

Kang v Sungchancho Attorney at Law P.C

2024 NY Slip Op 35064(U)

December 23, 2024

Supreme Court, Queens County

Docket Number: Index No. 714123/23

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
YOUNG S. KANG,

Plaintiff,

-against-

Index No.: 714123/23

Mot. Date: 10/15/24

Mot. Seq.: 1

SUNGCHANCHO ATTORNEY AT LAW P.C,
and SUNG CHAN CHO,

Defendants,

-----X
The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3215, granting plaintiff a default judgment as to liability on the twelve causes of action in plaintiff’s First Verified Amended Complaint and ordering an inquest to determine the plaintiff’s damages.

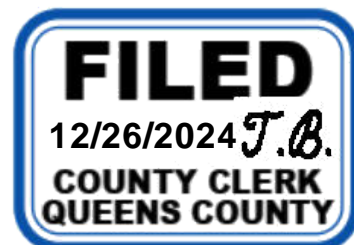
PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 29-42
Affirmation in Opp-Exhibits.....	EF 60-61
Affirmation in Reply-Exhibits.....	EF 64-65

Upon the foregoing papers, it is ordered that the motion by plaintiff is decided, as set forth below.

Plaintiff commenced the instant action by the filing of a Summons and Complaint, on July 11, 2023. The Complaint contained three causes of action: breach of an employment contract, violation of New York Labor Law and negligence; and, consisted of twelve (12) pages. The breach of contract claim is for \$1,820,000. On August 4, 2023, the defendants filed an Answer with counterclaims.

On the same day that the defendants served their Answer, the plaintiff filed an Amended Complaint with twelve (12) causes of action, and consisting of twenty-four (24) pages. The Amended Complaint included the original claim for breach of an employment contract, as well as a new breach of contract claim for \$1,820,000, plus unjust enrichment. It also added new causes of action including assault, battery and intentional infliction of emotional distress. Plaintiff also alleged in the Amended Complaint that the



conduct of defendant Sung Chan Cho (Cho), consisted of, among other things “unconsented sexual violations”.

It is undisputed that the defendants did not timely answer the Amended Complaint. On March 19, 2024, almost seven (7) months after the filing of the Amended Complaint, the plaintiff made the instant motion, pursuant to CPLR 3215, for an order granting a default judgment as to liability on the twelve causes of action in the Amended Complaint. Thereafter, on April 23, 2024, Cho filed an Answer to the Amended Complaint with counterclaims (NYSCEF Doc No 44), which was rejected by the plaintiff on May 6, 2024 (NYSCEF Doc No 55). On August 9, 2024, another Amended Answer (NYSCEF Doc No 56) was e-filed by Elio Forcina, Esq. (attorney Forcina), which was also rejected by the the plaintiff (NYSCEF Doc No 57-58).

The motion for default judgment is opposed by Cho, who submits an attorney affirmation from attorney Forcina, as well as his own affidavit. In his affidavit, which is somewhat disjointed, Cho states, in sum and substance, that after receiving the Amended Complaint, he hired attorney Forcina, who was “supposed to file an amend [sic] answer” but Forcina did not do so, so Cho prepared his own Answer to the Amended Complaint. Cho also claims, in sum and substance, that in late 2023, the plaintiff filed false charges of assault against him and which were ultimately dismissed, although he did plead guilty to disorderly conduct. He further affirms, in sum and substance, that due to being distracted by the criminal charges, as well as the new theories of liability and the new allegations being against him in the Amended Complaint, he did not realize that a timely Answer to the Amended Complaint had to be filed. Upon realizing this when he received the motion for default judgment, he did serve an Answer to the Amended Complaint containing counterclaims. Cho contends that all of the plaintiff’s allegations are false and that the case “be decided on merit of the case, not based on the default of the defendant.”

Cho also submits an affirmation from attorney Forcina, who claims, in effect, that he did not realize that he had been formally retained by Cho, and that Cho had been expecting him to file an Answer to the Amended Complaint. He states that this was law office failure due to “miscommunication surrounding representation”. A review of the papers reveals that, in effect, Cho is cross moving to compel the acceptance of his

untimely Answer to the Amended Complaint. In reply, the plaintiff argues, *inter alia*, that Cho did not formally cross-move for leave to file an Amended Complaint.

As an initial matter, “[n]ormally, a party seeking relief in connection with another party's motion is, as a general rule, required to do so by way of a cross motion” (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 65 [2d Dept. 201]). However, “courts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215. (*Id.*). Specifically, “since successful opposition to a CPLR 3215 motion for leave to enter a default judgment requires the same showing as an affirmative motion for leave to extend the time to answer ... the interest of judicial economy does not favor the denial of the type of relief sought in this action where, as here, the application was sufficiently supported and clearly articulated (*Fried, supra*, 110 AD3d at 66) (internal citations omitted).

On a motion for leave to enter a default judgment, pursuant to CPLR 3215, a plaintiff is required to file proof of (1) service of a copy or copies of the summons and the complaint; (2) the facts constituting the claim; and, (3) the defendant's default (see CPLR 3215 [f]). To demonstrate "the facts constituting the claim" the movant need only submit sufficient proof to enable a court to determine that "a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; see *Alterbaum v Shubert Org., Inc.*, 80 AD3d 635, 636 [2d Dept 2007]). CPLR 3215 (f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint.

To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense (see *Wassertheil v Elburg, LLC*, 94 AD3d 753 [2012]; *New Seven Colors Corp. v White Bubble Laundromat, Inc.*, 89 AD3d 701, 702 [2d Dept 2011]).

Whether a proffered excuse is 'reasonable' is a 'sui generis determination to be made by the court based on all relevant factors, including 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' " (*Fried v Jacob Holding, Inc.*, *supra*, 110 AD3d at 60, quoting *Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005]. "Law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion" (*Nwauwa v Mamos*, 53 AD3d 646, 649 [2d Dept. 2008]; see CPLR 2005; *Castor v Cuevas*, 137 AD3d 734 [2d Dept 2016]. "Law office failure may be accepted as a reasonable excuse in the exercise of the court's sound

discretion, and a defendant may establish a reasonable excuse for his [or her] default based upon his [or her] attorney's failure to respond to the summons and complaint" (*Wilmington Sav. Fund Socy., FSB v Rodriguez*, 197 AD3d 784, 786 [2d Dept 2021] [internal citations omitted]).

Here, given the totality of all relevant factors, including evidence that the delay in appearing was not willful; that Cho evidenced an intent to defend himself by timely answering the original Complaint and serving counterclaims; the lack of prejudice to the plaintiff resulting from Cho's delay in answering the Amended Complaint; the fact that the plaintiff waited more than six months to file her motion for leave to enter a default judgment on the Amended Complaint; the existence of a potentially meritorious defense; and, the strong public policy favoring the resolution of cases on the merits; the Court, in its discretion, denies the plaintiff's motion for leave to enter a default judgment, and grants Cho's application, to in effect, compel the acceptance of his untimely Answer (*Fried v Jacob Holding, Inc., supra*, 110 AD3d at 56, *Nowakowski v Broadway Stages*, 179 AD3d 824, 826 [2d Dept 2020]).

Accordingly, it is

ORDERED that the motion by plaintiff for leave to enter a default judgment against the defendants, is denied; and it is further

ORDERED that the "cross-motion" by defendants is granted; in that: it is

ORDERED that the defendants' Answer to the Amended Complaint with counterclaims (NYSCEF Doc. No. 44), filed on April 23, 2024, is deemed timely filed and served, *nunc pro tunc*; and it is further

ORDERED that the defendants are to serve a Verification to the Answer to the Amended Complaint and counterclaims, pursuant to CPLR 3020(a), within twenty (20) days of the date that this Order appears in the minutes of the Queens County Clerk - NYSCEF system; and it is further

ORDERED that the plaintiff's time to file a reply to the counterclaims raised in said Verified Answer is hereby sixty (60) days from the date that the verification is served; and it is further

ORDERED that any requests for relief not expressly granted herein are denied.

Dated: December 23, 2024



TIMOTHY J. DUFFICY, J.S.C.

