

Bakhshoudeh v Torres
2020 NY Slip Op 32227(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 653519/2019
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 653519/2019

BOBAK BAKHSHOUDEH,

MOTION DATE 02/11/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALEXANDER TORRES and TNT RACEWERKS CORP.

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for a default judgment against defendants is granted; and it is further

ORDERED that defendants' cross motion for an order granting it permission to file a late answer, or alternatively for an order dismissing the complaint, pursuant to CPLR 3211 (a) is denied and it is further

ORDERED that this matter having come on before this court on February 11, 2020, on application of the plaintiff for a default on the written submissions, and the plaintiff having been represented in connection therewith by Stephen A. Florek, III, Esq., and the defendants having been represented in connection therewith

by Christopher Ross, Esq., pursuant to CPLR 4317, and it appearing to the court that a reference to determine is proper and appropriate pursuant to CPLR 4317 (a), it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose

(1) the issue of the amount of damages incurred by plaintiff to be assessed against defendants; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-

9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly.

DECISION

In this breach of contract action, plaintiff, Bobak Bakhshoudeh, moves for an order pursuant to CPLR 3215, granting a default judgment against defendant, Alexander Torres (Torres), individually, and defendant TNT Racewerks Corp., (TNT); and for an inquest on damages. Defendants oppose the motion and cross-move

for an order (1) pursuant to CPLR 3012, permitting the filing of a late answer; or (2) pursuant to CPLR 3211(a) dismissing the complaint on the grounds that a defense is founded upon documentary evidence.

Plaintiff commenced this action by filing the summons and complaint with the court on June 17, 2019. Torres was personally served with the summons and verified complaint on July 8, 2019 (NYSCEF Doc. No. 3), and failed to answer the complaint, appear, or move with respect thereto within the 20-day statutory period (see CPLR 320 [a]). Service of process was effectuated on TNT on July 8, 2019, pursuant to CPLR 311 (a) (1) and BCL 306 (a) (NYSCEF Doc. No. 2). TNT failed to appear in this action or request an extension of time to appear and its time for doing so has expired.

On October 3, 2019 plaintiff moved for leave to enter a judgment against defendants upon their default in answering and for an inquest on the issue of damages. Pursuant to CPLR 3215 (g) (3) (i) and (4), defendants were given additional notice of the instant lawsuit with plaintiff's mailing of a copy of the summons on September 5, 2019 (NYSCEF Doc. No. 9). On October 14, 2019, defendants submitted opposition to plaintiff's motion and cross-moved for an order 1) permitting the filing of a late answer pursuant to CPLR 3012; and 2) dismissing the complaint pursuant to CPLR 3211(a).

On a motion for leave to enter a default judgment under CPLR 3215, a plaintiff must submit proof of service of the summons and the complaint, the facts constituting the claim, and defendant's default (see CPLR 3215[f]; Diederich v. Wetzel, 112 AD3d 883 [2d Dept 2013]); King v King, 99 AD3d 672 [2d Dept 2012]). A defendant who has failed to appear or answer a complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid the entry of a default judgment or to extend the time to answer (Wells Fargo Bank, N.A. v Cervini, 84 AD3d 789 [2d Dept 2011]). What constitutes a reasonable excuse lies within the discretion of the court (id.; citing Maspeth Fed. Sav. & Loan Assn. v McGown, 77AD3d 890 [2d Dept 2010]). In exercising its discretion in this regard, the court may accept law office failure as an excuse (id. at 644). However, law office failure should not be excused where allegations of law office failure are conclusory and unsubstantiated (id.). A claim of law office failure should be supported by a detailed and credible explanation of the default at issue (Strunk v Revenge Cab Corp., 98 AD3d 1029 [2d Dept 2012]).

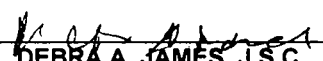
Here, plaintiff has submitted proof of service of the summons and complaint, proof of facts constituting the claim, and proof of defendants' failure to answer or appear in this action (see CPLR 3215). Specifically, plaintiff, in his affidavit dated January 10, 2019, stated that as a customer of defendants, he paid over

\$80,000 for parts, labor and services relating to his 2017 BMW M4 and 2018 Audi RS3 vehicles. Plaintiff further states he received and paid numerous invoices for the purchase, and alleged installation of various parts. Plaintiff alleges that defendants failed to install the parts to his vehicle, despite his having paid for such services. Plaintiff argues that defendants refused to turn over approximately \$15,917.89 in parts, that are in their possession, but belong to plaintiff.

In opposition, defendants argue law office failure as their excuse for their failure to timely appear or answer in this action. Christopher Ross, Esq., counsel for defendants, affirms that "the office had draft[sic] and assembled the verified answer, over a holiday weekend, but then allowed the defendants to come in and sign said paperwork just after the holiday" (Ross affirmation ¶ 8). Mr. Ross further affirms that "the office while in receipt of said papers, never properly filed the same with the ECF system." (id.)

Here, defendants failed to establish a reasonable excuse for their default in answering the complaint or appearing in the action. Their attorneys' description of the "papers, as never properly filed" begs the question as to an excuse for such failure, and since it is conclusory, does not constitute a reasonable excuse for their default. Counsel's affirmation is insufficient to establish that defendants had a reasonable excuse for defaulting

and counsel's explanation is unjustifiable, amounting to nothing more than mere neglect, which does not constitute an excusable default (Seaman v New York Univ., 175 AD3d 1578 [2d Dept 2019], citing One West Bank, FSB v Singer, 153 AD3d 714 [2d Dept 2017]). Since defendants failed to demonstrate a reasonable excuse for their default, it is unnecessary to determine whether they demonstrated the existence of a meritorious defense (EMC Mtge. Corp. v Lamb, 126 AD3d 669 [2d Dept 2015]). Therefore, in light of defendants' failure to establish a reasonable excuse for their default, plaintiff's motion for leave to enter a default judgment on the issue of liability is granted. Defendants' motions for leave to file a late answer, and for an order dismissing the complaint, are denied in their entirety.

<u>7/1/2020</u> DATE					 DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	SUBMIT ORDER
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input checked="" type="checkbox"/>	REFERENCE