

**Lowy v Dailey**

2025 NY Slip Op 33497(U)

September 16, 2025

Supreme Court, New York County

Docket Number: Index No. 654612/2022

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

*Justice*

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ALLEN LOWY

Plaintiff,

- v -

RALPH DAILEY,

Defendant.

-----X

INDEX NO. 654612/2022

MOTION DATE 07/19/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 17, 18, 19, 20, 23, 24, 25, 26

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

Upon the foregoing documents, it is

Plaintiff, Allen Lowy, commenced the underlying action via summons with notice to recover amounts allegedly owed by defendant, Ralph Dailey, based on claims of: (1) breach of contract; (2) fraud; (3) misrepresentation; (4) unjust enrichment; (5) tortious interference with a contract; (6) breach of fiduciary duties of care, good faith and loyalty; and (6) conversion, evidenced by, among other things, documents and witnesses, and seeking compensatory damages in the amount of \$1.5 million.

In Motion Sequence 001, filed on or around March 9, 2023, plaintiff sought entry of a default judgment against Dailey, pursuant to CPLR § 3215. In the Decision and Order, issued by the Hon. Lucy Billings of this Court and dated June 9, 2023, the plaintiff's motion was denied without prejudice to a future timely motion for similar relief due to the plaintiff's failure to comply with additional notice requirements under CPLR § 3215(g), failure to file an affidavit regarding the defendant's non-military service, and finding the plaintiff "utterly fail[ed]" to provide any proof of the facts constituting the claims (NYSCEF Doc. No. 8).

Now, in Motion Sequence 002, Lowy again moves for an order, pursuant to CPLR § 3215, seeking entry of a default judgment against the defendant Dailey. Defendant has cross-moved for an order, pursuant to CPLR §§ 3012(b) and 3215(c), dismissing the action as abandoned or in the alternative, pursuant to CPLR § 3012(d), compelling acceptance of the notice of appearance and demand for complaint. For the reasons set forth below, the defendant's cross-motion is granted, the plaintiff's motion for a default judgment is denied, and the action is hereby dismissed in its entirety.

Discussion:

Plaintiff commenced the underlying action by filing of a summons with notice on or around December 1, 2022 (NYSCEF Doc. No. 1), and, in accordance with CPLR § 308(1), served the summons with notice for this action on the defendant on or around December 14, 2022 (NYSCEF Doc. No. 2). Accordingly, under CPLR § 320(a), defendant was therefore required to appear in the action and/or demand a complaint within twenty days of the date of service, on or around January 3, 2023, but failed to do so. As plaintiff is statutorily required to move for entry of a default judgment within the one-year period following this default, here, the plaintiff's application should have been filed on or before January 3, 2024.

The plaintiff's first motion for a default judgment, filed March 9, 2023, was timely filed within the relevant time-period. Further, following the Court's denial of this motion on June 9, 2023, the plaintiff should have, and could have, timely filed an additional application based on the default. However, the present application, the plaintiff's second motion for a default judgment, was not filed until July 19, 2024, well outside the statutory period.

As set forth under CPLR § 3215(c), "[i]f 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 language of CPLR § 3215(c) requiring dismissal is not discretionary but mandatory, with the statute excepting cases where sufficient cause has been shown (*Deutsche Bank Natl. Tr. Co. v Cruz*, 173 AD3d 610, 610 [1st Dept 2019]). To establish sufficient cause, the plaintiff is required to set forth both a reasonable excuse for the delay and demonstrate that it has a meritorious cause of action (*Selective Auto Ins. Co. of New Jersey v Nesbitt*, 161 AD3d 560 [1st Dept 2018]; *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]). The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court (*Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 752 [2d Dept 2014]).

The plaintiff’s present motion was filed approximately thirteen-months after the denial of the first motion without prejudice and six-months after the expiration of the statutory time-period. Thus, the plaintiff is required to set forth both a reasonable excuse for the delay and demonstrate a meritorious cause of action. In support of the motion and in opposition to the motion to dismiss, the plaintiff alleges in his affirmation that “[p]laintiff has been dealing with a major medical situation involving [p]laintiff’s immediate family member which has included several major surgeries, including several during the last two months alone. Plaintiff has and continues to be the sole caregiver in this matter” (NYSCEF Doc. No. 19).

However, while the Court is sympathetic to the above, this “proffered explanation for the delay in moving for a default judgment, namely health problems, did not constitute a reasonable excuse since those health problems occurred outside the one-year period in which plaintiff had to move” (*Brown v Andreoli*, 81 AD3d 498 [1st Dept 2011], relying on *Mattera v Capric*, 54 AD3d 827, 828 [2d Dept 2008] [health issues was legally insufficient where it occurred after the one-

year statutory time period had expired and the purported excuse was vague, conclusory, and unsubstantiated]). Additionally, although the plaintiff is an attorney licensed to practice in New York, he is represented by counsel in this action and there is no explanation or excuse offered relating to plaintiff's counsel. Therefore, although there were some steps taken within a year from the default showing an initial of intent to abandon the claim, plaintiff has not offered anything which adequately addresses or accounts for the plaintiff's and/or his counsel's period of inactivity that followed this time (*Cabral v Mueses*, 234 AD3d 475, 476 [1st Dept 2025]; *c.f. U.S. Bank N.A. as Tr. for Greenpoint Mtge. Funding Tr. Mtge. Pass-Through Certificates, Series 2007-AR1 v Nunez*, 190 AD3d 660, 661 [1st Dept 2021]). Thus, as "the plaintiff failed to proffer a reasonable excuse, this Court need not consider whether it had a potentially meritorious cause of action" (*U.S. Bank, Nat. Ass'n v Dorvelus*, 140 AD3d 850, 852 [2d Dept 2016]).

Accordingly, it is hereby

ORDERED that the motion by plaintiff, Allen Lowy, for entry of a default judgment is DENIED in its entirety; and it is further

ORDERED that the cross-motion by defendant, Ralph Dailey, is GRANTED to the extent that the above-entitled action may be dismissed as abandoned under CPLR § 3215(c); and it is further

ORDERED that the above-entitled action is dismissed, in its entirety, without costs and disbursements to either side and the action may be disposed; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of its entry.

This constitutes the decision and order of the court.

  
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9/16/2025  
DATE

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NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE