SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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EAST COAST STORES LLC,

Plaintiff,

- v -

PETER XU and AARON CHAUS

Defendant.

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INDEX NO. 651808/2018

MOTION DATE 2/27//2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24

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

And Cross-Motion to File Late Answer.

In this action breach of contract action, the plaintiff seeks to recover $65,000.00 in brokerage commissions allegedly earned upon the sale of three Papa John's franchise stores in 2016. Defendant Aaron Chaus, the buyer, answered the complaint; defendant Peter Xu (a/k/a Jiandong Xu), the seller, did not. The plaintiff now moves for leave to enter a default judgment against defendant Xu pursuant to CPLR 3215, alleging that the defendants violated the "non-circumvention" provision of the contract and refused to pay the agreed upon 6% sales commission. Defendant Xu opposes the motion and cross-moves to compel the plaintiff to accept his late answer *nunc pro tunc* pursuant to CPLR 3012(d), alleging, *inter alia,* that he was in contact with and attempting to negotiate a settlement with the plaintiff after being served with the summons and complaint and that his signature was forged on the subject contract. The motion is denied and the cross-motion is granted.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown.

Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action." Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, supra; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). As such, "[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default." Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992). The plaintiff has not met this burden.

In support of the motion, the plaintiff submits only a complaint verified by an attorney and an attorney's affirmation, but no affidavit of someone with personal knowledge. Since the plaintiff's attorney claims no personal knowledge of the underlying facts asserted, the affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Guzetti v City of New York, supra; Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010) *lv denied* 17 NY3d 713 (2011). Furthermore, "[a] complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215." Feefer v Malpeso, 210 AD2d 60, 61 (1st Dept. 1994); see Martinez v Reiner, 104 AD3d 477 (1st Dept. 2013). Thus, the plaintiff's submissions are insufficient to establish, *prima facie,* a cause of action for breach of contract, unjust enrichment or quantum meruit. Even though the defendant does not dispute that the plaintiff served him with the summons and complaint and that he failed to timely answer, the motion must be denied for the plaintiff's failure to establish the facts constituting the claims. See CPLR 3215(f).

The plaintiff is reminded that, as a general rule, where, as here, a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012).

In determining a motion pursuant to CPLR 3012(d), the court takes into account the excuse offered for the defendant's delay in answering, any possible prejudice to the plaintiff, the

absence or presence of willfulness and the potential merits of its defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001). While the plaintiff disputes the defendant's assertion that the parties engaged in ongoing settlement negotiations, that excuse has been held to be reasonable. See e.g. Gluck v McDonough, 139 AD3d 628 (1st Dept. 2016); Performance Constr. Corp. v Huntington Bldg, LLC, 68 AD3d 737 2nd Dept. 2009); compare Maspeth Fed. Savings and Loan Assoc. v McGown, 77 AD3d 889 (2nd Dept. 2010). Further, the defendant's asserted defenses of forgery, Statute of Frauds, laches and unclean hands may not ultimately succeed, but are potentially meritorious. To the extent that the delay was in part due to law office failure, there is no indication of willfulness or bad faith. Therefore, the court is inclined to find such a failure to be a reasonable excuse. See Imperato v Mount Sinai Med. Ctr., 82 AD3d 414 (1st Dept. 2011); Chelli v Kelly Group, P.C., 63 AD3d 632 (1st Dept. 2009). The defendant then cross-moved promptly upon being served with the plaintiff's motion for a default judgment. Nor is there any discernible prejudice to the plaintiff in accepting the late answer. Indeed, the plaintiff does not articulate any prejudice. In that regard, the court is mindful of the strong public policy favoring resolution of disputes on the merits. See Wimbledon Financing Master Fund, Ltd. v Weston capital Mgmt. LLC, 150 AD3d 427 (1st Dept. 2017); Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 (1st Dept. 2016); Jones v 414 Equities LLC, supra.

Finally, the court notes that the defendant appeared but the plaintiff failed to appear for oral argument on January 23, 2019. Rather than deny the motion and/or dismiss the complaint for failure to appear (22 NYCRR 202.27), the court adjourned the oral argument to February 27,2019, with the defendant's consent.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 is denied, and it is further

ORDERED and the cross-motion of defendant Peter Xu to compel acceptance of his late answer pursuant to CPLR 3012(d), is granted, and it is further,

ORDERED that the plaintiff is deemed to have been timely served with the proposed answer dated November 19, 2018, appended to the defendant's motion papers, and it is further,

ORDERED that all parties shall appear for a **preliminary/settlement conference** on **November 7, 2019**, at 2:30 p.m.

This constitutes the Decision and Order of the court.

10/9/2019
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE: ☐ CASE DISPOSED ☐ GRANTED ☒ DENIED ☒ NON-FINAL DISPOSITION ☐ GRANTED IN PART ☐ OTHER