SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63**

Justice

----------X

WARREN GILDER,

Plaintiff,

- v -

MICHAEL STERN, DAVID JURACICH

Defendants.

----------X

INDEX NO. 653042/2021

MOTION DATE May 3, 2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 92, 93, 94, 95, 96

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, Defendants' motion seeking to vacate the April 7, 2022 Order of this Court which granted plaintiff's motion for summary judgment and permitting defendants to submit a formal opposition to Plaintiff's motion to renew.

A Microsoft Teams appearance was held on May 3, 2022 where both sides were present.

Plaintiff's initial motion seeking summary judgment in lieu of complaint pursuant to CPLR 3213, seeking the amount of $400,000, plus interest on a February 1, 2012 promissory note was submitted on or about May 7, 2021, together with defendants' cross-motion to dismiss. A Decision and Order by this Court Denied Plaintiff's motion for summary judgment in lieu of complaint and Denied Defendants' motion to dismiss (see NYSCEF Doc. No. 63).

Thereafter, plaintiff moved pursuant to CPLR 2221, for leave to reargue and renew said Decision and Order. Defendants failed to submit opposition and on April 7, 2022, this Court granted Plaintiff's motion to renew and "Ordered that the Clerk is directed to enter judgment …, in the sum of $400,000, with interest at the rate of 17.5% from February 1, 2012, until the entry of

judgment, as calculated by the Clerk, less interest paid in the amount of $323,898.70" (see NYSCEF Doc. No. 79).

Defendants now move by Order to Show Cause, pursuant to CPLR 5015 to vacate this Court's April 7, 2022 Decision and Order. CPLR 5015(a)(1) states, "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just … upon the ground of excusable default." "Under CPLR 5015(a)(1), a default judgment may be vacated where the moving party demonstrates a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the proceeding" (see *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 NY2d 138, [1986]; *Goldman v. Cotter*, 10 AD3d 289 [1st Dept. 2004]).

REASONABLE EXCUSE

Defendants' affirmation affirms,

> "[o]n or about November 8, 2021 – while I was preparing for a jury trial in a different matter – Plaintiff filed a … motion to renew submitting the same evidence previously submitted in support of its 3213 motion and additional evidence for which Plaintiff fails to explain its prior unavailability. As a result of working from home due to the COVID-19 pandemic, I had calendared the return date for the … motion to renew in the December month of my 2021 calendar. However, because the year was ending, I obtained a new hard – copy calendar for 2022, which included a page for December 2021. Unfortunately, when transcribing the numerous December deadlines from the 2021 calendar into the new 2022 calendar, the return date for the … motion to renew was inadvertently omitted. Further, the primary associate on the case at the time had recently left the firm, so the email sent to that associate regarding the … motion to renew was not forwarded to me, the lead counsel on this matter" (see NYSCEF Doc. No. 83 Pars. 8 – 12).

"More motions to vacate defaults are made on the ground of reasonable excuse than on any other singular ground. Within the reasonable excuse category, one of the most frequently seen excuses is law office failure. Indeed CPLR 2005 provides that law office failure is a ground that

may properly be considered by courts in exercising discretion, in the interest of justice, to excuse defaults" (see NY CPLR Rule 5015 [McKinney 2022]).

This Court views Defendants' Affirmation as law office failure. This Court also notes that a portion of the Court's inventory was being reassigned during that time period and this specific case was in flux for a short window which may have led to confusion.

Plaintiff's affirmation in opposition states, "[d]efendants did nothing until this Court issued a decision and order granting Plaintiff's motion and empowering Plaintiff to enforce its judgment. However, … Plaintiff filed a letter with the Court some seventeen (17) days before this Court's ruling that put Defendants' counsel on notice of the pending motion (ECF Docket No. 78). Yet Defendants' counsel did nothing, awaiting the Order from this Court" (see NYSCEF Doc. No. 94 Par. 5).

As Defendants' Affirmation highlights the transfer of a hard-copy calendar to another hard-copy calendar and the COVID-19 pandemic, along with the interplay of documents between chambers, this Court gives credence to the "reasonableness … of the proffered excuses." and based upon same views the excuse as having merit.

MERITORIOUS DEFENSE

New York Courts have a long – standing public policy and a "strong preference in the law that matters be decided on the merits" (see *Smith v. Daca Taxi*, 222 AD2d 209, 211 [1st Dept 1995]). Defendants' Memorandum of Law states, "[d]efendants possess meritorious defenses to Plaintiff's defective motion to renew as well as the underlying action. Specifically, Plaintiff's defective motion to renew is not based upon any newly discovered facts. First, Plaintiff fails to offer any explanation as to why these documents were not previously available. Indeed, Plaintiff's defective motion to renew actually admits that they were previously available and that Plaintiff

merely thought they 'were [not] needed' NYSCEF Doc. No. 71, Par. 10; NYSCEF Doc. No. 76 P. 4; 'Plaintiff originally not think he needed to contact his accountant regarding this matter.' Second, these 'new' documents do nothing but confirm that the payments Defendants testified were submitted to Plaintiff – for which Defendants submitted wire confirmations – were in fact received by Plaintiff a fact that was never in dispute. Indeed, the 3213 Decision expressly noted that 'Defendants submit the bank statement from Chase Bank showing deposits in said accounts for amounts stated [as paid by Defendants] NYSCEF Doc. No. 63 P. 3" (see NYSCEF Doc. No. 82 P. 12 - 13).

Both parties highlight an email from named Defendant David Juracich to named Plaintiff Warren Gilder wherein named Defendant Michael Stern was "cc'd" or "carbon copied" (see NYSCEF Doc. No. 36). This email states, "you invested with us on Dec 29th 2009 $757,000 and were promised 20% simple interest on your money until the end of March 2010."

Plaintiff's Affirmation in Opposition affirms, "[d]efendants continue to assert … that Plaintiff's loan was repaid by Defendants' December 2013 payments to Plaintiff of $507,000 and $929,000 (ECF Docket No. 36). Putting aside that the loan's due date was March 1, 2015, some fourteen (14) months BEFORE Defendants' payments to Plaintiff, Defendant Juracich (sic) contemporaneous email to Plaintiff establishes that the two payments then being made to Plaintiff in the amounts of $507,000 and $929,000 were to repay a different loan (and accrued interest) on a separate construction project (ECF Docket No. 36). It is for this reason that Defendants' present motion is utterly baseless" (see NYSCEF Doc. No. 94 Par. 7).

Defendant's affirmation continues, "[t]he Court rendered the correct decision in its Order on Plaintiff's motion to reargue and renew. However, Plaintiff respectfully submits that the Court erred in its reasoning by granting the motion to renew, and not the motion to reargue. The Court

mistakenly reasoned that the Juracich email, which Plaintiff submitted on reply to prove Defendant Stern's sworn statement was a lie, would not have been reviewed by the Court and therefore was newly discovered evidence (ECF Docket No. 79). Because this critical document was included in Plaintiff's reply papers, it was not newly discovered evidence necessary to support a motion to renew. Instead, Plaintiff believes … the Court simply and understandably overlooked it. Plaintiff therefore submits that on Defendants' present motion to vacate, before denying it for the reasons stated herein, the Court should rule that it meant to grant the motion to reargue (and not renew) based on that key document (ECF Docket No. 36), and grant the relief the Court already properly ordered" (see NYSCEF Doc. No. 94 Par. 8).

This Court accepts the Memorandum of Law in Reply from Defendant. Said Reply states, "the email (NYSCEF Doc. No. 36) creates a significant issue of fact regarding what monies were loaned, for which properties, and whether they were repaid. Indeed, Defendant Stern submitted an affirmation, under oath, that the monies referenced in the email repaid the loan, and not a different loan from Plaintiff" (see NYSCEF Doc. No. 96 P. 10). Defendant does not cite Defendant Stern's affirmation nor affidavit. This Court does not find a submission of Defendant Michael Stern's affidavit.

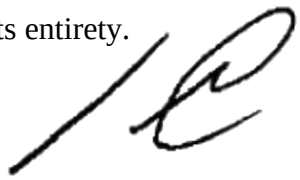
Plaintiff Warren Gilder submits a Reply Affidavit (see NYSCEF Doc. No. 19) and an Affidavit (see NYSCEF Doc. No. 66). The affidavit states, "an email to me from Defendant Juracich and copying Defendant Stern, establishes as a matter of law that the two payments Defendants made to me in the amounts of $909,327 and $507,000, were in repayment for a separate, earlier loan I made to Defendants in connection with a separate real estate project, and have nothing to do with the 57th Street Project for which the Note was made. These payments had nothing to do with the Note. I went to the local branches of both of my banks (TD Bank and

Citibank) where the two payments ($909,327 and $507,000) that Defendants made to me in 2013 were deposited" (see NYSCEF Doc. No. 66 Par. 5, 6). Plaintiff submits the TD Bank Statement of $909,327 (see NYSCEF Doc. No. 67) and the Citibank Statement of $507,000 (see NYSCEF Doc. No. 69).

Plaintiff's attorney asks for sanctions but does not move for said relief. Sanctions will not be considered by this Court.

As there is a "strong preference in the law that matters be decided on the merits" this Court now accepts all of the papers submitted by the parties which should have been considered on the underlying motions. Having considered all of the evidence, defendant's allegations that certain payments should have been credited as payments under the subject loan are clearly contradicted by documentary evidence and as such establish neither an issue of fact nor a defense to this action.

ORDERED that the instant motion is DENIED in its entirety.



5/5/2022
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE