SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES **PART** 39M

Justice

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ROBERT KREMER,

Plaintiff,

- v -

BPS US INC., et. al.,

Defendants.

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INDEX NO. 161835/2024

MOTION DATE 06/16/2025, 07/25/2025

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 61, 62, 63

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 64, 65, 66, 67

were read on this motion to/for LEAVE TO FILE.

Motion Sequence Numbers 001 and 002 are consolidated for disposition.

Plaintiff Robert Kremer ("plaintiff") commenced this action against defendants BPS US Inc. ("BPS") and 1900 Acquisition LLC. ("1900 Acquisition") (together "defendants"), alleging that he was lawfully on BPS premises when he tripped and fell, sustaining injuries.

Because 1900 Acquisition answered, plaintiff moves for a default judgment pursuant to CPLR 3215 against BPS only (Motion Sequence Number 001), while BPS moves to compel plaintiff's acceptance of BPS's previously filed answer and/or for leave to file a late answer pursuant to CPLR 3012 (d) and/or CPLR 204 (Motion Sequence Number 002).

For the reasons stated below, plaintiff's motion is denied, and BPS's motion is granted.

BACKGROUND FACTS AND PROCEDURAL HISTORY

A. The Incident

Plaintiff affirms that on November 2, 2024[1], he was lawfully on BPS's premises, located on 1900 Shore Parkway, Brooklyn, NY ("premises"), when he tripped and fell on "a defective door threshold" (NYSCEF Doc No. 15, plaintiff's affirmation, ¶¶ 5-6). Plaintiff further affirms that he suffered serious and permanent injuries because of the fall (*id.*, ¶ 7). Consequently, plaintiff filed the current lawsuit on December 16, 2024.

BPS is a domestic corporation in New York state, and it is in the business of wholesale lumber materials (NYSCEF Doc No. 38, Mike Zhao affidavit, ¶¶ 3, 10). Mike Zhao ("Zhao) attests that BPS is *not* the owner of the premises, which is located at 1900 Shore Parkway, Brooklyn, NY 11214, and that he is the president of BPS (*id.*, ¶ 11; NYSCEF Doc No. 40, Zhao affidavit, exhibit b). Zhao explains that co-defendant Acquisition LLC is the actual owner of the premises, who leased it to Shore Development Holding Upland LLC ("Shore Development") (NYSCEF Doc No. 38, ¶ 11). Shore Development then entered into an agreement with iHome Building Supply Inc. ("iHome"), licensing a portion of the premises to iHome for storing building materials and supplies (*id.*, ¶ 12). Zhao further attests that he is the principal of iHome (*id.*, ¶ 12).

Zhao's affidavit attaches the actual agreement between Shore Development and iHome, which was to be in effect from June 15, 2023, to June 14, 2025, and it states in pertinent part that Shore Development would license a portion of the premises to iHome for use as storage of *building materials and supplies only* (NYSCEF Doc No. 39, Zhao affidavit, exhibit a [emphasis added]).

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[1] Although plaintiff's affidavit of merit indicates that the incident occurred on "April 2, 2024," plaintiff's complaint alleges that the incident occurred on November 2, 2024 (*see* NYSCEF Doc No. 17). BPS points out to this date discrepancy in their papers, and plaintiff's attorney argues that this is a clerical error (*see* NYSCEF Doc No. 61). BPS also appears to cite to the November 2, 2024 date as the date of plaintiff's alleged slip and fall in Zhao's affidavit. The court thus will disregard this error, as there is no indication that a right of any party is prejudiced by the mistake (*see* CPLR 2001).

The agreement further provides that Shore Development was to erect a fence around the premises, and iHome was to keep the licensed premises in good order and free from any trash or debris (*id.*). The agreement was intended to be a license for use, rather than a lease, and it was "not intended to create a landlord-tenant relationship between the parties" (*id.*). The agreement further specifies, that iHome may assign the agreement to any entity with which it has a common ownership with iHome (*id.*).

Zhao further attests that iHome then sublicensed the premises to BPS to use as storage of wholesale lumber/building materials (NYSCEF Doc No. 38, ¶ 12). Zhao emphasizes that BPS does not operate a store or mercantile establishment on the premises, nor does it sell goods or merchandise to the public on the premises (*id.*, ¶ 13). According to Zhao, the premises is used solely for storage of BPS's wholesale materials (*id.*).

To further show that the premises was used as storage, Zhao points to a sign on the fence of the premises stating: "Private Property; Not Open to Public; Do Not Enter" (NYSCEF Doc No. 40). He attests that this sign was posted on November 2, 2024, the same date of plaintiff's alleged injury (NYSCEF Doc No. 38, ¶ 13). He further affirms that at no time was he made aware of any defective or dangerous condition on the premises, as alleged by the plaintiff (*id.*, ¶ 15). According to Zhao, the premises were maintained, and lighting was adequate (*id.*).

Per Zhao, BPS was not personally served with the summons and complaint in this action (*id.*, ¶ 4). Zhao explains that BPS first became aware of the case in January of 2025, when his wife received a call from Atlantic Casualty Insurance Company, informing her that the landlord of the premises filed an insurance claim regarding a trip and fall on the premises (*id.*, ¶ 4). BPS received the actual summons and complaint by mail on January 7, 2025 (*id.*, ¶ 5). Zhao attests that BPS immediately sent copies of the summons and complaint to the insurance broker and its prior

attorney and it sought legal advice requesting that the attorney contact plaintiff's attorney (*id.*). Zhao believed that BPS's prior attorney was taking the necessary steps with respect to the summons and complaint (*id.*). Zhao attests that at no point did BPS willfully default in the action and Zhao believed that BPS was taking the necessary action by contacting the insurance broker and its attorney (*id.*). The moment Zhao was made aware that the insurance may not be available to BPS and that the prior attorney did not take any action, BPS retained the current attorney (*id.*, ¶ 6).

B. Procedural Posture

Plaintiff filed his summons and complaint and his affirmations of service on December 16, 2024. 1900 Acquisition filed its answer on March 3, 2025. Plaintiff then requested a preliminary conference on March 5, 2025, which has not yet been held.

On May 22, 2025, plaintiff filed a motion for a default judgment against BPS. On June 24, 2025, BPS filed its verified answer and its crossclaims. The court ordered a motion schedule for plaintiff's motion for a default judgment. BPS also filed a motion pursuant to CPLR 3012(d) and/or CPLR 2004 for a leave to appear and file a late answer and/or to compel plaintiff's acceptance of BPS's answer previously filed on June 24, 2025.

DISCUSSION

A. Plaintiff's Motion for a Default Judgment

In its motion, plaintiff moves for a default judgment, for setting the matter down for inquest and for assessment of damages. Specifically, plaintiff argues that BPS's default should not be excused, that Zhao's affidavit of merit is unsubstantiated, and that BPS does not show a meritorious defense in suggesting that the plaintiff was trespassing or that BPS did not have notice of the alleged dangerous condition. In opposition BPS argues that there was a reasonable excuse

for BPS's default because BPS's delay was not lengthy, the default was not willful and its delay in answering did not prejudice the plaintiff. BPS further argues that it has a potentially meritorious defense to plaintiff's Labor Law §376 claim because BPS does not operate a mercantile establishment on the premises. According to BPS, the premises is a private property and there was no known defect or dangerous condition on the premises. BPS also points to the strong public policy in favor of resolving cases on the merits as another reason why the court should deny plaintiff's motion for a default judgment.

To obtain a default judgment, the movant is required to submit proof of (1) service of process of the summons and complaint, (2) proof of the facts constituting the claim, and (3) the non-moving party's default (CPLR 3215; *see also Bigio v Gooding*, 213 AD3d 480, 481 [1st Dept 2023] ["A party seeking a default judgment must submit proof of service of the summons and the complaint and 'proof of the facts constituting the claim, the default and the amount due"']). While the standard of proof required is not stringent, "amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]), "[t]o demonstrate 'facts constituting the claim,' the movant need only proffer proof sufficient 'to enable a court to determine that a viable cause of action exists'" (*Bigio*, 213 AD3d at 481[citations omitted]; *see also Petty v Law Off. of Robert P. Santoriella*, P.C., 200 AD3d 621 [1st Dept 2021] ["[T]he standard of proof is 'minimal,' 'not stringent'"] [citations omitted]). "The movant may [meet this standard of proof] . . . by submission of an affidavit of merit or by verified complaint, if one has been properly served" (*Bigio*, 213 AD3d at 481; *see also* CPLR 3215[f], which governs the proof that must be submitted in an application for a default judgment).

Here, plaintiff provided proof of service of the summons and complaint on BPS. The proof of service of the summons and complaint can be shown through "an affidavit of service by a

process server with direct knowledge of the service" (Mark C. Dillon, Prac Commentaries, McKinney's Cons Laws of NY, C3215:21), and such affidavit of service "constitutes prima facie evidence of proper service" (*HSBC Bank USA, N.A. v Gifford*, 224 AD3d 447, 450 [1st Dept 2024]). With an affidavit of service sworn on December 27, 2024, plaintiff demonstrates that it served BPS with process by delivering a notice of electronic filing and two copies of summons and complaint to the secretary of state (NYSCEF Doc No. 18, Jaroslawicz affirmation, exhibit b, affirmation of service). "Service of process was complete when plaintiff served the Secretary of State" (*Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020], citing Business Corporation Law §306 [b] [1]).

Plaintiff also met the CPLR 3215 (g) (4) requirement through an affirmation stating that an additional copy of the summons and complaint was served on BPS on March 31, 2025, via first-class mail and certified mail (NYSCEF Doc No. 16, Ribeiro affirmation). On April 3, 2025, the certified mail was marked delivered and the first-class mailing was *not* returned as undelivered by the post office (NYSCEF Doc No. 14, ¶¶12-13 [emphasis added]; *see* NYSCEF Doc No. 21, Jaroslawicz affirmation, exhibit e, USPS tracking). On May 22, 2025, plaintiff also mailed a notice of the default motion to BPS with the annexed supporting documents (NYSCEF Doc No. 22, Ribeiro's affirmation of service).

Plaintiff established BPS's default through its attorney's affirmation stating that BPS failed to timely appear or answer the complaint and that the time for BPS to answer or otherwise appear in this action has expired (NYSCEF Doc No. 14, ¶ 15). Additionally, the case docket further supports BPS's default because it shows that it did not appear or answer the complaint until after plaintiff filed the current motion for a default judgment.

Plaintiff's affidavit sufficiently provides proof of the facts constituting the claim of negligence against BPS. To prevail on a negligence claim, a plaintiff must show "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981] [citations omitted]; *see also CB by Suarez v Howard Sec.*, 158 AD3d 157, 164 [1st Dept 2018]). "To impose liability upon a defendant for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Winder v Executive Cleaning Servs., LLC*, 91 AD3d 865, 865 [2d Dept 2012]). "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]; *see also Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]). Here, plaintiff attests that BPS operated a lumber yard and a building supplies business on the premises, that he was lawfully on the premises on the day of the incident, that he slipped and fell on a defective door threshold and that he suffered serious injuries as a result (*see Rosenstein v Permanent Mission of the Republic of Sierra Leone to the United Nations*, 217 AD3d 553, 554 [1st Dept 2023] [the court held that plaintiff's allegations "that on a particular date, she slipped and fell on an 'unsafe, dangerous, hazardous' condition on the sidewalk in front of premises owned by the Sierra Leone defendants, and that she sustained serious injuries as a result" were sufficient for a default judgment]; *see also Bigio*, 213 AD3d 480).

Plaintiff, however, fails to sufficiently provide proof of the facts constituting the claim of a violation of Labor Law § 376 against BPS. "Labor Law § 376 addresses the safe conditions of

mercantile establishments" (*Brown v Garda CL Atl., Inc.*, 2016 WL 11715639, *1, [Sup Ct, Bronx County 2016], affd, 150 AD3d 542 [1st Dept 2017]). The statute states in pertinent part:

> "Every mercantile establishment . . . shall be construed, equipped and maintained as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein and frequenting the same"

(Labor Law § 376). The statute further provides: "[e]very room in a mercantile establishment or restaurant and every part thereof and all fixtures therein shall at all times be kept sanitary . . . [and that] [f]loors shall be kept in safe condition" (*id.*). A mercantile establishment is defined as "a place where one or more persons are employed in which goods, wares or merchandise are offered for sale and includes a building, shed or structure, or any part thereof, occupied in connection with such establishment" (Labor Law § 2[11]). The Merriam-Webster's Dictionary defines the word "frequent" to "associate with, be in, or resort to *often or habitually*" (https://www.merriam-webster.com/dictionary/frequent [last accessed Nov. 17, 2025] [emphasis added]).

The court in *Mahoney v. Whole Foods Market Group, Inc.*, 2025 WL 2772949, *6-7, (ED NY 2025, Sept. 26, 2025, No. 21CV4127 [MKB]), found that Labor Law § 376 does not expressly provide for a private right of action. To determine whether the legislative intent favored an implied private cause of action, the court used the three-prong test set out by the New York Court of Appeals in *Ortiz v. Ciox Health LLC*, 37 NY3d 353, 359-360 (2021). In *Ortiz v. Ciox Health LLC*, the three prong test is: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether the recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Ortiz*, 37 NY3d at 360, [citations omitted]). "[A]ll three factors must be satisfied before an implied private right of action will be recognized" (*id.*).

Applying the law to the facts at hand, plaintiff's affidavit does not satisfy the first factor set out in *Ortiz*, because while his affirmation states that the premises is a mercantile establishment because BPS uses the premises as a "supplies business," (NYSCEF Doc No. 15, ¶ 5), plaintiff fails to show that he is of a class for whose particular benefit the statute was enacted: he does not attest that he *frequented* the premises or explain why he was there (emphasis added). For the foregoing reasons, plaintiff fails to provide sufficient proof of the facts constituting his claim of Labor Law § 376.

"[T]o avoid entry of a default judgment upon a failure to appear or answer, [BPS] is required to demonstrate both a justifiable excuse for the default and a meritorious defense" (*Young v Richards*, 26 AD3d 249, 250 [1st Dept 2006] [citations omitted]). "What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court" (*Xiaoyong Zhang v Jong*, 195 AD3d 435, 435 [1st Dept 2021]; *see also Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]). Factors to consider in determining if there is a reasonable excuse for a party's default are: "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" (*Omansky v Tribeca Citizen LLC*, 2022 WL 3647133, 2022 N.Y. Slip Op. 32883[U], *4 [Sup Ct, NY County 2022]; *see also Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 414 [1st Dept 2011]).

Here, BPS has proffered a reasonable excuse for the delay and the circumstances in this case do not warrant a "deviation from New York's strong public policy in favor of litigating matters on the merits" (*Silverio v City of New York*, 266 AD2d 129 [1st Dept 1999]). The case record shows that BPS was served on December 27, 2024, and thus had until January 26, 2024 to appear or answer the complaint (*see American Transit Ins. Co. v. Surgicare Surgical Assoc. of Jersey*

City, 2021 NY Misc LEXIS 48171, *3 [Sup Ct, NY County 2021] ['[a]n appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state 'authorized to receive service in his behalf.. the appearance shall be made within thirty days after service is complete'"]). Zhao averred, however, that BPS did not receive the summons and complaint until January 7, 2025, and that he believed that BPS's prior attorney and insurance broker were taking the necessary steps with respect to the summons and complaint he forwarded. BPS did not file its answer until June 24, 2024, which is approximately five months after BPS's answer was due. Some courts in this jurisdiction have excused defaults delayed in months (*see New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 - 466 [1st Dept 2012] [the court excused a party's approximately five-months delay in failing to answer; *Hertz Vehs., LLC v Mollo*, 171 A.D.3d 651, 651 [the court excused a three-month delay in submitting an answer]; American Transit Ins. Co., 2021 NY Misc LEXIS 48171, *4 [the court found that a two-month delay was brief]).

There is also no evidence that BPS's "failure in answering the complaint was willful, or that plaintiff was prejudiced by the delay" (*Romero v Alezeb Deli Grocery Inc.*, 115 AD3d 496 [1st Dept 2014]). The docket shows that a preliminary conference has not yet been held in the case.

Finally, BPS sufficiently demonstrated potentially meritorious defenses to plaintiff's claims. BPS provided an affidavit from Zhao attesting that BPS only uses the property for storage (NYSCEF Doc No. 38, ¶ 13). Zhao's affirmation is further supported by the agreement between Shore Development and iHome, which states in pertinent part that Shore Development will license a portion of the premises for use as storage of building materials and supplies only (NYSCEF Doc No. 39). BPS thus has a potential meritorious defense on plaintiff's Labor Law § 376 claim by attesting that the premises is not a mercantile establishment. BPS has demonstrated a potential

meritorious defense for plaintiff's negligence claim as well. Zhao attests that BPS is not the owner of the premises, that the premises is private, and that BPS did not have notice that a dangerous condition existed on the premises (NYSCEF Doc No. 38, ¶ 15).

For all these reasons, plaintiff's motion for a default judgment against BPS is denied.

B. BPS's Motion

BPS makes the same arguments in its motion for a leave to file a late answer and/or to compel plaintiff to accept its untimely answer, pursuant to CPLR 3012 (d) and/or CPLR 204, as it did in opposition to plaintiff's motion *supra*. Plaintiff also makes the same arguments in opposition as it did above.

Pursuant to CPLR 2004:

> "Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."

(CPLR 2004). 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"

(CPLR 3012 [d]).“The First Department has outlined five factors that 'must . . . be considered and balanced' when considering a motion under CPLR 3012 (d) for an extension of time to appear or plead, including (1) length of the delay, (2) the excuse offered, (3) the extent to which the delay was willful, (4) the possibility of prejudice to adverse parties, and (5) the potential merits of any defense” (Liberty Mut. Ins. Co. v Cooper, 2020 NY Misc LEXIS 2641, *3-4 [Sup Ct, NY County 2020 [citations omitted]).

Because the court has already determined *supra* that BPS's default was excusable and that it has shown a potential meritorious defense to plaintiff's claims, an extension of time and/or

compelling acceptance of BPS's answer is warranted under the circumstances. The court thus grants BPS's motion for extension of time to file an answer and/or to compel plaintiff's acceptance of BPS's previously filed untimely answer.

CONCLUSION and ORDER

Accordingly, it is hereby,

ORDERED that plaintiff Robert Kremer's motion for a default judgment against BPS US Inc. (Motion Sequence Number 001) is denied; and it is further

ORDERED that defendant BPS US Inc.'s motion to leave to file a late answer and/or to compel plaintiff Robert Kramer to accept its previously filed untimely answer (Motion Sequence Number 002) is granted; and it is further

ORDERED that plaintiff is directed to accept defendant BPS US Inc.'s previously filed answer.

This constitutes the Decision and Order of the court.

11/18/2025
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE