SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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R G O & F INC d/b/a TJ FLOWERS & EVENTS, RGO NY INC d/b/a TJ ORCHID,

Plaintiffs,

- v -

CARRERA RS LLC, KSK CONSTRUCTION GROUP LLC,

Defendants.

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INDEX NO. 162201/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for VACATE DEFAULT.

In this property damage action, defendants Carrera RS LLC (CR) and KSK Construction Group LLC (KSK) move by Order to Show Cause (OSC) to vacate a March 2, 2020 default judgment order (March 2 Order) entered against them pursuant to CPLR 5015(a). Plaintiffs R G O & F Inc. d/b/a TJ Flowers & Events and RGO NY INC d/b/a TJ Orchid oppose the motion. The Decision and Order is as follows:

ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiffs allege that on or before April 2018, defendants damaged their property while performing construction, excavation, and underpinning around or under the plaintiffs' premises (NYSCEF # 18). Plaintiffs allege that their property sustained severe damage that was directly and proximately caused by defendants' failure to comply with Title 33 of the Building Code of the City of New York (*id.*).

Prior to the commencement of the instant action, the parties attempted to resolve their dispute without court intervention (NYSCEF ## 23, 24). Defendants provide evidence demonstrating that the parties' last contact by email in these negotiations was on August 29, 2019 (NYSCEF # 23).

As the pre-suit negotiations failed, plaintiffs filed their summons and complaint on December 17, 2019, and served the defendants through the New York Secretary of State on December 31, 2019 (NYSCEF ## 16, 36). However, defendants

failed to appear or answer the complaint. Thus, on February 27, 2020, plaintiffs filed a proposed ex parte order seeking a default judgment pursuant to CPLR 3215, which another Supreme Court Justice signed four days later on March 2, 2020 (NYSCEF # 20 – Order of Hon. Lori Sattler dated March 2, 2020). The March 2 Order directed the Clerk of the Trial Support Office to assign the matter to an IAS part for an Inquest and assessment of damages (*id.*).

On May 13, 2020, defendants filed the instant motion (NYSCEF ## 16, 17). Defendants argue that their default should be vacated because they did not receive proper notice of the application required by CPLR 3215(g) thus depriving this court of jurisdiction. They also claim to have a reasonable excuse and meritorious defense warranting vacatur of their default under CPLR 5015.

On June 23, 2020, plaintiffs submitted their opposition to defendant's motion (NYSCEF # 40). Plaintiffs argue that they were not required to provide defendants with notice of the default and that defendants do not provide a reasonable excuse or meritorious defense warranting vacatur of the judgment.

DISCUSSION

Defendants' motion to vacate the default judgment is denied. The court has jurisdiction, and defendants fail to provide a reasonable excuse warranting vacatur of their default.

Defendants argue that their default judgment should be vacated because the court did not have jurisdiction to render the judgment. Defendants allege that they did not receive the additional notice of default as required by CPLR 3215(g) thereby stripping this court of jurisdiction to enter a default judgment. Thus, defendants conclude that they are entitled to a vacatur of their default based on the court's lack of jurisdiction pursuant to CPLR § 5015(a).

Defendants' argument is unavailing. CPLR 3215(g)(1) provides additional notice only for a party that has previously appeared (CPLR 3215[g][1]). Defendants never appeared and therefore are not entitled to additional notice under this CPLR provision.

Defendants' alternate argument based on CPLR 3215(g)(4)(i) notice also does not apply here. CPLR 3215(g)(4)(i) provides domestic corporations and authorized foreign corporations with additional notice if a default judgment is sought:

> When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been

> served pursuant to paragraph (b) of section three hundred six of the business corporation law, 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.
>
> (CPLR 3215[g][4]).

As defendants are limited liability corporations, they are not entitled to additional notice provided by CPLR 3215[g][4][i] (*Gershman v. Ahman,* 131 AD3d 1104, 1104 [2d Dept 2015] [holding that limited liability corporations are not entitled to the additional notice granted to corporations stating that "the [CPLR 3215(g)(4)(i)] notice requirement is limited to situations where a default judgment is sought against a 'domestic or authorized foreign corporation' which has been served pursuant to Business Corporation Law § 306(b), and does not pertain to a limited liability company"]). Therefore, based on the express terms of CPLR § 3215(g)(4)(i), defendants are not entitled to additional notice of the default judgment.

In any event, even if defendants were entitled to CPLR 3215(g)(4)(i) notice, "a plaintiff's failure to comply with the additional notice requirement of CPLR 3215(g)(4)(i) does not constitute a fatal defect where… the defendant fails to present grounds for vacatur of the default judgment under CPLR 317 or 5015(a)(1)" (*Mauro v. 1896 Stillwell Ave., Inc.*, 39 AD3d 506, 506-07 [2d Dept 2007]). As such, a lack of additional notice of the default is not a jurisdictional defect necessitating vacatur in the absence of a reasonable excuse and meritorious defense. Therefore, the defendants are not entitled to vacatur based solely on a failure to provide additional notice of the default; they must also provide a reasonable excuse and meritorious defense.

As such, this court now turns to defendants' reasonable excuse and meritorious defense. A court may vacate a default judgment on the grounds of an excusable default "if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry…" (CPLR 5015). A default is excusable if the defaulting party presents a reasonable excuse for failure to respond, and the party has a meritorious defense (*see QRT Assoc., Inc. v Mouzouris*, 40 AD3d 326, 326 [1st Dept 2007]). A trial court has the discretion to determine what constitutes a reasonable excuse (*see Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 [1st Dept 2001]). In the absence of a reasonable excuse it is unnecessary to consider whether the defendant demonstrates a potentially meritorious defense (*see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [1st Dept 2009]).

Here, the defendants do not provide a reasonable excuse. Defendants in their moving papers assert that "a reasonable excuse exists in failing to timely answer

the Complaint, the delay is not extensive, there was no intent to deliberately default in answering the Complaint, [and] the Plaintiffs have not been prejudiced by the delay" (NYSCEF # 17). However, defendants do not elaborate further on their excuse. Since the defendants did not provide a reasonable excuse, this court need not consider whether they have presented a meritorious defense. Therefore, defendants are not entitled to vacatur of the March 2 default judgment.

In a final attempt to obtain vacatur of the default, defendants rely on *Classie v. Stratton Oakmont* (236 AD2d 505, 505 [2d Dept 1997]) to argue that this court must vacate the default because the parties were engaged in pre-suit settlement negotiations, and this absolves their default. In *Classie*, the Second Department held it was an improvident use of the court's discretion to refuse to vacate a default where the parties had been engaging in negotiations prior to and continuing after the commencement of an action (*id.*). Defendants point out that the parties had attempted to resolve their dispute through negotiations and exchange of discovery prior to commencement of the action.

However, this case is distinguishable from *Classie* because in *Classie*, the negotiations substantially continued after the commencement of the action, whereas here, the evidence demonstrates that negotiations stalled prior to commencement of the action and did not continue afterwards. Additionally, the *Classie* defendant served a late answer, whereas defendants here did not make any attempts to involve themselves in this case.

Accordingly, it is ORDERED that defendants' motion to vacate the March 2, 2020 default judgment is denied; it is further

ORDERED that the parties appear in Part 33 for a virtual hearing on October 8, 2020 at 10:30 am, for an inquest on damages; and it is further

ORDERED that plaintiffs serve a copy of this Decision and Order with notice of entry upon the defendants and the Clerk of the Court within fifteen (15) days.

This constitutes the Decision and Order of the court.

9/3/2020
DATE

MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		