

**Paintworks & Decorating Inc. v So-Il Off. Ltd.**

2023 NY Slip Op 30268(U)

January 23, 2023

Supreme Court, New York County

Docket Number: Index No. 157895/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO

PART

33M

Justice

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INDEX NO. 157895/2020

PAINTWORKS & DECORATING INC,

MOTION DATE 12/06/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

SO-IL OFFICE LTD., RIBO PROPERTY LLC, JOHN DOES 1 THROUGH 10 BEING AND INTENDED TO BE THOSE PERSONS OR ENTITIES WITH AN INTEREST IN THE REAL PROPERTY

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, and after oral argument, which was held on November 15, 2021, where Daniel P. Rabinowitz, Esq. appeared for Plaintiff Paintworks & Decorating Inc. ("Plaintiff"), and Seth J. Feinstein, Esq. appeared for Defendant So-II Office Ltd. ("So-II"), Plaintiff's motion for default judgment is denied as untimely, and So-II's cross-motion to dismiss pursuant to CPLR § 3215(c) is granted.

Plaintiff filed its summons and complaint on September 25, 2020 (NYSCEF Docs. 1-2). An affidavit of service uploaded to NYSCEF indicates that service was made on Defendants So-II and Ribo Property LLC ("Ribo") via the Secretary of State on September 28, 2020 (NYSCEF Docs. 4-5). Plaintiff did not move for default judgment until November 29, 2021 (NYSCEF Doc. 6). So-II responded to Plaintiff's motion by cross-moving to dismiss the Complaint as abandoned pursuant to CPLR § 3215(c).

Pertinently, CPLR § 3215(c) provides that: “If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” The phrase “shall dismiss the complaint as abandoned” mandates dismissal unless a plaintiff provides a reasonable excuse for its dilatory behavior (*Sports Legends, Inc. v Carberry*, 38 AD3d 470 [1st Dept 2007]). “Sufficient cause” will not be found if a plaintiff’s assertions are merely conclusory, vague, or unsubstantiated (*MTGLQ Investors, L.P. v Shay*, 190 AD3d 527, 529 [1st Dept 2021]; *Deutsche Bank National Trust Company v Cruz*, 173 AD3d 610, 610-611 [1st Dept 2019]; *Katz v Mangel*, 173 AD3d 989 [2d Dept 2019]). A delay of 13 months before moving for default will result in dismissal (*Dooley v 603 W. 139th St. Realty Corp.*, 11 AD3d 403 [1st Dept 2004]).

Plaintiff concedes in its motion papers that “So-II is correct that Plaintiff’s motion for default judgment was submitted over one year after So-II’s default.” (NYSCEF Doc. 28 at ¶ 5). Plaintiff later attempts to retract this statement in a letter to the Court that was submitted months after briefing on this motion was complete by arguing that executive orders tolling certain filing deadlines extended So-II’s time to Answer and thereby extends the time Plaintiff had to move for default (NYSCEF Doc. 30). However, this argument is inappropriate as it was not raised in any of Plaintiff’s motion papers and Defendant So-II has objected to it being introduced months after briefing was complete (NYSCEF Doc. 31). Moreover, as So-II correctly points out, the Covid-19 toll ended on November 3, 2020, and service was made on the Secretary of State on October 28, 2020. Therefore, even with the Covid-19 filing tolls, So-II was in default on November 23, 2020, but the instant motion was filed on November 29, 2021, which violates CPLR § 3215(c).

Plaintiff's "reasonable excuse" proffered to excuse its delay is that Covid-19 caused staff absences which caused an issue with calendaring. However, there are no further facts provided, which substantiate Plaintiff's conclusory assertions. The First Department has held that under certain circumstances, law office failure may constitute a reasonable excuse; however, claims of law office failure which are conclusory and unsubstantiated cannot excuse a default (*Galaxy General Contracting Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]).

Here, there is no excuse provided for why a default judgment motion was not made for months while Defendants were in default. It is not explained at all the staffing or calendaring practices of Plaintiff's counsel's office and how they were disrupted by Covid-19, nor was it explained what date was incorrectly calendared or how the mistake was discovered (*see First American Title Insurance Company v Successful Abstract, LLC*, 178 NYS3d 448, 449 [Mem] [1st Dept 2022] [finding mis-calendaring date to be a reasonable excuse for failure to oppose summary judgment motion where counsel explained the date incorrectly calendared, the office's regular practice in calendaring dates, and that counsel was working part-time at home with a less robust system compared to his office ]; *see also Park v Kim*, 205 AD3d 429, 429-430 [1st Dept 2022] [law office failure excuse supported by counsel's affirmation that he was short-staffed, and that counsel believed that a reply had been prepared and filed was sufficient to vacate default judgment.]). First Department precedent draws a stark contrast between what constitutes an acceptable law-office failure related excuse and the three sentence conclusory and unsubstantiated excuse in the case at bar.

As such, because CPLR § 3215(c) mandates dismissal if a plaintiff does not move for default judgment 12 months after a party defaults, and Plaintiff has not provided a reasonable excuse for its dilatory actions, So-II's motion to dismiss pursuant to CPLR § 3215(c) is granted.

Accordingly, it is hereby,

ORDERED that Plaintiff Paintworks & Decorating Inc.'s motion for default judgment is denied as untimely; and it is further

ORDERED that Defendant So-Il Office Ltd's cross-motion to dismiss Plaintiff Paintworks & Decorating Inc. Complaint pursuant to CPLR § 3215(c) is granted; and it is further

ORDERED that Plaintiff Paintworks & Decorating Inc. Complaint is dismissed in its entirety and this matter shall be marked disposed; and it is further

ORDERED that within fifteen (15) days of entry, counsel for Defendant So-Il Office Ltd. shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the notice of pendency filed on the 25th day of September 2020 in the office of the County Clerk of New York County against SO-IL Office Ltd. and Ribo Property LLC is cancelled upon service of notice of entry of this Decision and Order by Defendant SO-IL Office Ltd. upon the Clerk of the Court, and that, upon service of notice of entry of this Decision and Order by Defendant SO-IL Office Ltd., the County Clerk of New York County is hereby directed to cancel said notice of pendency and to record in his records a notation of such cancellation; and it is further

*[The remainder of this page is intentionally left blank.]*

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse, and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the Decision and Order of the Court.

1/23/2023

DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE