

Xchange Telecom LLC v Knobloch
2022 NY Slip Op 30543(U)
January 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 524010/2018
Judge: Richard J. Montelione
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	At an IAS Term, Part DJMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York,
PRESENT: HON. RICHARD J. MONTELLONE, J.S.C. -----X XCHANGE TELECOM LLC, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> ABE KNOBLOCH, BENZION DOVID KNOBLOCH and BROOKLYN MAILING & COMMUNICATIONS INC, <p style="text-align: center;">Defendants.</p> -----X	on JAN 13 2022 Decision and Order Motion Seq.# 2 Index No. 524010/2018

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>The following e-filed papers read herein:</u>	NYSCEF Nos.:
Defendants Notice of Motion for leave to reargue pursuant to CPLR 2221(d) and/or to vacate the default judgment ordered against Defendants pursuant to CPLR 5015 and to compel plaintiff to accept defendants' answer pursuant to CPLR 2004 and/or 3012(d), dated August 12, 2020 (Doc. 52); Attorney Affirmation of Andrea J. Caruso, Esq., affirmed on August 11, 2020 (Doc. 53); Attorney Affirmation of Joann Monaco, Esq., affirmed on January 16, 2020 (Doc. 54).....	54
Exhibit A-Notice of Entry dated October 22, 2019 of order entered on August 26, 2019.....	55
Exhibit B-Defendants' Notice of Appeal dated November 22, 2019.....	56
Exhibit C- Plaintiff's Notice of Motion for Default Judgment, dated February 12, 2019; Attorney Affirmation of Michael Steinmetz, Esq., affirmed on February 12, 2019.....	57
Exhibit A-Summons with Notice dated November 29, 2018;	
Exhibit B- Affidavit of Service of the Summons with Notice upon Abe Knoblock on 12/12/2018 by "nail and mail" with mailing on 12/13/2018.	
Exhibit C-Affidavit of Service of the Summons with Notice on 12/06/2018 upon Benzion Dovid Knobloch by substitute delivery, with mailing on 12/07/2018;	
Exhibit D-Affidavit of the Summons with Notice on 12/06/2018 upon Brooklyn Mailing & Communications by substitute delivery and by mail on 12/07/2018; Affidavit of Service through the secretary of State on 12/10/2018;	
Exhibit E-Verified Complaint; annexed contract;	

Exhibit F-Attorney Affirmation of Service of Verified Complaint on 12/21/2019 via Federal Express overnight mail;	
Exhibit D-Attorney Affirmation of Susan Mauro, affirmed on July 30, 2019.....	58
Exhibit A-Attorney Affirmation of Joann Monaco, Esq. (undated Affirmation) (Doc 58), Verified Answer	
Exhibit B-Affidavit of Meritorious Defense of Benzion Dovid Knobloch, sworn to on July 30, 2019 (Defendants’ Opposition to Plaintiff’s Motion for Default Judgment-Memorandum of Law)	
Exhibit E-Affidavit of Zalmen Ashkenazi, affirmed on August 5, 2019.....	59
Defendants Memorandum of Law in Support of Motion.....	60
Plaintiff’s Memorandum of Law in Opposition to Motion to Reargue.....	61
Defendants’ Memorandum of Law in Reply to Plaintiffs’ Motion to Reargue.....	63

Upon the foregoing papers, defendants Abe Knobloch, Benzion Dovid Knobloch (Benzion), and Brooklyn Mailing & Communications Inc. (BMC) move for an order, pursuant to CPLR 2221 (d), for leave to reargue this court’s August 20, 2019 order granting the motion of plaintiff Xchange Telecom LLC for a default judgment and, upon reargument, vacating the default judgment against defendants pursuant to CPLR 5015 and compelling plaintiff to accept defendants’ answer pursuant to CPLR 2004 and/or 3012 (d).

Plaintiff commenced this action to recover sums allegedly owed by defendants pursuant to a contract for telecommunications services. A summons with notice was filed on November 29, 2018 and a notice of appearance was thereafter filed on December 17, 2018 by defendants’ prior counsel, Joann Monaco, Esq., who stated, among other things, that “the matter is moot” as it is subject to Rabbinical arbitration. The complaint was filed on December 20, 2018. As a result of defendants’ failure to timely answer the complaint, plaintiff moved for a default judgment on February 12, 2019. In opposition to the motion, defendants submitted the affirmation of Monaco who stated that “[d]ue to an oversight on the part of [her] office [she] failed to timely respond” to the complaint; that after she received the notice of motion for a default judgment, which was returnable on March 12, 2019, she tried to contact defendants to explain the situation but did not receive a call back;

that she appeared before Justice Lawrence Knipel on the March 12, 2019 return date for the default motion and the matter was adjourned to April 2, 2019 for purposes of submitting a proposed answer and opposition papers; that on March 25, 2019, she sent an e-mail to defendants explaining the default motion and the adjourned date; that she prepared a draft of a proposed answer to the complaint on March 26, 2019; and that she did not hear back from defendants, but rather was contacted by their new counsel stating they had been retained and were taking over the matter. On April 2, 2019, Monaco appeared but opposition papers and the proposed answer were not filed presumably because of the substitution. The matter was again adjourned to June 11, 2019, and again to August 6, 2019, and marked final, when the motion was fully submitted.

In the prior motion, Defendants submitted an affidavit in opposition from Benzion, who identified himself as president and sole owner of BMC, and alleged various defenses to this action, which was sworn to on July 30 and filed on July 31, 2021, along with a proposed answer.

By order dated August 20, 2019, this court granted plaintiff's motion for a default judgment and set this matter down for an inquest. On or about February 3, 2020, defendants applied, by ex parte order to show cause, for an order to vacate the August 20, 2019 order and for leave to serve a late answer. This court declined to sign the proposed order to show cause as the application was essentially one for reargument/renewal but was not identified specifically as such in accordance with CPLR 2221 (d) (1). Defendants thereafter brought the instant motion to reargue, claiming that this court misapprehended the affidavit of Monaco and the "timeline of events."

“A motion for leave to reargue must be ‘based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion’” (*Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 1154 [2d Dept 2020], quoting CPLR 2221 [d] [2] [internal quotation marks omitted]). “While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [citations and internal quotations omitted]).

“To successfully oppose a facially adequate motion for leave to enter a default judgment . . . on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for the delay and a potentially meritorious defense to the action” (*Nowakowski v Stages*, 179 AD3d 822, 823 [2d Dept 2020] [internal quotation marks omitted]). Likewise, a defendant who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action (*see Green Tree Servicing, LLC v Weiss*, 180 AD3d 654, 655 [2d Dept 2020]). “The court has discretion to accept law office failure as a reasonable excuse (*see CPLR 2005*) where the claim is supported by a detailed and credible explanation of the default” (*Option One Mtge. Corp. v Rose*, 164 AD3d 1251, 1252 [2d Dept 2018]). “A conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse” (*Bank of N.Y. Mellon Tr. Co.*,

N.A. v Talukder, 176 AD3d 772, 774 [2d Dept 2019] [internal quotation marks omitted]; *see Bank of N.Y. Mellon v Colucci*, 138 AD3d 1047 [2d Dept 2016]). Mere neglect will not be accepted as a reasonable excuse (*see U.S. Bank, N.A. v Essaghof*, 178 AD3d 876, 878 [2d Dept 2019]).

In this matter, there is no showing that the court misapprehended any law or facts in determining the August 20, 2019 order. Prior to substitution of counsel, Monaco contacted her clients at least twice without a response, and between the substitution and actually filing an affidavit in opposition, a period of four months passed without any explanation as to why there was a delay in filing the affidavit or the proposed answer. Without any explanation, this court drew the inference that the failure to promptly file opposition papers and a proposed answer was an intentional act to delay the proceedings.

The court's prior decision reflects the following:

The delay through the substitution of counsel does not appear to prejudice the plaintiff. However, the affidavit of Benzion Dovid Knobloch, one of the individually named defendants, and the president and sole owner of defendant Brooklyn Mailing and Communications Inc., fails to provide any information as to his failure to communicate with his counsel prior to March 12, 2019. *See, Apolonio v HAAV 575 Realty Corp.*, 2014 NY Slip Op 32706[U], (Sup Ct, NY County 2014)], "Failure of a party to communicate or cooperate with their attorney does not excuse a default. *Allied Building Products Corp. v Clarke*, 187 AD2d 1036, 590 N.Y.S.2d 335 (4th Dept 1992);" and *see also, Candeloro v Candeloro*, 133 AD2d 731 (2d Dept 1987). The commentary to CPLR 2005 makes clear that this section was meant to spare clients from the mistakes of their counsel; not to provide a party with an excuse to further delay proceedings. It is noteworthy that the affidavit of defendant is dated July 30, 2019 which is four months after the substitution of counsel.

Here, *there is still no explanation* as to why it took four months to file the opposition papers and the proposed answer. Deficiencies in proof on the former motion cannot be corrected on a motion for reargument (*see Central Mtge. Co. v Sukhdeo*, 45 Misc 3d 1226[A], 2014 NY Slip Op 51718[U] [Sup Ct, Kings County 2014]).

As a result, defendants' motion for reargument of the August 20, 2019 order granting a default judgment and for leave to serve a late answer is denied in all respects.

The foregoing constitutes the decision and order of the court.

ENTER,



HON. RICHARD J. MONTELIONE, J.S.C.

2022 FEB 17 11:11 AM
CLERK OF SUPREME COURT
KINGS COUNTY