SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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STEPHEN FINKELSTEIN

Plaintiff,

- v -

THE BANK OF NEW YORK MELLON, AS TRUSTEE (AND ANY PREDECESSORS OR SUCCESSORS THERETO),

Defendant.

**INDEX NO.** 655302/2021

**MOTION DATE**

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44

were read on this motion to/for JUDGMENT - DEFAULT.

In this action arising out of defendant's alleged breaches of its obligations as trustee under four trusts, plaintiff moves pursuant to CPLR 3215 for an order granting judgment by default against defendant based on defendant's failure to timely appear or respond to the complaint. In the alternative, plaintiff moves for an order compelling defendant to accept service of the complaint and for sanctions. Defendant opposes the motion and cross moves for an extension of time to answer. Plaintiff opposes the cross-motion but withdraws its request for sanctions. For the reasons described below, plaintiff's motion for default judgment is denied and defendant's cross-motion is granted.

## Background

This action was commenced by plaintiff's filing of a summons (NYSCEF # 1) and complaint (NYSCEF # 2) on September 1, 2021. The affidavit of service (NYSCEF # 7) establishes that on September 13, 2021, the summons and complaint and related documents were served on defendant by delivery to defendant's New York offices. On October 19, 2021, plaintiff filed this motion for a default judgment (NYSCEF # 14), asserting that defendant had failed timely to answer, appear, or otherwise respond to the complaint. On October 27, 2021, defendant filed a notice of appearance via its attorneys (NYSCEF #'s 16-18). On November 3, 2021, defendant filed a notice of this cross-motion (NYSCEF # 19).

This action is substantially identical (bearing identical litigants, claims, and a nearly completely identical complaint) to the action plaintiff filed on February 22, 2021 under the index number 651222/2021 (the February Action). In the February Action, defendant appeared on July 8, 2021, and plaintiff belatedly filed his complaint on September 1, 2021. Defendant rejected service that same day arguing that it was untimely under CPLR 3012 (b). Defendant moved to dismiss the February Action on September 8, 2021, which plaintiff opposed on September 17, 2021. This court denied defendant's motion and granted plaintiff's cross-motion to compel defendant to accept the complaint.

One day after defendant was served with the complaint in this action, defendant sent a letter to plaintiff rejecting service on the ground that the newly served complaint was untimely under CPLR 3012 (b) (NYSCEF # 33). Defendant's letter conflated the complaints in the separate actions and included the index number of the February Action in the subject line (*id.).* Defendant also filed a notice of rejection in the February Action on the same day that defendant rejected the complaint in this action (NYSCEF # 34).

In support of his motion for a default judgment, plaintiff argues that defendant's conduct in rejecting this action based on the February Action is unreasonable, amounting to an intentional ploy to delay the resolution of plaintiff's claims (NYSCEF # 40 at 1). Plaintiff notes that the Request for Judicial Intervention (NYSCEF # 4) and the Request for Judicial Intervention Addendum, (NYSCEF # 5) served on defendant both acknowledged that the complaint was a refiling of the same claims as the February Action under a new index number (*id.* at 5). Plaintiff also contends, inter alia, that the papers served on defendant on September 13, 2021, were embossed with the new index number, and that when defendant filed them in the February Action, the resulting document highlighted in the headers that the papers in this action were not from the February Action (*id.* at 6). Plaintiff notes that defendant has not submitted a proposed answer nor any sworn statements in support of any underlying defense to plaintiff's claims (*id.* at 3). Plaintiff contends that he has been prejudiced by defendant's failure to answer and that if defendant is permitted to file an answer it would substantially delay his prosecution of this action.

In opposition to the motion and in support of its cross motion to extend the time to answer, defendant asserts that it believed that the September 13, 2021 service of the complaint in this action was re-service of the complaint in the February Action and argues that such belief is a reasonable excuse for its delay in answering or appearing in this action (NYSCEF # 20 at 11-13). Defendant argues that plaintiff contributed to defendant's confusion by asserting in the February Action that dismissal was unnecessary because it would mean "nothing more than that the parties will litigate the same claims under a different index number"

(NYSCEF # 30 at 4), failing to mention that plaintiff had in fact already commenced this action on September 1, 2021 with a complaint virtually identical to that in the February Action. Defendant also contends that its default was not willful since three days after plaintiff's service of the motion for default judgment, defendant contacted plaintiff to explain the misunderstanding and to request that plaintiff withdraw the motion (NYSCEF # 35). Upon plaintiff's refusal, defendant entered appearances the next day. Defendant argues that plaintiff has suffered no prejudice from defendant's default (NYSCEF # 20 at 16). Defendant also argues that it has meritorious defenses to plaintiff's claims, including, among others, the prior action pending doctrine (*id.* at 13).

## Discussion

CPLR 3012 (d) provides that "the court may extend the time to appear to plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In determining a defendant's motion pursuant to CPLR 3012 (d) to extend the time to plead, the court considers a number of factors including the length of defendant's delay, the excuse offered for the delay, the absence or presence of willfulness, the possibility of prejudice to plaintiff, the potential merits of the defense, and the public policy favoring the resolution of disputes on their merits (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472-473 [1st Dept 2017]; *Guzetti v City of New York*, 32 AD3d 234, 234 [1st Dept 2006]). While the court is to consider the potential merits of the defense, where no default judgment has been entered, a defendant is not required to set forth a meritorious defense (*see Hirsch v New York City Dep't of Educ.*, 105 AD3d 522 [1st Dept 2013]; *see also Pichardo v 969 Amsterdam Holdings, LLC*, 176 AD3d 571, 572 [1st Dept 2019]; *but see Young v Richards*, 26 AD3d 249 [1st Dept 2006]). The motion court "has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve timely an answer" (*Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [1st Dept 2009]).

Here, the length of delay in defendant's appearance is only a few weeks, followed by defendant's prompt response to plaintiff's motion for default judgment, and plaintiff has failed to demonstrate prejudice (*see, e.g., DashDevs LLC v Cap. Markets Placement, Inc.*, 199 AD3d 452 [1st Dept 2021] [plaintiff failed to show prejudice by two-week delay]). And since plaintiff apparently has contributed to the delay in pursuing his legal remedies through late service of the complaint in the February Action and otherwise, his claim of prejudice is further neutralized (*see, e.g., Rosabianca*, 156 AD3d at 474 ["plaintiff's argument as to the prejudice it would suffer due to the delay in recouping its interest in the property is substantially neutralized by its delay in pursuing its legal remedies"]).

A reasonable excuse exists as evidenced by defendant's adequate explanation in failing to distinguish between two nearly identical complaints filed by the same plaintiff in the same court, especially given the brief delay and the lack of any prejudice to plaintiff (*see, e.g., Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008] [finding excuse is adequate, if not overwhelming, in situation where delay was brief, and plaintiff was not prejudiced by the delay]). Additionally, plaintiff's assertion that defendant's default was intentional to cause delay is belied by defendant's prompt appearance and response following plaintiff's motion for default judgment, and defendant's ongoing participation in the February Action, displaying a lack of willfulness on the part of defendant (*see, e.g., Telep v Republic Elevator Corp.*, 267 AD2d 57, 58 [1st Dept 1999] [significant pretrial activity weighs against finding abandonment]; *see also American Transit Ins. Co. v Gomez*, No. 651949/2020, 2020 WL 6378964, at *2 [Sup Ct, NY County 2020] [finding "no indication of willfulness or bad faith, particularly as the defendant had diligently participated in the underlying arbitration proceedings"]).

Next, because no default judgment has been entered, defendant was not required to set forth a meritorious defense. Plaintiff relies on *Tewari v Tsoutsouras* (75 NY2d 1, 12 [1989]) to argue that in the case of pleading defaults, the absence of an affidavit of merit defeats the motion regardless of the weight of the other factors. Plaintiff's position is unavailing as "a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer … where, as here, no default order or judgment has been entered" (*414 Equities LLC*, 57 AD3d at 81; *see also Guzetti*, 32 AD3d at 234 [holding that late-answering defendants "were not required to submit an affidavit of merit]). Furthermore, this court credits defendant's argument that the prior action pending doctrine presents a meritorious defense, and no affidavit of merit is needed for the court to take judicial notice of the pending February Action.

Finally, plaintiff requests that if the court grants defendant's cross-motion that it only permit defendant to answer the complaint but not to seek its dismissal. Plaintiff cites no authority for this request, which is denied.

In view of the foregoing, plaintiff's motion for a default judgment is denied and defendant's cross-motion for an extension of its time to answer is granted.

## Conclusion

In view of the above, it is

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

ORDERED that defendant's cross-motion is granted to the extent of extending defendant's time to answer, move or otherwise respond to the complaint within 20 days of service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the court.


01/13/2022
DATE

MARGARET A. CHAN, J.S.C.

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