

**Jiang v Howe**

2023 NY Slip Op 30254(U)

January 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 522911/2021

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JAMES JIANG, SHERRY HOU, and RICH  
BENEFIT LLC,

Plaintiffs, Decision and order

- against -

Index No. 522911/2021

TINA HOWE,

Defendant, January 25, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Sequence #3

The defendant have moved seeking to vacate an order dated November 18, 2022 granted upon notice of settlement to all parties. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

on December 22, 2021 the plaintiffs filed a motion seeking a default based on the fact the defendant had not answered the complaint which had been filed August 31, 2021 (see, NYSCEF Doc. No. 10). On January 27, 2022 the defendant filed a letter wherein she indicated that she was suffering from long COVID and needed time to review the paperwork and respond (see, NYSCEF Doc. No. 18). Further, on November 29, 2022 the defendant moved seeking to dismiss the complaint for the failure to state any cause of action (Motion Sequence Number 2). That motion included a verified answer. The court entered the default order on the same day and shortly thereafter the defendant filed this current motion seeking to vacate the default. The defendant argues she

maintains a reasonable excuse for not appearing and has meritorious defenses. The plaintiff counters the defendant cannot present either a reasonable excuse or any meritorious defense.

Conclusions of Law

It is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious defense (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]). The existence of law office failure may provide the necessary reasonable excuse as long as the movant presents a detailed and credible explanation of the default (IndyMac Bank, FSB v. Izzo, 166 AD3d 866, 89 NYS3d 196 [2d Dept., 2018]). In this case the reasonable excuse presented is essentially that counsel for the defendant made a calendaring error and that in any event the defendant has been suffering from long COVID which prevented her attention and participation.

It is true that law office failure may be deemed a reasonable excuse where there is a "detailed and credible explanation of the default" (see, Servilus v. Walcott, 148 AD3d 743, 48 NYS3d 494 [2d Dept., 2017]). This is especially true where no prejudice accrues to any of the parties and the party seeking the default has moved expeditiously to vacate the default (American International Insurance Company v. MJM Quality

Construction Inc., 69 AD3d 520, 895 NYS2d 35 [1<sup>st</sup> Dept., 2010]). Essentially, in this case the defendant's counsel asserts that a calendaring error led to the default.

It is well settled that miscalendaring dates is a valid demonstration of law office failure (First American Title Insurance Company v. Successful Abstract LLC, AD3d, 178 NYS3d 448 [1<sup>st</sup> Dept., 2022]). Therefore, a reasonable excuse has been presented. Moreover, there has been no evidence there has been any prejudice to any of the parties (Sheridan v. Mid-Island Hospital Inc., 9 AD3d 490, 781 NYS2d 366 [2d Dept., 2004], Statewide Insurance Company v. Bradham, 301 AD2d 606, 753 NYS2d 861 [2d Dept., 2003]). In addition, pursuant to CPLR §5015 this motion, made within one year of the default is timely. Furthermore, the defendant filed a motion to dismiss, coincidentally, on the same date the default order was signed, prior to the entry of that order. That further demonstrates the defendant's interest in pursuing this action.

Further, as noted, the party must demonstrate a meritorious defense (New Century Mortgage Corp., v. Chimmiri, 146 AD3d 893, 45 NYS3d 209 [2d Dept., 2017]). In the instant case, the defendant argues the defendants lack capacity and privity to sue. Substantively, the defendant asserts she did not breach any agreement due to an unfulfilled condition precedent. While of course the validity of these defenses will be explored through


discovery at this juncture meritorious defenses have been presented. Indeed, it is well settled that a verified answer from a party may raise a meritorious defense (see, Lai v. Montes, 182 AD3d 646, 121 NYS2d 431 [3rd Dept., 2020]).

Thus, considering the satisfaction of the above criteria and the preference to decide cases on the merits (Dodge v. Commander, 18 AD3d 943, 794 NYS2d 482 [3<sup>rd</sup> Dept., 2005]) the motion seeking to vacate the default is granted. The plaintiffs are now directed to oppose the defendant's motion seeking dismissal and to notify the court when that motion is ready for argument.

So ordered.

ENTER:

DATED: January 25, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC