COPY

SHORT FORM ORDER **INDEX NO.: 11072/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

---x

MATEO PATTISO,

Plaintiff,

-against-

TOMMY ALVINO, MICHAEL O'SULLIVAN, HAMPTON DREAM PROPERTIES, LLC,

Defendants.

---x

Motion Submit Date: 08/08/19
Mot Seq 005 MD; RTC

PLAINTIFF *PRO SE*:
MATEO PATTISO
PO Box 337
Remsenberg, New York 11960

DEFENDANTS' COUNSEL:
David A. Bythewood, Esq.
85 Willis Ave., Ste J
Mineola, New York 11501

DEFENDANT *PRO SE*:
TOMMY ALVINO
319 W. 11th St.
Deer Park, New York 11729

On plaintiff *pro se*'s motion for entry of default judgment as against defendant *pro se* Tommy Alvino pursuant to CPLR 3215, the Court considered the following:

1. Notice of Motion, Affirmation in Support & supporting papers;
2. Affidavit and upon due deliberation and full consideration of the same; it is

ORDERED that plaintiff's motion for entry of default judgment against defendants, having been fully considered, is **denied** as follows, and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry by certified first class mail, return receipt requested within 30 days on defendant.

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

The Court assumes the parties' familiarity with the relevant and salient facts and circumstances alleged by plaintiff in his pleadings and underlying this litigation. Plaintiff originally made an application for entry of default against the defendants by motion marked

returnable on May 25, 2017. This Court denied that application as facially insufficient lacking requisite proof of proper service of process on the defendants by short-form decision & order dated February 6, 2018.

Plaintiff then moved to renew or reargue that denial on February 28, 2019, which this Court denied on procedural grounds, having reviewed the electronic court file and seeing the matter marked as "disposed" for entry of a stipulation of discontinuance. That determination has since by short-form decision & order on motion by plaintiff for vacatur pursuant to CPLR 5015(a)(5) within the interest of justice been vacated and recalled and the matter has been set down for conference after the expiration of an unrelated stay in proceedings pursuant to CPLR 321 after an additional short-form decision & order granted defense counsel's application for leave to withdraw.

Now, plaintiff moves again for default judgment as against defendant *pro se* Alvino arguing that he has failed to answer the pleadings and join issue or appear and defend himself against plaintiff's claims in the litigation.

STANDARD OF REVIEW

Entry of Default Generally

" 'A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215' " (***U.S. Bank, N.A. v. Razon***, 115 AD3d 739, 740, 981 NYS2d 571, *quoting* ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314; *see* ***Todd v. Green***, 122 AD3d 831, 831–832, 997 NYS2d 155). "Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer" (*see* CPLR 3215[f]; ***Triangle Props. # 2, LLC v. Narang***, 73 AD3d 1030, 1032, 903 NYS2d 424; ***DLJ Mortg. Capital, Inc. v United Gen. Tit. Ins. Co.***, 128 AD3d 760, 761, 9 NYS3d 335, 336 [2d Dept 2015]).

Generally, where a defendant has defaulted in appearing or answering a complaint, he or she will be "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Mortgage Elec. Registration Sys., Inc. v. Smith***, 111 AD3d 804, 806, 975 NYS2d 121 [citations and internal quotation marks omitted]; ***Boudine v Goldmaker, Inc.***, 130 AD3d 553, 554, 14 NYS3d 405, 407 [2d Dept 2015]).

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

Generally, a process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; *see* ***NYCTL 2009–A Trust v. Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571; ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984, 912 NYS2d 96). Bare and unsubstantiated denials

are insufficient to rebut the presumption of proper service (*see* ***Wachovia Bank N.A. v. Greenberg***, 138 AD3d 984, 985, 31 NYS3d 110; ***Wells Fargo Bank, N.A. v. Christie***, 83 AD3d 824, 825, 921 NYS2d 127; ***Wachovia Mtge. Corp. v Toussaint***, 144 AD3d 1132, 1133, 43 NYS3d 373, 374 [2d Dept 2016]).

"Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*see* ***Edwards, Angell, Palmer & Dodge, LLP v. Gerschman***, 116 AD3d 824, 825, 984 NYS2d 392; ***Simonds v. Grobman***, 277 AD2d 369, 370, 716 NYS2d 692; ***Mtge. Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 733, 5 NYS3d 112, 113 [2d Dept 2015]).

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 (***Ennis v. Lema***, 305 AD2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

Furthermore, it is settled that the mere denial of receipt of the summons and the complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (*see* ***Commissioners of State Ins. Fund v. Nobre***, *Inc.*, 29 AD3d 511, 816 NYS2d 493; ***Truscello v. Olympia Constr.***, 294 AD2d 350, 741 NYS2d 709; ***De La Barrera v. Handler***, 290 AD2d 476, 736 NYS2d 249; ***Trini Realty Corp. v Fulton Ctr. LLC***, 53 AD3d 479, 480, 861 NYS2d 743, 744–45 [2d Dept 2008]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 N.Y.S.2d 923 [2d Dept. 2000]).

In determining whether a party has a viable cause of action, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff (*see* ***Woodson v. Mendon Leasing Corp.***, 100 NY2d 62, 71, 760 NYS2d 727, 790 N.E.2d 1156; ***Feffer v. Malpeso***, 210 AD2d 60, 619 NYS2d 46), ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314, 315 (2005). Judgment by default further requires "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due", or at least a verified complaint (***Zelnik v. Bidermann Indus. U.S.A., Inc.***, 242 AD2d 227, 228, 662 NYS2d 19, 19 [1997]. Traditionally this requires under CPLR 3215(f), plaintiff to submit for judicial review the viability of the facts underlying movant's claims, either by affidavit or verification of the pleadings (*see e.g.* CPLR 3215[f]; ***Giovanelli v. Rivera***, 23 AD3d 616, 804 NYS2d 817; ***599 Ralph Ave. Dev., LLC v. 799 Sterling Inc.***, 34 AD3d 726, 726, 825 NYS2d 129, 129-30 [2d Dept. 2006][Supreme Court properly granted the plaintiff's motion for leave to enter judgment against the defendant upon the plaintiff's submissions of proof of service of the summons and complaint, a factually-detailed verified complaint, and an affirmation from its attorney regarding the defendant's default in appearing and answering]; ***Woodson v Mendon Leasing Corp.***, 100

NY2d 62, 70 [2003][CPLR 3215(f) requires that an applicant for a default judgment file "proof by affidavit made by the party of the facts constituting the claim."

Taking of Default Judgment Beyond One Year's Time

Where, as here, over a year's time has passed since defendant was served with the process and plaintiff seeks entry of default, CPLR § 3215(a) cautions the motion court that:

> When a defendant has failed to appear plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him,

However, CPLR § 3215(c) must be read in conjunction which provides:

> If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Where pursuant to CPLR 3215(c), plaintiff seeks entry of default judgment beyond one year's time of defendant's failure to answer or appear, in order to avoid the dismissal of the complaint as abandoned, he was required to demonstrate a reasonable excuse for his delay in seeking a default judgment and a meritorious cause of action (***Staples v Jeff Hunt Developers, Inc.***, 56 AD3d 459, 460, 866 NYS2d 756, 757 [2d Dept 2008]).

DISCUSSION

Here, a review of the court file and the motion record clearly indicates that well over a year's time has passed since plaintiff served defendant with legal process. However, much of that delay may fairly be attributed to this Court, which after having denied plaintiff's motion for default, also denied plaintiff's renewed application for the same relief on erroneous procedural grounds. Thus, it can be objectively stated that plaintiff has reasonable excuse for some of the delay in making this motion now. Nevertheless, the application must be denied for substantive reasons unrelated to the timing of its making.

This Court is now well acquainted and fully versed with all the intricacies of this matter's file, having reviewed it no less than on 3 separate occasions since its requisition from the Suffolk County Clerk to resolve and dispose of 3 separate pending applications before the Court. Having reviewed the litigation's history and court file, the Court notes that on February 3, 2017, defendant Alvino filed an answer with counterclaims dated January 15, 2017. None of the motion papers or submissions presently before the Court indicate that Alvino's answer was rejected. This Court has not stricken it nor has any application for such relief been addressed to the Court. Accordingly, the entire premise underlying plaintiff's motion is faulty. Plaintiff

cannot seek entry of default for defendant's failure to answer or appear where that party has previously appeared and joined issue.

CONCLUSION

Therefore, plaintiff's motion for entry of default judgment is **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: December 11, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ✓ **NON-FINAL DISPOSITION**