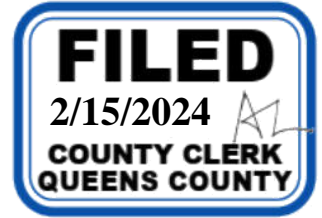


Nagua v Xianchu Ding
2024 NY Slip Op 35200(U)
February 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 713808/2022
Judge: Karina E. Alomar
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This opinion is uncorrected and not selected for official publication.

Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **KARINA E. ALOMAR**
Justice

IA PART 23

-----X
CARMITA NAGUA,

Index No.:713808/2022
Motion Date: 02/08/2024
Motion Seq. No.:1

Plaintiff,

-against-

XIANCHU DING, DING BROTHER SERVICE
INC., AND VICTOR ESPIN NAGUA,

Defendants.

-----X

The following numbered papers 22 to 48 read on this: (1) motion by defendant Victor Espin Nagua dismissing the plaintiff’s complaint and all cross claims as against Victor Espin Nagua on the grounds of abandonment, or in the alternative, for an order extending the moving defendant’s time to serve an answer; and (2) defendant Xianchu Ding and Ding Brother Service Inc’s cross-motion pursuant to CPLR §3215 granting default judgment as against co-defendant Victor Espin Nagua

PAPERS	NUMBERED
Notice of Motion, Affidavits, Exhibits	22 – 28
Affirmation in Opposition.....	30
Notice of Cross Motion, Affidavits, Exhibits.....	31 – 38
Affirmation in Opposition, Affidavit, Exhibits...	39 – 45
Affirmation in Reply.....	46 – 48

Upon the foregoing cited papers, it is ordered that defendant Victor Espin Nagua’s motion and defendants Xianchu Ding and Ding Brother Service Inc.’s cross-motion are decided as follows:

Plaintiff commenced the instant action on July 1, 2022, to recover for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on February 29, 2020, at 95-16 Northern Boulevard, eastbound, Queens, New York. Defendant Victor Espin Nagua (“Victor”) was the owner and operator of a certain motor vehicle bearing New York State license plate number FMS-5722, in which plaintiff was a passenger. Whereas defendant Ding Brother Service Inc (“Ding Inc”) was the owner of a certain motor vehicle bearing New York State license plate number 78329PC, which was operated by co-defendant Xianchu Ding.

Defendants Ding Inc and Xianchu Ding submitted their answer on July 22, 2022. Plaintiff served defendant Victor the summons and verified complaint on August 13, 2022, by affix and mail (mailing of the summons and complaint was complete on August 19, 2022). Defendant Victor had not filed an answer. On November 14, 2023, plaintiff

served the Note of Issue with Certificate and Readiness and Affirmation of Compliance upon all defendants.

With respect to defendant Victor's branch of motion to dismiss plaintiff's complaint. Pursuant to CPLR §3215(c), 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. Under such circumstances, to avoid dismissal of the complaint, the plaintiff must offer a reasonable excuse for its delay and demonstrate the merits of the complaint. (*State Farm Mut. Auto. Ins. Co. v Rodriguez*, 12 AD3d 662 [2d Dept 2004]). Pursuant to CPLR §2005, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure. Moreover, there is a strong public policy in favor of resolving cases on the merits. (*Ezra Huber & Assocs., P.C. v Lopresti*, 211 AD3d 689 [2d Dept 2022]).

Herein, defendant Victor had not filed an answer and plaintiff had failed to move for default judgment as against defendant Victor within one year of default. In opposition, plaintiff contends that its complaint should not be dismissed as they had engaged in continuous communication and litigation with the answering defendants Ding Inc and Xianchu Ding. Plaintiff also contends that its complaint should not be dismissed as a result of law office failure.

In opposition, plaintiff submits the affidavit of Arnold Baum, Chief Operating Officer for Subin Associates LLP. Mr. Baum deposed that on or about June 14, 2023, the Human Resources Director for Subin Associates, LLP, Jen Phillip, received an email from the spouse of the attorney in charge of drafting and filing default motions stating that due to his illness he would not be able to work temporarily. Thereafter, on July 18, 2023, Jen Phillip with a copy to Gregory T. Cerchione, Principal Managing Partner of Subin Associates, LLP, received an email from the attorney stating that he was optimistic and hoping to return to work with certain limitations. However, the attorneys' medical condition worsened and on August 2, 2023, the Director of Human Resources received an email stating that the attorney had to go on disability commencing August 1, 2023. Mr. Baum further deposed that at the time this attorney went out on disability he had well in excess of 150 motions and cases that required his attention. Mr. Baum averred that the disabled attorney did not advise the firm that these cases needed attention. By the time they were able to recover from this attorney leaving their law firm, it was not until November 2023 that they were able to attend to those cases that needed default motions. However, plaintiff's time to move for default judgment had expired after September 2023.

Here, the court finds that the handling attorney's medical condition constitutes reasonable excuse for failing to move for default. Moreover, defendant Victor has requested, in the alternative, an extension of time to file an answer and plaintiff has requested that this Court grant that portion of the defendant's motion seeking time to interpose an answer. As such, in the interest of justice, and in favor of resolving cases on

the merit, defendant Victor's branch of motion for an extension to file an Answer is granted.

With respect to co-defendants Ding Inc and Xianchu Ding cross-motion pursuant to CPLR §3215 granting default judgment as against co-defendant Victor. Pursuant to CPLR §3012, "a subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds."

Co-defendants filed their answer on NYSCEF on July 22, 2022. Defendants Ding Inc and Xianchu Ding did not file an affidavit of service providing that the Answer with Crossclaims dated July 22, 2022, was served upon defendant Victor. Additionally, defendant Victor was not represented by counsel and was not registered as a NYSCEF e-filing participant until December 20, 2023. As such, defendants Ding Inc and Xianchu Ding fail to provide that defendant Victor was in possession of their Answer which included crossclaims as against Victor. Moreover, even if the court were to overlook defendants Ding Inc and Xianchu Ding failure to serve their Answer with crossclaims against Victor, defendants Ding Inc and Xianchu Ding motion would still fail as they had failed to move for default within one year of Victor's alleged default. Unlike plaintiff, defendants Ding Inc and Xianchu Ding fail to provide a reasonable excuse for their failure to move for default as against Victor. Defendant Ding Inc and Xianchu Ding's contention that the time to move for default had been tolled until the completion of mandatory settlement conference (CPLR §3408) are unavailing as such requirements are for residential foreclosure actions.

As such, defendants Ding Inc and Xianchu Ding motion pursuant to CPLR §3215 is denied. Moreover, co-defendant's motion to dismiss the crossclaims for failure to move for default within one year is also denied as co-defendants never served the Answer with crossclaims, thus the time to move for default had not commenced.

Accordingly, it is hereby

ORDERED, that defendant Victor Espin Nagua's branch of motion pursuant to CPLR §3215(c) dismissing plaintiff's complaint and all cross claims is denied, it is further

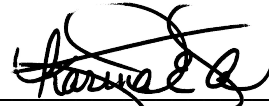
ORDERED, that defendant Xianchu Ding and Ding Brother Service Inc's cross-motion pursuant to CPLR §3215 granting default judgment as against co-defendant Victor Espin Nagua is denied, it is further

ORDERED, that defendant Victor Espin Nagua's branch of motion for extension of time to interpose an answer is granted. Defendant Victor Espin Nagua shall interpose an Answer within thirty (30) days from the date of entry, it is further

ORDERED, that defendant Victor Espin Nagua shall serve a copy of this order, with notice of entry, upon thirty (30) days of the date of entry.

This constitutes the decision and order of the Court.

Dated: February 13, 2024



KARINA E. ALOMAR, J.S.C.

Index No.: 713808/2022

Motion Sq.: 1

