

**Consolidated Edison Co. of N.Y., Inc. v P&T Contr.
Corp.**

2020 NY Slip Op 30990(U)

April 22, 2020

Supreme Court, New York County

Docket Number: 155466/2018

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

INDEX NO. 155466/2018

MOTION DATE 03/09/2020

MOTION SEQ. NO. 001

- v -

P&T CONTRACTING CORP., P&T II CONTRACTING CORP.

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11 were read on this motion to/for JUDGMENT - DEFAULT

In this negligence action, plaintiff Consolidated Edison Company of New York, Inc. moves, pursuant to CPLR 3215(c), for a default judgment against defendants P & T Contracting Corp. and P & T II Contracting Corp. After a review of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is decided as follows:

On or about July 30, 2015, defendants allegedly damaged equipment owned by plaintiff in Queens, New York while performing excavation. Doc. 1. On June 11, 2018, plaintiff commenced this action against defendants by filing a summons and verified complaint. Doc. 1. Defendants were then served with process on June 25, 2018. Docs. 3 and 4. To date, defendants have failed to answer or

otherwise appear in this matter, and their deadline for doing so expired in or about July 2019. Doc. 6.

On February 12, 2020, plaintiff filed the instant motion for a default judgment against defendants pursuant to CPLR 3215(c). Doc. 5. The motion, filed months after the expiration of the one-year deadline set forth in CPLR 3215(c) for seeking such relief, was served on defendants. Doc. 5.

In its motion, plaintiff acknowledges that it has not complied with CPLR 3215(c), which imposes a one-year deadline from the date of a defendant's default to move for a default judgment. However, it contends that its delay in moving for a default judgment arises from law office failure and that this Court should thus exercise its discretion in granting it the relief requested.

Plaintiff contends that: "the date by which the [a]nswers to the [v]erified [c]omplaint were due was inadvertently not calendared as a result of a clerical error"; the "clerical error in failing to calendar the [a]nswer due date resulted in the missed deadline to seek default"; and "[t]he clerical error was recently discovered during a file review." Doc. 6.

Failure to comply with CPLR § 3215(c) requires dismissal of the [c]omplaint unless sufficient cause is shown why the [c]omplaint should not be dismissed. *Id.* (absent sufficient cause, the court "*shall* dismiss the complaint as abandoned") (emphasis added). "It is plaintiff's burden to show a lack of intent to abandon the action *and* to demonstrate both a reasonable excuse for the period of non-

prosecution and merit to the action." *Sports Legends, Inc. v. Carberry*, 38 A.D.3d 470, 470 (1st Dep't 2007) (emphasis added; citations omitted); *see also Giglio v. NTIMP, Inc*, 86 A.D.3d 301, 301 (2nd Dep't 2011) (a showing of sufficient cause requires "both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious."). The determination of whether an excuse is sufficient in any given instance is committed to the sound discretion of the motion court. *Seide v. Calderon*, 126 A.D.3d 417, 417 (1st Dep't 2015).

Colonial Funding Network, Inc. v Austin James Assoc., Inc., 2018 NY Misc LEXIS 4667, *2-3, 2018 NY Slip Op 32614(U), 2-3 (Sup Ct New York County 2018).

This Court deems inadequate plaintiff's conclusory excuse that "clerical error" prevented it from seeking a default judgment within one year after defendants defaulted. *See Colonial Funding Network, Inc. v Austin James Assoc., Inc., supra* (citations omitted). "Under the terms of CPLR 3215(c), excusing a party from compliance with the one-year deadline for seeking a default judgment is the exception rather than the rule. A failure of a party or its counsel to keep track of the case, without extenuating circumstances more compelling than those present here, does not constitute sufficient cause. *See, e.g., Herzbrun v. Levine*, 23 A.D.2d 744, 259 N.Y.S.2d 237 (1st Dep't 1965) (the fact that plaintiffs moved out of the country and 'lost contact' with their attorney did not constitute sufficient cause under CPLR §3215[c]); *cf. e.g., Smith v. Arce*, 78 A.D.3d 612, 912 N.Y.S.2d 44 (1st Dep't 2000) (sufficient cause was found where delay was explained by law

office failure in the aftermath of the sudden death of lawyer's child)." *Colonial Funding Network, Inc. v Austin James Assoc., Inc., supra* at 3-4.

Given the findings set forth above, this Court need not address the proposed merits of plaintiff's claim.

Therefore, in light of the foregoing, it is hereby:

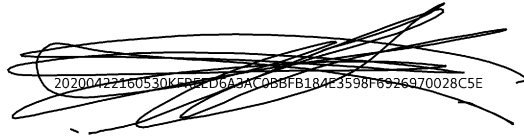
ORDERED plaintiff's motion for default judgment is denied; and it is further

ORDERED that the complaint is dismissed as abandoned pursuant to CPLR 3215(c), and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days of entry of this order, plaintiff is directed to serve the Clerk of the Court and defendants with a copy of this order, with notice of entry; and it is further

ORDERED that this constitutes the decision and order of the court.

4/22/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE