SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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HOHMANN & BARNARD, INC.,

Plaintiff,

- v -

RISING SUN CONSTRUCTION L.L.C.,

Defendant.

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INDEX NO. 151177/2021

MOTION DATE 06/16/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

RISING SUN CONSTRUCTION L.L.C.

Plaintiff,

-against-

RSC GROUP LLC, FRANCISCO TAVARES, BRETT STEINBERG

Defendant.

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Third-Party
Index No. 595868/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for RESTORE.

The motion by plaintiff to restore this action is denied.

On March 17, 2022, this Court issued a Court notice directing that the parties upload an update about discovery by April 26, 2022 or the case might be dismissed (NYSCEF Doc. No. 27). This notice observed that the parties had failed to e-file a discovery update on two prior occasions (*id.*). The Court also observed that a discovery update was required by April 26, 2022 in a decision concerning a discovery motion filed by plaintiff (NYSCEF Doc. No. 30). However, nothing was uploaded and so the Court dismissed the case (NYSCEF Doc. No. 31).

Plaintiff now moves to vacate the dismissal and to restore the action to the active calendar. Counsel for plaintiff explains that he has been out of the office for the last month because his wife gave birth in early April and she suffered from complications. Counsel also explains that he assumed that by filing a discovery motion, he did not have to file an additional update about discovery.

In opposition, defendant insists that plaintiff has not established a meritorious case or reasonable excuse for his refusal to follow Court directives. Defendant maintains that plaintiff has only offered conclusory reasons for this Court to grant the instant motion.

In reply, plaintiff insists that it has established a reasonable excuse and has a meritorious case. It argues it has viable claims against defendant and points to the affidavit of Kevin Korkosz (NYSCEF Doc. No. 48).

Discussion

"As to vacating the default, a party seeking to vacate a default judgment must demonstrate both a reasonable excuse for the default and a meritorious defense" (*Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 401 160 NYS3d 590 [1st Dept 2022] [citations omitted]).

Here, the Court finds that plaintiff established a reasonable excuse for ignoring the Court because it filed a discovery motion in March 2022 and mistakenly believed that it need not file a discovery update or simply just forgot to file an update. The Court is satisfied that plaintiff had no intention of abandoning this case. Even though plaintiff should have read and understood the court notices filed on February 7, 2022, (NYSCEF Doc. No. 17), March 17, 2022 (NYSCEF Doc. No. 27) and the Court's decision on the discovery motion (NYSCEF Doc. No. 30) all of which directed plaintiff to file a status update, the fact is that plaintiff showed it was trying to

move its case by making the subject motion. In addition, complications relating to the birth of a child is more than enough reason to give an attorney a break and forgive the instant failure.

However, plaintiff failed to establish a meritorious case in its moving papers. In support of the motion, plaintiff only included an affirmation from its attorney. It did not include anything from the client. The Court also observes that it could not rely on the pleadings (which were not attached to the motion but are available on NYSCEF) because they were not verified by plaintiff.

Defendant pointed this out in opposition and argued that "Plaintiff does not include a written contract, proof of an oral contract, an affidavit attesting to any alleged agreement with Defendant, or any evidence whatsoever that goods or services were provided to Defendant" (NYSCEF Doc. No. 37, ¶ 18). It also correctly observes that plaintiff cannot remedy this infirmity in reply.

And, unfortunately, that is what plaintiff attempted to do in reply. It attached an affidavit from its Director of Finance (NYSCEF Doc. No. 48). Under these circumstances, the Court cannot consider arguments raised for the first time in reply (*De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566, 909 NYS2d 448 [1st Dept 2010]). Because plaintiff did not meet its burden to establish a meritorious cause of action, the Court denies the motion.

Now that the defendant knows the whole story and knows the plaintiff can add his client's affidavit to moving papers the next time, perhaps the defendant will extend professional courtesy (and save attorney's fees) by entering into a stipulation to restore the case. Otherwise, plaintiff is given leave to bring another motion for the same relief. Of course, defendant may oppose any future motion.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to restore this action is denied without prejudice to bring another motion for the same relief upon proper papers.

6/21/2022
DATE

ARLENE BLUTH, 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