SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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ELVIN PEREZ,

Plaintiff,

- v -

S.W. MONTE INC.,THE MERCURY EAST, LLC,JOHN DOES 1-2

Defendant.

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INDEX NO. 153453/2022

MOTION DATE 12/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 25, 26, 27, 28, 29, 30, 31

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

Plaintiff, Elvin Perez (plaintiff), commenced this action for personal injury against defendants, S.W. Monte Inc. and The Mercury East, LLC (Mercury Lounge) seeking damages stemming from an alleged March 15th, 2022 assault while inside "The Mercury Lounge," a music venue located at 217 East Houston Street, New York, New York (premises). Mercury Lounge answered and filed a counterclaim for alleged trespass. Mercury Lounge now moves pursuant to CPLR 3215 for a default judgment against plaintiff. Plaintiff opposes the motion and cross-moves pursuant to CPLR 3012(d) for additional time to reply to the crossclaim. The cross-motion is opposed. For the following reasons, both motions are denied.

Plaintiff commenced this action by filing the summons and complaint on April 22, 2022. Mercury Lounge filed an answer with verified counterclaims on June 30, 2022 (NYSCEF doc. no. 8). There is no dispute that plaintiff failed to reply to the verified answer with counterclaims

until December 5, 2022, beyond the twenty days after service of the pleading in person or thirty days after completion of service where service is made in any other manner (CPLR 3012[a]).

Plaintiff alleges that on March 15, 2022, he was at The Mercury Lounge when he was assaulted by defendants' employees. The verified answer with counterclaims alleges that plaintiff trespassed on the stage at The Mercury Lounge, and that the stage was clearly and visibly marked off limits and had obstructions preventing patrons from gaining access to it. According to the counterclaim, plaintiff refused to leave said stage after he was asked to do so several times. It is unclear from the record precisely how plaintiff was injured.

CPLR 3215(f) requires a movant seeking default judgment to submit the following proofs: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of the facts constituting the claim; and (3) an affidavit showing the default in answering or appearing. It is well settled that CPLR § 3215 "does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzelli v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [McGuire, J., concurring], quoting *Jooslen v Gale*, 129 AD2d 531, 535 [1st Dept 1987]).

Here, Mercury Lounge fails to submit an affidavit describing the facts constituting its counterclaim for trespass. The verified answer with counterclaims, verified by Mercury Lounge's attorney, and their attorney's affirmation, are insufficient to establish the merits of plaintiff's claims (*see DLJ Mortg. Cap., Inc. v United Gen. Title Ins. Co.*, 128 AD3d 760, 761

[2d Dept 2015]). In any event, even if the verified answer with counterclaims were properly verified, the record is devoid of any facts establishing plaintiff's intentional intrusion (*see Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312 [1st Dept 2006] ["A claim for trespass requires an affirmative act constituting or resulting in an intentional intrusion upon plaintiff's property"]). Accordingly, Mercury Lounge's motion for a default judgment on its counterclaim for trespass is denied.

In support of his cross-motion for an extension of time to reply to the counterclaim, counsel for plaintiff argues that "during [the exchange of discovery], and inadvertently, the counterclaims went unanswered to" (NYSCEF doc. no 26 at ¶ 7). Counsel for plaintiff avers that he filed an answer on December 5, 2022, and thereafter emailed counsel for Mercury Lounge requesting that counsel withdraw the motion for a default judgment, to no avail.

Pursuant to CPLR § 3012(d), "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." "The determination whether a reasonable excuse has been offered is sui generis and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits" (*Chevalier v 368 E. 148th St. Assoc, LLC*, 80 AD3d 411 [1st Dept 2011]). While the Supreme Court has the discretion to accept law office failure as a reasonable excuse, the excuse must be supported by detailed allegations of fact explaining the law office failure (*Cantor v Flores*, 94 AD3d 936 [2d Dept 2012]; *Trokaik Realty,*

Inc. v HP Yuco, HDFC, Inc., 188 AD3d 1281, 1282 [2d Dept 2020] ["a conclusory, undetailed, and unsubstantiated claim of law office failure does not amount to a reasonable excuse"]; *Galaxy Gen. Contracting Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012] ["claims of law office failure which are 'conclusory and unsubstantiated' cannot excuse default"]).

In support of his claim of law office failure, counsel for plaintiff simply states that he inadvertently failed to reply to the counterclaims. Without any further detail or evidentiary support, plaintiff's conclusory claims are insufficient to establish law office failure (*see Carmody v 208-210 E. 31st Realty, LLC*, 135 AD3d 491 [1st Dept 2016] ["The property manager's conclusory claim that the first attorney he retained 'must have dropped the ball' is insufficient to demonstrate a reasonable excuse of law office failure"]; *Neilson v 6D Farm Corp.*, 123 AD3d 676 [2d Dept 2014] [counsel for defendants' "unsubstantiated and conclusory claims were insufficient to establish a reasonable excuse for the failure of BDF and the estate to serve and file an answer"]). In addition, the lack of detail in counsel for plaintiff's affirmation precludes this Court from making an assessment as to whether plaintiff's failure to reply was made in bad faith. The void of factual support in the affirmation explaining the nature of the law office failure leave ajar the realm of possibilities as to what precipitated plaintiff's failure to reply to the counterclaim.

The lack of detail in counsel for plaintiff's affirmation explaining the law office failure also calls into question whether plaintiff's counsel has personal knowledge of the failure to reply to the counterclaim, especially since the affirmation does not state counsel's involvement in this matter from the time the answer with counterclaims was served (*see HSBC Bank USA, N.A. v*

Hutchinson, —NYS3d—2023 N.Y. Slip Op. 01782 [2d Dept 2023] [denying plaintiff's claim of law office failure, finding that plaintiff "failed to provide an affidavit from anyone with personal knowledge of the purported law office failure, provide any details regarding such failure, or provide any other evidence of the system's purported breakdown that led to counsel's nonappearance at the conference"]; *U.S. Bank Natl Assn as Tr. of J.P. Morgan Alternative Loan Tr. 2006-S2 v Thompson*, 179 AD3d 497, 498 [1st Dept 2020] [a party seeking to establish law office failure is required to submit an affidavit of a person with personal knowledge]; *Ward v New York City Health & Hosps. Corp.*, 82 AD3d 471, 472 [1st Dept 2011] [finding that the plaintiff failed to establish law office failure where the "proffered excuse is based not on the affirmant's personal knowledge"]).

Plaintiff cites to *Thomas Anthony Holdings LLC v Goodbody* (210 AD3d 547 [1st Dept 2022]) in support of the proposition that cross-motions for late responses and answers to counterclaims in reviewing the court's exercise of its discretionary powers. In *Goodbody*, the Appellate Division, First Department, affirmed the lower court's decision, in relevant part, to grant the plaintiff's motion pursuant to CPLR 3012(d), holding that "[a]lthough petitioner's excuse that it overlooked the counterclaims in respondents' answer was 'hardly overwhelming,' it was adequate given that the delay was minimal, was not willful, and did not prejudice respondents" (*id.*, citing *Jones v 414 Equities LLC*, 57 A.D.3d 65 [1st Dept 2008]). However, in *Goodbody*, counsel for the petitioner submitted a detailed affidavit explaining the basis for two-month delay of filing their answer. Counsel for petitioner's affirmation stated as follows:

> "[P]etitioner was not aware of the existence of the counterclaims. Again, the counterclaims start on a separate page as opposed to directly following the last affirmative defense. The formatting is so contrary to standard legal practice and since no physical answer was physically served, it was unclear that any further allegations existed beyond the pro-forma affirmative defenses. Indeed, it was not until Respondent efiled the instant motion for default judgment – with no predicate notice or warning – that Petitioner had actual knowledge of the counterclaims."

(*Thomas Anthony Holdings LLC v Bridget Goodbody et al.*, index no. 157008/2021, NYSCEF doc. no 35 at ¶ 12; *see* ¶¶ 7-8).

Unlike in *Goodbody*, where counsel for the petitioner established law office failure by describing in detail the facts forming the basis for law office failure, including by stating that counsel was unaware of the counterclaims and the specific reasons establishing why counsel failed to reply to the respondents' counterclaims, plaintiff here has made no such showing. Thus, the holding in *Goodbody* is inapposite to the facts herein.

Plaintiff also cites to *Barajas v Toll Bros.*, 247 AD2d 242 [1st Dept 1998]) for the proposition that the First Department generally grants motions to compel acceptance of late answers and grant cross-motions seeking the same relief as the cross-motion herein. In *Barajas*, a personal injury action, the plaintiff served the summons and complaint on the defendant, who then forwarded it to its carrier. Within the twenty-day answer period, the carrier's claims adjuster

contacted plaintiff's counsel to request additional information and documentation concerning the injury and to request an extension of time to answer the complaint. Plaintiff's counsel's responsive letter declined the requests except to demand an answer within seven days, coupled with a warning that counsel would seek a default judgment. The carrier thereafter failed to contact its attorney and the complaint was not answered and a default was entered. In reversing the lower court's denial of the defendant's motion to vacate the default judgment and extend its time to answer, the court in *Barajas* found that "[t]here was no evident pattern of neglect . . . or a demonstrable absence of any reasonable belief by the client that the matter was being diligently handled" (*id.* at 242-242). The court further held that "[i]n view of the absence of an intentional default or dilatory conduct by defendant, the short time periods involved and the absence of demonstrated prejudice to plaintiff . . . , the excuse for the delay was reasonable and warrants vacatur" (*id.* at 243). The court in *Barajas* had the benefit of a wealth of information concerning the nature of the defendant's failure to answer the complaint, including facts demonstrating the lack of its bad faith, whereas here, plaintiff's conclusory affirmation does not provide such insight.

In light of the above, the Court finds that plaintiff fails to establish a reasonable excuse for his failure to respond to the counterclaims.

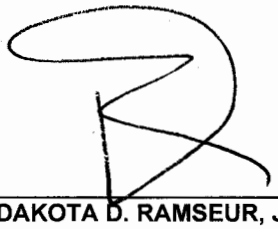
Accordingly, it is hereby

ORDERED that Mercury Lounge's motion pursuant to CPLR 3215 for a default judgment on its counterclaim for trespass against plaintiff is denied; and it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 3012(d) for an extension of time *nunc pro* tunc to answer, reply or otherwise appear in response to the Mercury Lounge's counterclaims is denied; and it is further

ORDERED that Mercury Lounge shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



4/13/2023
DATE

DAKOTA D. RAMSEUR, 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