SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

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MORTON VILLAGE REALTY CO., INC.,

Plaintiff(s),

-against-

PLAINVIEW HARDWARE INC., ATEK HARDWARE INC, BRUCE CARLOW, FRANCESCA CARLOW, TODD KIRSCHNER and RITSA KIRSCHNER,

Defendant(s).

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TRIAL/IAS, PART 21
NASSAU COUNTY

Index No. 616328/18

Motion Seq. No.: 001
Motion Submitted: 6/21/19

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Memorandum of Law.....X

Plaintiff, Morton Village Realty Co., Inc. (Morton), moves this court for an order, pursuant to CPLR §3215, granting it leave file a default judgment against Defendants, Plainview Hardware, Inc. (Plaintiview) and Atek Hardware Inc. (Atek). Atek opposes the motion. Plainview does not oppose the motion. Defendants, Bruce Carlow (Bruce), Francesca Carlow (Francesa), Todd Kirschner (Todd) and Ritsa Kirschner (Ritsa)

(collectively "the Individual Defendants") do not submit papers in support of, or opposition to the motion.

Morton commenced this action for, *inter alia*, breach of contract, by service of a summons and complaint dated December 5, 2018. Issued was joined by service of separate answers by Bruce and Francesca, proceeding *pro se*, each dated January 22, 2019. Todd and Ritsa interposed separate answers, also proceeding *pro se*, dated February 6, 2019. Plainview and Atek never answered. Morton now moves for leave to file a default judgment against Plainview and Atek.

According to CPLR § 3215 a motion for default judgment can be made once a defendant has failed to appear.

CPLR 3215(f) holds:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney.

Once a plaintiff submits proof of service and an affidavit constituting the merits of his claim, the application for a default judgment must be granted (*see Pampalone v. Giant Building Maintenance, Inc.*, 17 AD3d 556 [2d Dept. 2005]; *Andrade v. Ranginwala*, 297

AD2d 691 [2d Dept. 2002]). Moreover, once the requisite showing has been made and the requisite proof proffered, said motion shall be granted unless the defendant can establish that it has a meritorious defense to the claims made, a reasonable excuse for the delay in interposing its answer, and that the delay in interposing an answer has in no way prejudiced the plaintiffs in the prosecution of their case (*see Buywise Holding, LLC v. Harris*, 31 AD3d 681 [2d Dept. 2006]; *Giovanelli v.Rivera*, 23 AD3d 616 [2d Dept. 2005]; *Mjandi v. Maguire*, 21 AD3d 1067 [2d Dept. 2005]; *Thompson v. Steuben Realty Corp.*, 18 AD3d 864 [2d Dept. 2005]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (*see* CPLR §5015 [a] [1]; *O'Shea v. Bittrolff*, 302 AD2d 439 [2d Dept. 2003]; *Matter of Gambardella v. Orlov Light*, 278 AD2d 494 [2d Dept. 2000]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*see Gambardella v. Ortov Light*, 278 AD2d 494 [2000], *supra*).

Herein, Morton has submitted affidavits of service indicating that both Plainview and Atek were served through service upon the Secretary of State. Further, Morton submits the complaint, verified by its President, as its affidavit of merits substantiating its claims.

The motion will be granted against Plainview as there is no opposition. As for

Atek, Ritsa submits an affidavit stating she is Atek's sole shareholder. She does not deny Atek was served, and claims she attempted to submit an answer *pro se*, but did not know a corporation must be represented by an attorney. She offers as proof an email from the e-file site rejecting her attempt to open an e-file account on behalf of Atek. She took no further action thereafter, believing she could wait until the preliminary conference to ask what she needed to do. Also, was very busy at work, the implication being she did not have the time to spend on addressing the need for Atek to answer. However, once she was served with the within motion, she was able to retain an attorney soon thereafter to represent Atek.

In *Seidler v. Knopf*, 153 AD3d 874 (2d Dept 2017), a case cited by Morton, the defendant used a similar excuse. The *pro se* defendant's "unsuccessful attempt" to appear on behalf of the corporation did not constitute a reasonable excuse for failing to timely appear. *Id.* at 875. In *Pisciotta v. Lifestyle Designs, Inc.*, 62 AD3d 350 (2d Dept 2009), a case cited by *Seidler*, the court found that the medical condition of the sole shareholder of a corporation did not justify the corporation's failure to oppose a motion.

Herein, the court notes that even if Ritsa was successful in opening up the account and had filed an answer on behalf of Atek on the date she attempted to do so, it still would have been late. Further, it is clear, by her having timely filed her individual answer, and attempting to file Atek's answer, that she knew an answer was required and that time was of the essence. However, she still decided to wait until being served with

the within motion before taking any further action. The court finds that Atek's excuse is akin to the one used in *Seidler*, *supra*, and therefore is not reasonable under the circumstances. Nor is being busy at work a reasonable excuse for taking no further action. Lacking a reasonable excuse, the court need not consider whether there is a meritorious defense. *Seidler v. Knopf, supra.*

Accordingly, it is hereby

ORDERED, that Morton's motion to enter judgment against Plainview in the amount of $36,890.98 plus interest on the First Cause of Action is GRANTED in its entirety; and it is further

ORDERED, Morton's motion for an inquest on the Second Cause of Action to determine the amount of reasonable counsel fees Plainview must pay to Morton under the terms of the contract is GRANTED. That proceeding is severed, and an inquest will be ordered; and it is further

ORDERED, that Morton's motion for judgment on liability against Plainview and Atek on the Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action is GRANTED. The issue of damages on those causes of action will be referred to the trial court, and will be heard at the time the trial for the individual defendants occurs or when those matters are otherwise resolved; and it is further

ORDERED, that Morton's motion to enter judgment against Atek on the Ninth Cause of Action is GRANTED to the extent that Morton is granted judgment on liability.

The issue of damages and counsel fees on that cause of action will be referred to the trial court, and will be heard at the time the trial for the individual defendants occurs or when those matters are otherwise resolved; and it is further

ORDERED, that the inquest on the Second Cause of Action is referred to the Calendar Control Part (CCP) to be held October 1, 2019 at 9:30 a.m. Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within thirty days of the date of this orde.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the rights giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

This constitutes the Decision and Order of the Court.

Settle judgment on notice.

Dated: August 15, 2019
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.