SHORT FORM ORDER

INDEX NO. 21460-2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-15-11
ADJ. DATE 9-20-11
Mot. Seq. # 001 - MD; 002 - MG

PRELIMINARY CONFERENCE SCHEDULED FOR JUNE 12, 2012, 9:30 a.m.

JOSEPH NAVA, Plaintiff(s), - against - BRUCE KRAMER and ELIZABETH TENKE, Defendant(s).	**O'Brien & O'Brien, LLP** Attorneys for Plaintiff 168 Smithtown Boulevard Nesconset, New York 11767 **Law Office of Deidre Tobin & Associates** Attorneys for Defendant **Tenke** 901 Franklin Avenue Garden City, New York 11530 **Richard T. Lau & Associates** Attorneys for Defendant **Kramer** 300 Jericho Quadrangle East, Suite 260A Jericho, New York 11753-9040

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated August 23, 2011, and supporting papers; (2) Order to Show Cause by the defendant, signed October 17, 2011, and supporting papers; (3) Affirmation in Opposition by the plaintiff, undated, and supporting papers; (4) Reply Affirmation by the defendant **Kramer**, dated November 28, 2011, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (001) by the plaintiff for a default judgment against defendant Bruce Kramer for failure to timely appear or answer is considered under CPLR §3215 and is hereby denied; and it is further

ORDERED that the application by Order to Show Cause (002), dated October 17, 2011, in which the defendant, Bruce Kramer, seeks an order pursuant to CPLR 5015(a) vacating any default and pursuant to CPLR §3012(d) granting an extension of time to answer the plaintiff's summons and complaint, is hereby granted, and counsel for defendant Kramer shall promptly serve an answer upon counsel for all parties; and it is further

ORDERED that counsel for defendant Kramer shall promptly serve a copy of this Order upon counsel for all parties by First Class Mail, and shall promptly thereafter file the affidavit(s) of such service with the County Clerk; and it is further

ORDERED that all parties shall appear for a Preliminary Conference on Tuesday, **June 12, 2012 at 9:30 a.m.** before the undersigned in the courtroom located at One Court Street, Room A-257, Part 17, Riverhead, New York.

This action arose from a motor vehicle accident that occurred on October 25, 2010 at the intersection of Stackyard Drive and Wavecrest Drive in Mastic Beach, New York. At the time of the accident, the plaintiff was a passenger in the vehicle operated by defendant, Elizabeth Tenke, when the vehicle operated by Ms. Tenke came into contact with the vehicle operated by defendant Bruce Kramer. The plaintiff now seeks a default judgment against defendant Kramer pursuant to CPLR §3215 for failure to timely answer or otherwise appear in this action. Although plaintiff's counsel would not accept the late answer of defendant Kramer, he did accept the late answer of defendant Tenke pursuant to a stipulation dated September 14, 2011. Defendant Kramer cross-moves, pursuant to CPLR 5015(a), to vacate the default in answering, and to extend his time to answer the complaint pursuant to CPLR §3012(d).[1]

Defendant Kramer was served with the summons and complaint on July 26, 2011 and faxed the papers to State Farm Insurance Company claim representative, Michael Hefferon, on August 8, 2011. According to an affidavit from Michael Hefferon, a claim representative from State Farm, on August 9, 2011 he was assigned to handle the claim. Mr. Hefferon dictated letters that same day referring the summons and complaint to Richard T. Lau & Associates, the law firm assigned to defend Mr. Kramer's interests in the action. In his affidavit, Mr. Hefferon states that due to a delay in the word processing department, the letters were not completed until August 24, 2011 and the letters and pleadings were sent to Richard Lau & Associates on August 31, 2011.

In support of his motion to vacate his default and extend his time to answer, defendant Kramer submits an affidavit from Sharyn Sawyer, the office manager for Ricahrd T. Lau & Associates. Ms. Sawyer supervises the firm's data entry group, which enters new case assignments into the computer system so attorneys in the office may prepare answers to complaints. be assigned to for the purpose of forwarding the files to an attorney in the office to prepare answers. According to Ms. Sawyer, the firm changed to a new case management system in August 2011. At the time, the firm was the pilot office for rollout of the new system. This new system would eventually be used by all 39 Claims Litigation Counsel offices. The servers for the new system are located in Phoenix, Arizona, and are not controlled by the firm.

When the firm and other offices began using the system, the system had very slow response times and even failed to operate at all on some days. During those down times, no new files could be entered into the system or opened by employees. The problem was exacerbated by the employees having to learn how to use the new system. According to Ms. Sawyer, on September 9, 2011, the firm received the assignment to represent defendant Kramer; however, due to the backlog and delays caused by the new system, Mr.

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[1]Christopher Citera was also a passenger in the Tenke vehicle when the accident occurred. Mr. Citera is a plaintiff in a separate but related action, *Christopher Citera v Bruce Kramer and Elizabeth Tenke*, under Suffolk County Index # 21461-2011. Plaintiff Citera has also moved for a default judgment against Kramer in that action and Kramer has, likewise, cross-moved to vacate the default in that action pursuant to CPLR 5015(a), and to extend his time to answer pursuant to CPLR §3012(d).

Kramer's defense file was not opened until September 26, 2011. Teresa Gawronski is employed as a legal secretary in the data entry department at defendant's counsel's law firm. Her affidavit in support of defendant's motion confirms, in detail, the problems Kramer's defense counsel experienced with the new computer system and the reasons for the delay in answering.

In relevant part, CPLR 5015(a)(1) provides that the "court which rendered a judgment or order may relieve a party from it upon such terms as may be just ... upon the ground of ... excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party ..." A defendant seeking to vacate its default in appearing or answering the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action (see CPLR 5015 [a] [1]; *Gray v B. R. Trucking Co.*, 59 NY2d 649 [1983]; *Weinberger v Judlau Contr.*, 2 AD3d 631, 768 NYS2d 338 [2d Dept 2003]; *Kaplinsky v Mazor*, 307 AD2d 916, 762 NYS2d 902 [2d Dept 2003]; *Ennis v Lema*, 305 AD2d 632, 760 NYS2d 197 [2d Dept 2003]; *O'Shea v Bittrolff*, 302 AD2d 439, 753 NYS2d 737 [2d Dept 2003]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*Gambardella v Ortov Lighting, Inc.*, 278 AD2d 494, 717 NYS2d 923 [2d Dept 2000]).

In view of the public policy in favor of resolving cases on the merits, the Court may excuse a defendant's failure to timely answer where the delay in answering is relatively short, there is no showing of prejudice to plaintiff, a potential meritorious defense exists, and no willfulness on the part of the defendant has been shown (*see*, *Finkelstein v Sunshine*, 47 AD3d 882; 852 NYS2d 168 [2d Dept 2008]; *Jolkovsky v Legeman*, 32 AD3d 418, 819 NYS2d 561 [2d Dept 2006]; *Rottenberg v Preferred Prop. Mgt., Inc.*, 22 AD3d 826, 803 NYS2d 177 [2d Dept 2005]; *Kaiser v Delaney*, 255 AD2d 362, 679 NYS2d 686 [2d Dept 1998]; *Mulder v Rockland Armor & Metal Corp.*, 140 AD2d 315, 527 NYS2d 550 [2d Dept 1988]; *McNeill v. Lasala*, 115 AD2d 459; 496 NYS2d 357 [2d Dept 1985]; *Stark v Marine Power & Light Co.*, 99 AD2d 753, 471 NYS2d 668 [2d Dept 1984]; *Lindo v Evans*, 98 AD2d 765, 469 NYS2d 481 [2d Dept 1983]; *Alpha Executive Planning Corp. v Alan,* 59 AD2d 548, 397 NYS2d 139 [2d Dept 1977]).

The court has discretion to accept law office failure as a reasonable excuse pursuant to CPLR 2005 (see, *Montefiore Med. Ctr. v Hartford Acc. & Indem. Co.*, 37 AD3d 673, 830 NYS2d 336 [2d Dept 2007]). A conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse (*Petersen v v Lysaght, Lysaght & Kramer, P.C.*, 47 AD3d 783, 851 NYS2d 209 [2d Dept 2008]; *Piton v Cribb*, 38 AD3d 741, 742, 832 NYS2d 274 [2d Dept 2007]; *Matter of Bloom v Lubow*, 45 AD3d 680, 845 NYS2d 439 [2d Dept 2007]; *Lugauer v Forest City Ratner Co.*, 44 AD3d 829, 843 NYS2d 456 [2d Dept 2007]).

Pursuant to CPLR §2004, "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." Similarly, CPLR §3012(d) states that upon a motion by 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."

Plaintiff's counsel claims that defendant can not allege law office failure as his excuse, because the attorneys assigned to defend this case, Richard Lau & Associates, are employees of his insurance carrier, State Farm Mutual Automobile Insurance Company. According to counsel, "there was no 'law office' failure because Richard T. Lau and Associates is not a law office but a department of State Farm, all of whose attorneys and staff are employees of State Farm." It is true that a general excuse that a default was

caused by an insurance carrier's delay is, by itself, insufficient to establish a reasonable excuse for the default (see *Kaplinsky v Mazor*, 307 AD2d 916, 762 NYS2d 902 [2d Dept 2003]; *O'Shea v Bittrolff*, 302 AD2d 439, 753 NYS2d 737 [2d Dept 2003]; *Meggett v Gibson*, 302 AD2d 372, 754 NYS2d 556 [2d Dept 2003]; *Cilindrello v Rayabin*, 297 AD2d 699, 747 NYS2d 388 [2d Dept 2002]; *Andrade v Ranginwala*, 297 AD2d 691, 747 NYS2d 385 [2d Dept 2002]; *Kachar v Berlin*, 296 AD2d 479, 745 NYS2d 471 [2d Dept 2002]). In this case, however, the defendant has submitted detailed affidavits to explain the delay. Further, plaintiff's counsel has submitted no authority for the proposition that a law firm employed by an insurance carrier is not a "law office" for purpose of a "law office failure" analysis. In fact, New York State Bar Association's Committee on Professional Ethics has opined on this very issue that "[a] group of lawyers who are salaried employees of an insurance company and whose practice is exclusively in defense of the company's policy holders may hold themselves out as a law firm ..." (NY St Bar Assn Comm on Prof Ethics Op726 [2000]).

When the default is the result of law office failure, and the motion to extend time satisfies the requirements of CPLR §3012(d) or §5015(a), "the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure" (CPLR §2005). Where, as here, the claim of law office failure is supported by a detailed and credible explanation of the default, the Supreme Court has the discretion to accept law office failure as a reasonable excuse (see *Kohn v Kohn*, 86 AD3d 630, 928 NYS2d 55 [2d Dept 2011]; *Remote Meter Technology of N.Y., Inc. v Aris Realty Corp.*, 83 AD3d 1030, 922 NYS2d 440 [2d Dept 2011]; *Winthrop Univ. Hosp. v. Metropolitan Suburban Bus Auth.*, 78 AD3d 685, 910 NYS2d 159 [2d Dept 2010]).

With regard to a meritorious defense, defendant Kramer's affidavit reveals that as he was stopped and attempting to see past trees and cars obstructing his view when his vehicle was struck by defendant Elizabeth Tenke's vehicle. According to Mr. Kramer, the Tenke vehicle was speeding and traveling too close to the right side of the road when it struck his vehicle. Indeed, the plaintiff named Elizabeth Tenke as a defendant in this action, setting forth the same allegations of negligence against defendant Tenke as those alleged against defendant Kramer. The statements set forth by Mr. Kramer in his affidavit, coupled with the allegations of negligence in plaintiff's own verified complaint against defendant Tenke constitute a meritorious defense for purposes of Mr. Kramer's motion under CPLR 5015(a) and 3012(d).

Finally, plaintiff's counsel claims that the plaintiff "would suffer serious prejudice if a default were not entered." In this regard, it is alleged that "following the Defendant's default, the Plaintiff borrowed money against the judgment for his damages . . . [, that] interest on the loan is substantial, and the Plaintiff took out the loan upon the understanding that the Defendant's default would shorten the time until the payment of the judgment."[2] Such understanding, however, is misguided and speculative. Even if a default were granted against defendant Kramer, the discovery process would have to proceed as to defendant Tenke and all proceedings for the entry of a judgment or the making of an assessment of damages against Kramer as the defaulting party would be stayed until the time of or following the trial or other disposition of the action. Pursuant to CPLR §3215(d), in an action involving multiple defendants, when "a defendant has answered and one or more other defendants have failed to appear, plead, or proceed to trial of an action reached and called for trial . . . the court may enter an ex parte order directing that proceedings for the entry of a judgment or the making of an assessment, the taking of an account or proof . . . be conducted at the

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[2] Plaintiff's opposition to defendant Kramer's motion to extend his time to answer is accompanied only by an affirmation from counsel, and is not supported by an affidavit from the party plaintiff.

time of or following the trial or other disposition of the action against the defendant who has answered." Accordingly, any alleged prejudice to the plaintiff would be the result of a self-imposed risk assumed by the plaintiff, by taking out a high-interest loan, based upon speculation that a default judgment would be granted against Kramer, and the misguided understanding that damages against Kramer would be assessed immediately. Any such alleged prejudice is not a "prejudice" for purposes of analysis under CPLR 5015(a) or §3012(d).

Based upon the foregoing, as well as the strong public policy in favor of resolving cases on the merits, the lack of prejudice to the plaintiff caused by the defendant's brief delay in answering, and the fact that the defendant's delay was not willful, the plaintiff's motion for a default is denied and defendant's time to serve an answer is extended (see *Henry v Kuveke*, 9 AD3d 476; 781 NYS2d 114 [2d Dept 2004]; *Burgess v Brooklyn Jewish Hosp.*, 272 AD2d 285, 707 NYS2d 462 [2d Dept 2000]).

This constitutes the Order of the Court.

Dated: May 9, 2012

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION