NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 04

PART 19

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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CLARKE, CLEMENT

- against -

DAVMAR HOLDINGS, INC., et ano

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Index Nº. **021806/2006**

Hon. **LUCINDO SUAREZ,**

Justice.

The following papers numbered 1 to 7 read on this motion, **VACATE ORDER/JUDGMENT**
Noticed on **April 23, 2012** and duly submitted as No. **2** on the Motion Calendar of **April 23, 2012**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4	
Answering Affidavit and Exhibits	5, 6	
Replying Affidavit and Exhibits	7	
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, defendants' motion to vacate a judgment entered after inquest and to restore the action to the calendar is denied, in accordance with the annexed decision and order.

Dated: **04/25/2012**

Hon. _____
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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CLEMENT CLARKE,

Plaintiff,

- against -

DAVMAR HOLDINGS, INC. and FENTON OWNERS CORP.,

Defendants.

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DECISION AND ORDER

Index No. 21806/2006

PRESENT: Hon. Lucindo Suarez

Upon the order to show cause signed April 6, 2012 and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated April 17, 2012 and the exhibits annexed thereto; defendants' reply affirmation dated April 20, 2012 and the exhibit annexed thereto; and due deliberation; the court finds:

Defendants Davmar Holdings, Inc. and Fenton Owners Corp. move to vacate a judgment in the amount of fifty-seven thousand four hundred thirty-three dollars and seventy-seven cents ($57,433.77) entered against defendants after an inquest held October 7, 2009 and to restore the action to the calendar. Defendants argue they were never informed of the inquest date and they possess a meritorious defense to the action. Plaintiff opposes the application on the grounds that (1) defendants were notified of the inquest; (2) defendants have offered no excuse for the two year delay in making the instant motion and (3) defendants have not demonstrated a meritorious defense to the action. The matter was referred to inquest after defendants failed to appear at a court conference on June 10, 2009.[1] *See* 22 NYCRR § 202.27(b).

[1] Defendants do not address their default in failing to appear for the June 10, 2009 court conference.

Although defendants do not cite any specific provision of the CPLR in support of their application, CPLR 5015(a)(1) permits the court to vacate a judgment for excusable default within one year after service of a copy of the order or judgment with notice of its entry. The motion is timely as plaintiff has not served notice with order of entry upon defendants of the order entered after the inquest or the judgment entered in the Bronx County Clerk's office.

A party seeking relief from a judgment entered on default must proffer both a reasonable excuse for the default and a meritorious defense to the action. *See Crespo v. A.D.A. Mgmt.*, 292 A.D.2d 5, 739 N.Y.S.2d 49 (1st Dep't 2002); *Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 N.Y.2d 138, 492 N.E.2d 116, 501 N.Y.S.2d 8 (1986). The determination whether movant has demonstrated a sufficient excuse rests within the court's sound discretion. *See Carroll v. Nostra Realty Corp.*, 54 A.D.3d 623, 864 N.Y.S.2d 10 (1st Dep't 2008), *appeal dismissed*, 12 N.Y.3d 792, 906 N.E.2d 1072, 879 N.Y.S.2d 38 (2009).

The court finds the proffered excuse for the default insufficient. *See On Kee Foods, Inc. v. 7 Eldridge LLC*, 80 A.D.3d 462, 914 N.Y.S.2d 153 (1st Dep't 2011). Plaintiff in opposition has submitted a copy of the letter mailed September 23, 2009 notifying defendants' counsel of the October 7, 2009 inquest date. The letter was sent via certified mail return receipt requested, and the return receipt was acknowledged and returned to plaintiff. The court declines to consider defendants' reply affirmation since it lacks an affirmation or affidavit of service. *See* CPLR 306(a). Even if the court were to consider defendants' reply, it is insufficient to rebut plaintiff's proof that counsel was notified of the inquest. Defendants do not contest the validity of counsel's address listed on the letter or on the return receipt. Furthermore, counsel's general denial of receipt, along with the statement that the receipt was not signed by someone within her office, is unsupported by any admissible evidence.

Absent a reasonable excuse, the court need not determine whether defendants have asserted a

meritorious defense. *See M. R. v. 2526 Valentine LLC*, 58 A.D.3d 530, 871 N.Y.S.2d 131 (1st Dep't 2009); *Crespo v. A.D.A. Mgmt., supra.*

Accordingly, it is

ORDERED, that the motion of defendants Davmar Holdings, Inc. and Fenton Owners Corp. to vacate the judgment entered against them after inquest and restore the action to the calendar is denied.

This constitutes the decision and order of the court.

Dated: April 25, 2012

Lucindo Suarez, J.S.C.