SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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JAIME SANCHEZ

Plaintiff,

- v -

FREDERIC FEKKAI (MARK NY) LLC,

Defendant.

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INDEX NO. 156622/2021

MOTION DATE 02/22/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20

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

In this action for unpaid wages under New York Labor Law, plaintiff Jaime Daniel Sanchez moves, pursuant to CPLR 3215, for a default judgment against defendant Frederic Fekkai (Mark NY) LLC. The motion is supported by the summons and complaint, an affidavit of service, plaintiff's affidavit and other exhibits. Defendant opposes the motion and submits an affidavit from Kimberly Callet (Callet), its Vice President, Salons (NYSCEF Doc No. 19, Callet aff, ¶ 2). Defendant has also served an answer (NYSCEF Doc No. 17).

A motion for a default judgment must be supported with "proof of service of the summons and complaint[,] … proof of the facts constituting the claim, [and] the default" (CPLR 3215 [f]; *see also Gordon Law Firm, P.C. v Premier DNA Corp.*, 205 AD3d 416, 416 [1st Dept 2022]). "[A] complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" satisfies this statutory requirement (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003] [stating that "the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists"]). The plaintiff must also offer "some proof of

liability … to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*id.*). A party in default "admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

The affidavit of service sworn to on August 2, 2021 shows that plaintiff served defendant with process on July 29, 2021 by personally delivering the summons and complaint and a notice of electronic filing to Mara Velasco, an agent authorized to accept service of process for "Frederic Fekkai (Mark LLC) c/o CT Corp." at 28 Liberty Street, New York, New York (NYSCEF Doc No. 12, Spasojevich affirmation, Ex G). Plaintiff filed the affidavit of service on August 2, 2021 (NYSCEF Doc No. 3). Plaintiff has established that defendant has failed to timely answer or appear (*see* CPLR 320) and has not sought an extension of time to do so (*see* CPLR 3012).

Plaintiff's counsel affirms that he personally mailed a copy of the summons to defendant at 25 East 77th Street, New York, New York 10075 on July 14, 2021 (NYSCEF Doc No. 5, Spasojevich affirmation, ¶ 28; NYSCEF Doc No. 13, Spasojevich affirmation, Ex H), although service of process upon a limited liability company's authorized agent in accordance with CPLR 311-a obviates the need for the additional mailing required under CPLR 3215 (g) (4).[1]

[1] Although CPLR 3215 (g) (4) does not expressly refer to limited liability companies, compliance with CPLR 3215 (g) (4) when seeking a default judgment against a limited liability company is required (*see Wonder Works Constr. Corp. v RCDolner, LLC*, 44 AD3d 526, 526 [1st Dept 2007]; *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 10 [1st Dept 2002]; *cf. Jian Hua Tan v AB Capstone Dev., LLC*, 163 AD3d 937, 939 [2d Dept 2018]).

Turning to the merits, plaintiff alleges that he is a manual laborer and that plaintiff failed to pay him on a weekly basis in violation of the New York Labor Law (NYSCEF Doc No, 11, Spasojevich affirmation, Ex F, ¶ 14). Labor Law § 190 (4) defines a "manual worker" as a "mechanic, workingman or laborer," and under Labor Law § 191 (1) (a) (i), "[a] manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned." In his affidavit, plaintiff avers that defendant employed him as a hair stylist between January 1, 2017 to December 31, 2020 for which he was compensated on a bi-weekly basis (NYSCEF Doc No. 6, Lawrence Spasojevich [Spasojevich] affirmation, Ex A, ¶¶ 3 and 6). His duties and responsibilities include washing, coloring and styling a client's hair, cleaning his station, sweeping, restocking and organizing shelves and breaking down boxes (*id*., ¶ 4). He states that he spent more than 25% of his time performing manual labor (*id*., ¶ 5). Included in his affidavit is a table listing dates for each pay period beginning September 22, 2019 through December 26, 2020, the amounts plaintiff was paid each week, and the dates he was paid (*id*., ¶ 7). Plaintiff states that he was not paid his wages for the first week in that bi-weekly pay period within seven calendar days of the end of that first work week (*id*., ¶ 12). Instead, he regularly received his total pay for the bi-weekly period approximately six days after the end of that period (*id*., ¶ 6). Plaintiff states that, based on his recall and recollection, defendant employed this same payment practice in 2017 and 2018 (*id*., ¶¶ 16-21).

Plaintiff also tenders two advisory opinion letters issued by the New York State Department of Labor (DOL) dated December 4, 2008 and December 9, 2009. The December 4, 2008 advisory opinion letter states that "hairdressers" qualified as manual workers within the meaning of the Labor Law because their job responsibilities involved "physical labor" such as "cutting, coloring, and styling [and] could also involve washing hair, cleaning the hairdresser's

own work stations, and cleaning wash sinks, equipment, and other shared work spaces in the salon" (NYSCEF Doc No. 15, Spasojevich affirmation, Ex 15 at 1-2, quoting NY St Dept of Labor Op No. RO-08-0061 [Dec. 4, 2008]). Such proof is sufficient to demonstrate the merits of his claim. Thus, plaintiff has demonstrated its entitlement to a default judgment.

"To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense" (*Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]). It is within the court's discretion to determine what constitutes a reasonable excuse (*see Xiaoyong Zhang v Jong*, 195 AD3d 435, 435 [1st Dept 2021]). Factors to consider include "the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012] [internal quotation marks and citation omitted]). "Moreover, courts have the inherent power to forgive even an unexplained default 'in the interest of justice'" (*id*. [citation omitted]).

As a reasonable excuse, defendant asserts that it never received service of the summons and complaint or additional service of the summons. Callet avers that defendant's corporate offices and salons were closed due to the COVID-19 pandemic, with its corporate offices closed from March 2020 through October 2021 and "most corporate staff" working remotely during this period (*id*., ¶ 4). She states that defendant never received the summons and complaint allegedly served on the Secretary of State or the summons purportedly mailed to 25 East 77th Street in New York (*id*., ¶¶ 5-6). She further states that defendant did not receive notice of the present motion for a default until January 26, 2022, when plaintiff's counsel emailed her about the motion (*id*., ¶ 7).

Generally, bare denial of receipt of the summons and complaint is not a reasonable excuse (*see Jansons Associated Inc. v 12 E. 72nd LLC*, 185 AD3d 499, 499 [1st Dept 2020]). Here, defendant fails to address how it processed mail received at its corporate address or at the salon on East 77th Street or if the salon reopened prior to July 14, 2021, the date plaintiff contends he mailed an additional copy of the summons. While defendant's proffered excuse is "less than compelling, there is a strong preference in our law that matters be decided on their merits" (*Catarine v Beth Israel Med. Ctr*., 290 AD2d 213, 215 [1st Dept 2002]). Crucially, plaintiff has not alleged, nor has he demonstrated, that he suffered prejudice from the delay (*see Peg Bandwidth, LLC v Optical Communications*, 150 AD3d 625, 626 [1st Dept 2017]), especially since he waited several months after defendant failed to appear to move for a default judgment (*see Sukhu v R.A.I.N. Home Attendant Servs., Inc*., 190 AD3d 468, 468 [1st Dept 2021]). Additionally, the defendant served an answer shortly after plaintiff filed the motion.

Defendant has also presented a potentially meritorious defense. Labor Law § 190 (4) defines a "manual worker" as a "mechanic, workingman or laborer," and Labor Law § 191 (1) (a) (i) provides, in relevant part, that "[a] manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned." Whether an employee qualifies as a manual worker must be made on a "case-by-case basis," as DOL's "longstanding interpretation of the term 'manual workers' … includes employees who spend more than 25 percent of their working time performing physical labor" (NY St Dept of Labor Op No. RO-09-0066 [May 21, 2009]). And while DOL's December 4, 2008 advisory opinion letter states, in part, that hairdressers "would be considered manual workers," the letter also states that the agency's opinion is "advisory only and [is] not determinative" (NYSCEF Doc No. 15 at 1-2).

Furthermore, as stated above, defendant has served an answer to the complaint, and plaintiff, in reply, does not contend that he has objected to or rejected service of defendant's late answer. Instead, plaintiff contends that defendant's arguments concerning prejudice and delay are better suited to a motion for an extension of time to answer brought under CPLR 3012 (d). However, in view of "the brief delay, the lack of intention on defendants' part to default, the failure of plaintiff to demonstrate any prejudice attributable to the delay and the policy preference in favor of resolving disputes on the merits," defendant's default is excused (*New Media Holding Co. LLC*, 97 AD3d at 466 [internal quotation marks and citation omitted]; *see also B.U.D. Sheetmetal & Massachusetts Bay Ins. Co.*, 248 AD2d 856, 856 [3d Dept 1998]). And, given the court's clear preference for a disposition on the merits, the court, sua sponte, deems defendant's answer timely served nunc pro tunc (*see Pena-Vazquez v Beharry*, 82 AD3d 649, 649 [1st Dept 2011] [denying a motion for a default judgment and the court, on its own motion, deeming the defendant's late answer timely served]).

Accordingly, it is

ORDERED that the motion of plaintiff Jaime Daniel Sanchez for a default judgment against Frederic Fekkai (Mark NY) LLC (motion sequence no. 001) is denied; and it is further

ORDERED that the answer of defendant Frederic Fekkai (Mark NY) LLC filed on February 15, 2022 (NYSCEF Doc No. 17) is deemed timely served nunc pro tunc; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order for the court's review and signature, within thirty (30) days.

8/17/2022
DATE

WILLIAM PERRY, J.S.C.

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