempts to attack the sufficiency of the Plaintiff’s complaint. The Defendant attempts a narrow reading of the complaint which alleges Forest Day Sp had some responsibility for the location where the Plaintiff was injured, was negligent in executing those responsibilities, and that negligence caused her injury. The affidavit of the Plaintiff elaborated on these allegations explain (*sic*) where at the premises she was injured, how she was injured at the premises and the injuries she sustained at the premises. When read in conjunction, the complaint and the affidavit show there is a cause of action against Forest Day Spa, which the court at this procedural juncture must assume is true. As the Plaintiff has a cause of action, the Court must deny Forest Day Spa’s motion on its merits.”

With respect to the branch of defendant Forest’s cross-motion (Seq. No. 05), pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against it, “[i]n reviewing

a motion to dismiss pursuant to CPLR 3211(a)(7), “the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander’s Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . **a court may freely consider affidavits submitted by the plaintiff to remedy any**

*defects in the complaint* (emphasis added).” *Leon v. Martinez, supra* at 88.

When viewing plaintiff’s Verified Complaint in light of the criteria set forth above, in conjunction with plaintiff’s Affidavit in Support of her motion (Seq. No. 04), the Court finds that plaintiff has stated cause of action for negligence against defendant Forest that falls within a cognizable legal theory.

Accordingly, the branch of defendant Forest’s cross-motion (Seq. No. 05), pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against it, is hereby **DENIED**.

With respect to the branches of defendant Forest’s cross-motion (Seq No 05), pursuant to CPLR § 3025(b), for an order allowing it to file an Amended Answer or an Answer; and, pursuant to CPLR § 5015(a) and 317, for an order vacating any deemed default as against it, on a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the Summons and Complaint, proof of the facts constituting its claim and proof of the defaulting party’s default in answering or appearing. To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default *and* a potentially meritorious defense to the action (emphasis added). *See Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 932 N.Y.S.2d 109 (2d Dept. 2011); *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202 (2d Dept. 2008).

To compel the acceptance of an untimely pleading, the movant must show a reasonable excuse for the delay *and* a potentially meritorious claim or defense (emphasis added). *See Gibbons v. Court Officers’ Benevolent Assn. of Nassau County*, 78 A.D.3d 654, 909 N.Y.S.2d 917 (2d Dept. 2010); *Pristavec v. Galligan*, 32 A.D.3d 834, 820 N.Y.S.2d 529 (2d Dept. 2006).

The showing of a reasonable excuse that a defendant must establish to be able to serve a late answer is the same as that which a defendant must make to be entitled to the vacatur of a

default judgment. *See Stephan B. Gleich & Associates v. Gritsipis*, 87 A.D.3d 216, 927 N.Y.S.2d 349 (2d Dept. 2011). The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. *See Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

The Court, in its discretion, finds that defendant Forest has shown a reasonable excuse for its default and a potentially meritorious defense.

Furthermore, the Court notes that justice disfavors defaults and prefers that issues be resolved on the merits. *See Ahmad v. Aniolowisk*, 28 A.D.3d 692, 814 N.Y.S.2d 666 (2d Dept. 2006); *Moore v. Day*, 55 A.D.3d 803, 866 N.Y.S.2d 303 (2d Dept. 2008); *Toll Brothers, Inc. v. Dorsch*, 91 A.D.3d 755, 936 N.Y.S.2d 576 (2d Dept. 2012); *Eichen v. George B. Jr. Realty, Inc.*, 154 A.D.2d 428, 547 N.Y.S.2d 236 (2d Dept. 1989).

Accordingly, the branches of defendant Forest's cross-motion (Seq No 05), pursuant to CPLR § 3025(b), for an order allowing it to file an Amended Answer or an Answer; and, pursuant to CPLR § 5015(a) and 317, for an order vacating any deemed default as against it, are hereby **GRANTED**. And it is further

**ORDERED** that defendant Forest is directed to serve its Answer, in the form annexed as Exhibit H in its cross-motion (Seq. No. 05), upon all parties herein by April 6, 2018. A copy of this Order shall be served with those papers.

Consequently, the branch of plaintiff's motion (Seq. No. 04), pursuant to CPLR § 3215(b), for an order granting a default judgment against defendant Forest, is hereby **DENIED**.

As previously indicated, no opposition was submitted to plaintiff's motion (Seq. No. 04) by defendants Ridgewood and Nature.

Therefore, the branches of plaintiff's motion, pursuant to CPLR § 3215(b), for an order granting a default judgment against defendants Ridgewood and Nature, are hereby **GRANTED**.

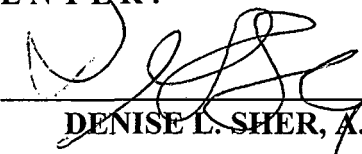
The matter is hereby set down for an Inquest on damages against defendants Ridgewood and Nature to be held after the trial or resolution of this action.

Plaintiff must file a Note of Issue before the aforementioned Inquest. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claims giving rise to the Inquest.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on April 10, 2018, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

  
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
March 22, 2018

**ENTERED**  
MAR 28 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE