| **Merchants Ins. Group v Brown** |
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| 2024 NY Slip Op 35418(U) |
| April 4, 2024 |
| Supreme Court, Erie County |
| Docket Number: Index No. 812213/2022 |
| Judge: John J. DelMonte |
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At a Special Term of the Supreme
Court held in and for the County of Erie,
State of New York, located at Part 36,
Buffalo, NY, on the 4th day of April. 2024

**PRESENT: HON. JOHN J. DELMONTE, J.S.C.**
**Justice Presiding**

STATE OF NEW YORK
SUPREME COURT: : COUNTY OF ERIE

MERCHANTS INSURANCE GROUP
A/S/O JIM'S STEAK OUT, INC.

Plaintiff

Index: 812213/2022

-vs-

**DECISION AND ORDER**

LAKESHA J. BROWN and
WILLIAM MATTHEWS, JR.

Defendants

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**DECISION**

The Court has read and considered the following papers on plaintiff's motion to be granted a default judgment:

Notice of Motion dated January 18, 2024, and filed on January 25, 2024 (Doc. No. 4); Attorney Affirmation dated January 18, 2024 (Doc. No. 5) and exhibits in support of the motion (Doc. Nos. 6-12, [including plaintiff's representative affidavit sworn to on September 14, 2023, Doc. No. 9]); Attorney Affirmation In Support (*nee* Supplemental) dated March 25, 2024.

This is a subrogation cause of action whereby plaintiff subrogee, Merchants Insurance Group (hereinafter "Merchants"), is seeking reimbursement from defendants as a result of dual motor vehicle crashes caused by defendant Matthews' "careless, negligent and reckless" operation of defendant Brown's vehicle that resulted in property damage to subrogor's two vehicles that were parked on Bidwell Parkway in Buffalo, New York on May 13, 2022. Plaintiff claims that the total property damage for the two vehicles was $26,562.28.

Merchants served both defendants with the summons and complaint by substituted service effective as of November 2, 2022. See Affidavits of Service (Doc. Nos. 2, 3). According to Merchants' supporting papers, neither defendant answered the complaint nor otherwise appeared in the action. (Notice of Default, Doc. No. 8[1]) and the NYSCEF record shows no appearances by or on behalf of either defendant. The time for defendants to answer or otherwise appear expired and both defendants came into default status as of December 2, 2022.

In support of its motion, Merchants submitted affidavits of service, its attorney's affirmation, and an affidavit of facts with accompanying exhibits (police report, photographs, and property damage estimates) from Elizabeth Green, a Merchants property damage claim representative. Ms. Green's affidavit was obtained and sworn to on September 13, 2023.

Plaintiff filed its motion for default on January 25, 2024. Recognizing that the motion was made nearly 14 months after the defendants' default, Merchants offered an excuse that the delay for the filing of its default motion was the result of a law firm employee who worked from home during COVID-19 left his/her employment without returning the physical file to the office. (See Doc. No. 5, Attorney Affirmation, para.9).

**ANALYSIS**

Motions for the entry of a default judgment must be made within one year from the date of the default failing which the court "shall dismiss the complaint as abandoned, without costs,

[1] All of plaintiff's moving papers incorrectly recite the effective date of the completed substituted service on each of the defendants as October 27 and October 29, 2022, respectively. The affidavits of service confirm that substituted service was completed with mailing of the summons and complaint to both defendants on 11/2/2022; the date of default, therefore, is December 2, 2022.

upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." CPLR § 3215 (c).

Merchants filed its motion for default judgment on January 25, 2024, nearly 14 months after the defendants' default. The motion is statutorily untimely, and the complaint is subject to dismissal unless plaintiff can show a reasonable excuse for its late filing to establish "sufficient cause" why the complaint should not be dismissed.

Plaintiff submits that a law firm employee to whom the file was assigned was working from home during COVID-19 restrictions and apparently for some time thereafter. Upon leaving the firm, the employee did not return the file. No dates or other time frames are offered in the affirmation to show the timing of when the subject employee left the firm or how that employee's departure interfered with the firm's continued handling and supervision of the file's status, particularly before and after the execution and delivery of Ms. Green's affidavit on September 14, 2023, which was made in support of the default application (nearly three months prior to the one year mark of the date of default). Significantly, the facts contained in Ms. Green's affidavit, along with its accompanying documentary exhibits submitted in support of the motion, clearly demonstrate the lack of any need for whatever other documents may have been contained in the physical file that the former employee had in its possession…all the papers needed to support the default motion were in hand and included as exhibits at the time Ms. Green's affidavit was signed on September 14, 2023.

On the record produced and submitted in support of the default motion, this Court finds the above circumstances offered by the plaintiff to explain the delay in making the motion before the expiration of one year after the default, to be unpersuasive and fails to rise to the level of "sufficient cause" to excuse the late filing of the default motion. In Port Authority v. Malave, 76

Misc.3d 1230(A) (Sup. Ct. N.Y. Co. 2022) the trial court held, "[p]laintiff's explanation offered on this motion for overlooking the untimeliness of its default-judgment motion is unpersuasive. Plaintiff does not provide any details or specifics about why it was unable to move for default judgment in 2021, within the one-year CPLR 3215 (c) period, beyond the vague implication that working remotely due to COVID-19 excusably impaired plaintiff's counsel's capacity to file motions as counsel normally would. That is not enough. (*See Katz v Mangel*, 173 AD3d 989, 990 [2d Dept 2019] ["Plaintiff's conclusory and unsubstantiated assertions failed to establish a reasonable excuse for [its] delay in seeking a default judgment."].)" See also Brooklyn Union Gas Company v. Class C Maintenance, Inc., 76 Misc.3d 830 (Civ. Ct., Richmond Co. 2022) on lack of COVID-19 related law firm inadequacies as satisfying the "sufficient cause" grounds under CPLR § 3215 (c). *Cf. generally,* Zenzillo v. Underwriters at Lloyd's London, 78 A.D.3d 1540 (4th Dept. 2010).[2]

By reason of the foregoing, it is hereby **ORDERED** that Plaintiff's Motion for Default Judgment is DENIED and the Complaint is DISMISSED pursuant to CPLR § 3215 (c).

GRANTED: April 4, 2024.

JOHN J. DELMONTE, J.S.C.

[2] Though related to the filing of a late notice of claim under GML 50-e the Court of Appeals recently held that excuses "offered only in conclusory and perfunctory fashion," (including the COVID-19 pandemic), are insufficient to obviate the failure to meet statutory filing deadlines. Matter of Jaime v. City of New York, ___N.Y.3d___ (decided 3/21/2024).