Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

JARDIN DE CHINA RESTAURANT, INC.

Plaintiff,

-against-

FABCO ENTERPRISES, INC. d/b/a FABCO SHOES

Defendants.

Index No: 402/11

Motion Date: 6/8/11

Motion Cal. No.: 13

Motion Seq. No.: 1

The following papers numbered 1 to 15 read on this motion by plaintiff for leave to enter a default judgment and proceed to inquest for an assessment of damages; and cross-motion by defendant dismissing the complaint pursuant to CPLR 3211(a), or in the alternative granting leave to appear and defend on the merits.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits	5 - 9
Answering Affidavits-Exhibits.....	10 - 12
Replying Affidavits.....	13 - 15

Upon the foregoing papers it is ordered that this motion for leave to enter a default judgment is granted. The defendant's cross-motion is denied.

An inquest and trial on damages shall be held on November 9, 2011 at 11:00 a.m. in Part 2, courtroom 46 of the Courthouse located at 88-11 Sutphin Blvd., Jamaica, N.Y. Plaintiff shall file a Note of Issue no later than 20 days prior to the date set herein for the inquest.

A copy of the order with notice of entry and a copy of the Note of Issue shall be served on the defendant and its attorney by regular mail at least twenty (20) days prior to the scheduled inquest date.

The plaintiff, the tenant and operator of a restaurant at 37-37 Junction Blvd. in Queens County, commenced this action to recover for damages caused by the defendant's negligence in the preparation of its application for a renovation work permit with the Department of Buildings. Plaintiff claims that the application erroneously designated the plaintiff's premises, 37-37 Junction Blvd., as part of the premises where the work was to be performed. The renovation was planned for the premises known as 37-41,43,45 Junction Blvd. which is adjacent to plaintiff's premises. As a result of the renovation work arising under the erroneous permit, a Violation and Stop Work Order was issued on September 3, 2002 which affected the premises being renovated and the plaintiff's premises. Plaintiff maintains that the defendant has failed to remove the violation improperly applied to its premises. As a result of the existing violation, plaintiff claims The Building Department has denied it a work permit to perform the planned improvements and renovation of its premises.

The plaintiff commenced this action against the defendant FABCO Enterprises, Inc. d/b/a FABCO Shoes by filing the summons and complaint on January 6, 2011 and serving the defendant pursuant to Business Corporation Law § 306 by delivering two copies of the summons and complaint to the Secretary of State on January 18, 2011. The defendant failed to interpose an answer or otherwise appear, and the plaintiff now moves for entry of a default judgment.

The plaintiff has demonstrated its entitlement to a default judgment against the defendant FABCO Enterprises, inc., on the issue of liability. Plaintiff submitted proof of service of the summons and the complaint, an affidavit of the facts constituting her claim of Martin Shiu, plaintiff's president, and its attorney's affirmation regarding defendant's failure to appear or answer the complaint (see CPLR 3215[f]).

Defendant cross moves to dismiss the complaint pursuant to CPLR 3211(a) on the ground that it is not the proper party to the action. As alternative relief, defendant moves for leave to appear and interpose an answer and defend on the merits pursuant to CPLR 3012(d). Defendant also moves for sanctions due to plaintiff's alleged failure and refusal to discontinue the action as against the defendant who defendant claims is the wrong party.

The branch of the motion seeking to dismiss the complaint pursuant to CPLR 3211(a) is denied as untimely. Pursuant to CPLR 3211(c), a motion to dismiss on one or more grounds set forth in

CPLR 3211(a) must be made before service of a responsive pleading is required. The defendant's time to answer has long expired and, thus, this branch of the motion is untimely (see Clinkscale v. Sampson, 74 AD3d 721 [2010]; Wenz v. Smith, 100 AD2d 585 [1984]).

The branch of the defendant's motion seeking an extension of time to interpose an answer pursuant to CPLR 3012(d) is denied.

The showing of reasonable excuse that a defendant must establish to be entitled to serve a late answer pursuant to CPLR 3012(d) is the same as that which a defendant must make to be entitled to the vacatur of a default judgment pursuant to CPLR 5015(a)(1)(see Stephan B. Gleich & Associates v. Gritsipis, ___ AD3d ___, 927 NYS2d 349, 357 [2011]). Thus, to vacate its default in appearing and answering the complaint and avoid entry of a default judgment pursuant to CPLR 5015(a)(1), defendant must demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action (see Garal Wholesalers, Ltd. v. Raven Brands, Inc., 82 AD3d 1041 [2011]; C & H Import & Export, Inc. v. MNA Global, Inc., 79 AD3d 784 [2010]). Defendant has failed to demonstrate either a reasonable excuse or a potentially meritorious defense.

The defendant has failed to submit any reason for its failure to appear and answer the complaint. The only competent evidence in this regard is the affidavit of David Weinman, FABCO Enterprises, Inc.'s president. Weinman does not deny timely receiving the summons and complaint, but merely asserts, upon information and belief and advice of counsel, that the summons and complaint were not served "as required by law". Defendant's conclusory denial is insufficient to rebut the process server's affidavit of service which is prima facie evidence of proper service upon defendant pursuant to BCL §306 (see generally (see Beneficial Homeowner Service Corp. v. Girault, 60 AD3d 984 [2009]; Simmons First Natl. Bank v. Mandracchia, 248 AD2d 375 [1998]) or to raise a triable issue with respect to proper service (see (Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v. Ellner, 57 AD3d 732, 733 [2008]; Genway Corp. v. Elgut, 177 AD2d 467 [1991]; Colon v. Beekman Downtown Hospital, 111 AD2d 844 [1985]).

Insofar as defendant claims lack of personal jurisdiction based upon an alleged defective service of an additional copy of the summons and complaint pursuant to CPLR 3215(g) is also unavailing. The additional mailing of the summons and complaint pursuant to CPLR 3215(g)(4)(i) which requires service of an additional copy of the summons and complaint upon a defaulting corporate defendant before "entry" of a default judgment, does

not affect jurisdiction or prevent granting a default judgment (see Rothschild v. Finkelstein, 248 AD2d 701 [1998]; see, also Fleet Finance v. Nielsen, 234 AD2d 728, 729-730 [1995]; 342 Madison Ave. Associates Ltd. Partnership v. Suzuki Associates, Ltd., 187 Misc.2d 488 [2001]).

The defendant has also failed to demonstrate even an arguably meritorious defense. The gravamen of the defendant's motion is its claim that plaintiff has sued the wrong defendant. In his affidavit Weinman asserts that the defendant is not the tenant nor the operator of the store located at 37-41 Junction Blvd. and that defendant is registered to do business at 52-55 74th Street, Elmhurst, N.Y. not at the store on Junction Blvd. In support of its claim defendant submitted a copy of the lease for the store, the check for the deposit on the lease of 37-41,43,44 Junction Blvd., several printouts from the Department of Buildings regarding renovations at the subject premises and printout of the records from the Department of State showing, among other things the defendant's address for service of process and that David Weinman is the Chairman and CEO of the defendant corporation.

Contrary to defendant's claim, it appears that defendant is the correct party. Defendant's Ex. D, Building Department Job No. 401077115 application approval on 3/13/200 lists at Item #1 Location Information as 37-37 Junction Blvd. and identifies the defendant as "Owner". While it is true that the tenant named on the lease for the premises 37-41-43-45 Junction Blvd. is not the defendant, the lease and personal guarantee are signed by Weinman and the deposit check is drawn on FABCO Enterprises, Inc.'s account and signed by Weinman. While it is apparent that Mr. Weinman owns, controls and/or operates several corporate entities under various names which are separate legal entities that would generally not be liable for the debts or negligence of each other, his claim in the proposed answer that defendant has no connection to the store operated as FABCO Shoes is, at best, less than credible.

In any event, regardless of what corporation may be the tenant or operator of the store, the application for a work permit to perform renovations at the premises presently operated as FABCO Shoes were made by FABCO Enterprises, Inc. and defense counsel has admitted that the request for a permit under Job No. 401077115 was not voided not signed off on nor did the architect file a Letter of Completion with respect to this Job no. The fact that the several premises under different house numbers are part of a single tax lot is irrelevant since the Building Department records identify each house address separately on the work permit

applications.

It is noted that since the defendant was served pursuant to BCL § 306 it could also have moved for relief from its default pursuant to CPLR 317. However, inasmuch as defendant has failed to assert that it did not receive the summons and complaint in time to defend, or demonstrate a potentially meritorious defense, it is not entitled to relief even under CPLR 317 (see Di Lorenzo v. Dutton, supra at 141; Marinoff v. Natty Realty Corp., 17 AD3d 412, 413 [2005]).

Insofar as the defendant's motion for sanctions for plaintiff's refusal to discontinue the action, it is denied.

Dated: September 20, 2011
D# 45

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J.S.C.